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Eu

MERGER CONTROL

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This country-specific Q&A provides an overview of merger control laws and regulations applicable in EU.

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EU
MERGER CONTROL

1. Overview

In a nutshell, the regulatory environment for mergers in the EU has been getting increasingly tougher: we have seen the changed approach to the referral process under Article 22 of the European Union Merger Regulation ("EUMR"), cases undermining the EU's one-stop-shop principle, as well as the obligation under the Digital Markets Act ("DMA") on gatekeepers to inform the European Commission ("Commission") of any transaction.

The Commission applied its new referral policy for the first time to establish jurisdiction over Illumina's acquisition of GRAIL in the beginning of 2021. Illumina challenged the Commission's decision before the General Court, arguing the lack of legal basis for the referral and that the Commission was time-barred from adopting the decision. The General Court sided with the Commission, thereby significantly expanding the powers of the latter in relation to transactions that do not meet the relevant EU and national merger control thresholds. The General Court reasoned that the term "any transaction" in Article 22 of the EUMR meant that the relevant thresholds did not have to be met for the purposes of a referral. Instead, the General Court laid down a four criteria test to Article 22 referrals: (1) one or more member states must make a request, (2) the transaction must be a "concentration" under the EUMR, without meeting the revenue thresholds, (3) the transaction must affect trade between member states and (4) the transaction must "threaten to significantly affect competition" within the territory of the member states that made the referral request. Illumina and GRAIL's arguments related to the breach of legitimate expectations were rejected on the ground that the Commission had not provided 'precise, unconditional and consistent assurances' about the fact that that it would not change its policy on article 22 referral requests. Finally, the General Court found that the Commission was not time-barred from adopting the decision as the 15 days deadline referred to in Article 22 runs from the moment the transaction is "made known" to the authorities, i.e. information is actively transmitted to the authorities. This approach limits legal certainty and may prompt merging parties to transmit information concerning the transaction to the authorities of all the member states to ensure that the transaction has been made known and the 15 working days deadline can begin to run. The Commission eventually blocked the Illumina/GRAIL transaction.

The Commission accepted Article 22 referral requests in two more concentrations: Meta/Kustomer and Viasat/Inmarsat. In the former, the Commission accepted the referral from Austria, but this did not prevent the German German Federal Cartel Office ("FCO") from reviewing the transaction in parallel, as the merger control thresholds were met in the country. As the FCO began its review after the Commission had already accepted referral, this suggests that the Commission's review would not prevent in the future member states from reviewing the transaction in parallel, seriously undermining the one-stop-shop principle. Ultimately the Commission accepted the parties' commitments and the FCO followed suit approving the transaction, but a conflicting decision would have caused significant issues.

Also with regard to the one-stop-shop principle, at the end of 2021 the Commission began investigating the decision of the Hungarian government to block the acquisition of the Hungarian subsidiaries of the AEGON Group (AEGON) by Vienna Insurance Group AG Wiener Versicherung Gruppe (VIG), despite the Commission's clearance of the same transaction in August 2021. Hungary investigated the transaction on the ground that it would harm its legitimate interests. The Commission concluded that Hungary's veto violated Article 21 of the EUMR and that Hungary should have communicated to the Commission its intention to veto the transaction prior to the Commission's approval. Hungary's veto also impinged upon the undertaking's right to engage in a cross-border deal without a "justified, suitable, and proportionate" explanation. Eventually Hungary accepted the Commission's decision and withdrew its veto, but this case confirms that the one-stop-shop principle is under attack. Lastly, the DMA entered into force on 1 November 2022 and will oblige all companies designated as gatekeepers to inform the Commission of acquisitions in the digital sector or enabling collection of data, irrespective of whether national or EU notification thresholds are met. The DMA will also empower the EC to impose a temporary ban on mergers of a gatekeeper found to be systematically non-compliant with its DMA obligations.

2. Is notification compulsory or voluntary?

A notification is compulsory if two conditions are met: (1) the transaction leads to a change of control (e.g. by acquisition of sole or joint control) or a change in the quality of control (e.g. from joint to sole control), and (2) the turnover thresholds set out in the EUMR are met.

3. Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?

Yes, the EUMR imposes a "stand-still obligation" which prohibits the parties from closing a transaction prior to receiving clearance from the Commission – also known as "gun jumping". As described above, the Commission is increasingly vigilant that companies do not breach this obligation.

In a public bid, the purchaser is allowed to acquire the outstanding shares, provided the Commission is informed without delay and the shares are not voted for until clearance has been granted.

The Commission can also grant a derogation from the stand-still obligation. Such derogations are granted very rarely, when it can be proved that the harm to the companies (or to a third party) of waiting until clearance is greater than any potential negative effects on competition.

4. What types of transaction are notifiable or reviewable and what is the test for control?

The EUMR applies to transactions which lead to a change of control (or change in the quality of control) over a company on a lasting basis. Control is exercised "positively" when a parent company enjoys the power to determine the strategic commercial decisions of the target by, for example, having sufficient votes in the decision-making bodies to pass all crucial decisions without the need to be supported by potential other parent companies. Control can also be exercised "negatively", which happens when one shareholder is able to veto strategic decisions in the target, but does not have the power, on its own, to impose such decisions. Two or more parent companies can "jointly control" a target when they both have the power to exercise decisive influence over the target (either positively or negatively).

Control is also possible on a "*de facto*" basis when a minority shareholder is likely to represent a majority of registered votes at the shareholders' meetings, mainly because shareholder presence at past meetings was low enough for the minority shareholding to actually amount to a majority of the registered votes.

5. In which circumstances is an acquisition of a minority interest notifiable or reviewable?

Minority shareholdings are not currently caught at the EU level, unless they confer (joint) control. The Commission has in the past examined this issue and considered proposing a change to the EUMR to be able to review acquisitions of minority shareholdings. The Commission has not yet formulated concrete proposals, as it is seemingly letting Member States spearhead the experimentation on this topic for now. However, we might see a resurgence of this topic at the EU level once the Member States return their verdict on the effectiveness of such measures.

6. What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)? Are there different thresholds that apply to particular sectors?

A concentration is notifiable to the Commission if it has "a Community dimension", which exists where:

a. the combined aggregate worldwide turnover of all the undertakings concerned is more than €5 billion; and
b. the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than €250 million,
c. unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

OR

a. the combined aggregate worldwide turnover of all the undertakings concerned is more than €2.5 billion;

b. in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than €100 million;
c. in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than €25 million; and
d. the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than €100 million,
e. unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

7. How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?

The EUMR's jurisdictional thresholds are based on turnover. Typically, the turnover for the last financial year for which audited accounts are available is taken into account.

Turnover is generally allocated to the place where the customer is located, which is normally the location where competition with alternative suppliers takes place and where the contractual obligations are performed, i.e. where the service is actually provided and the product is actually delivered. There are a number of exceptions for certain industries, e.g. transport of passengers, mining and commodity trading, credit and financial institutions.

8. Is there a particular exchange rate required to be used to convert turnover and asset values?

Typically, the average yearly European Central Bank exchange rate for the financial year to which the provided turnover information refers should be used.

9. In which circumstances are joint ventures notifiable or reviewable (both new joint ventures and acquisitions of joint control over an existing business)?

Acquisitions of joint control over an existing business or the setting up of a newly established joint venture ("**JV**") are notifiable if the general criteria mentioned in Question 6 above are met. There are no specific thresholds for JVs; each of the jointly-controlling parent companies is viewed individually as the "undertakings concerned" and, if joint control is acquired over an existing company, then the JV itself is also viewed as an "undertaking concerned". As a result, JVs with no actual or foreseeable effects within the EEA might be subject to mandatory EU notification, as the thresholds can be met solely on the basis of two parents' turnover – irrespective of the geographic location of the JV or the size of its activities and assets.

In addition, under the EUMR, only so-called "full-function" JVs are notifiable to the Commission. These are the JVs that are performing, on a lasting basis, all the functions of an autonomous economic entity on the market. A "full-function" JV needs to have sufficient resources to operate independently on the market and not just as an annex to its parent companies by, for example, manufacturing solely for its parent companies.

If the EUMR does not apply because a JV is not full-function, the creation of the JV may still be notifiable under national merger control rules, as not all national rules apply the concept of full-functionality.

10. Are there any circumstances in which different stages of the same, overall transaction are separately notifiable or reviewable?

One situation where the same overall transaction might be notifiable twice is where the transaction requires significant divestitures to obtain clearance from the Commission. The divestiture can independently trigger new merger control filings either at the EU level or at the level of Member States (depending on what turnover thresholds are met).

The opposite situation – where two seemingly independent transactions are considered as a single transaction for merger control purposes – can be trickier. Two or more transactions constitute a single concentration if they are "unitary in nature", which depends largely on the economic reality underlying the transactions and specifically whether the transactions are interdependent in such a way that "one transaction would not have been carried out without the other" (e.g., when two transactions are conditional on each other). In these circumstances, two or more transactions are considered to be one transaction if control is ultimately acquired by the same undertaking.

Article 5(2) EUMR allows the Commission to consider two or more transactions to constitute a single concentration for the purposes of calculating the turnover of the undertakings concerned and determining whether merger control thresholds are met.

11. How do the thresholds apply to "foreign-to-foreign" mergers and transactions involving a target /joint venture with no nexus to the jurisdiction?

Companies meeting the EU thresholds for aggregate turnover must notify their merger transactions to the Commission whether or not the target/joint venture has direct connections to the EU.

12. For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?

N/A

13. What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies? Are there different tests that apply to particular sectors?

The EUMR requires that the Commission examine whether a transaction would cause a "significant impediment to effective competition" ("SIEC" test). The adoption of this test in 2004 has led to a more effects-based approach to merger control by the Commission. This test applies across all sectors.

14. Are factors unrelated to competition relevant?

The EUMR does not stipulate that factors unrelated to competition be considered. During its 2017/2018 investigation into Bayer's acquisition of Monsanto, the Commission had received numerous third-party communications expressing concerns relating to non-competition issues, such as European and national rules on food safety, consumer protection, the environment, and the climate. In its March 2018 press release, the Commission stressed that such concerns cannot form the basis of a merger assessment.

The Commission's prohibition of Siemens' proposed acquisition of Alstom in February 2019 demonstrated as well that political factors unrelated to competition are not considered relevant. Siemens and Alstom's plan to merge with the view of establishing a European rail champion that would be able to take on the Chinese competition was not taken into consideration by the Commission, which decided to stick to the established merger rules despite political pressure from some EU Member States.

However, the clearance of the acquisition of Lotos by PKN Orlen, and thus of the creation of a Polish energy champion, signals that the Commission may be more receptive to political directions. Moreover, in Aurubis/Metallo, Commissioner Vestager explained to the press that copper was "*an important input needed for electric mobility and digitisation. A well-functioning circular economy in copper is important to ensure a sustainable usage of resources in the context of the European Green Deal.*" While such public interest is not typically a part of the EU merger control analysis, a good public interest story could help the parties to present a convincing broader narrative about the positive effects of the transaction, which might informally have an impact on the Commission's hierarchy to look at the bigger picture and potentially drop some smaller concerns.

15. Are ancillary restraints covered by the authority's clearance decision?

Yes. The EUMR provides that a decision declaring a concentration compatible with the common market shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration. The most common ancillary restraints that are covered by this provision include non-compete clauses, licence agreements, and purchase and supply obligations. The Commission notice on restrictions directly related and necessary to concentrations (2005/C 56/03) covers the details of this issue.

16. For mandatory filing regimes, is there a statutory deadline for notification of the transaction?

There is no deadline to file, but the transaction must be notified and clearance must be obtained prior to the implementation of the transaction.

17. What is the earliest time or stage in the transaction at which a notification can be made?

Concentrations should typically be notified to the Commission following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

However, notifications may also be made earlier where the companies demonstrate a good faith intention to conclude an agreement. Typically, the Commission would accept notifications on the basis of an agreed term sheet or similar document showing advanced negotiations. A public bid can be notified once an intention to make a bid has been publicly announced.

18. Is it usual practice to engage in pre-notification discussions with the authority? If so, how long do these typically take?

While pre-notification is not required by the EUMR, pre-notification takes place in almost all cases. Notifying without pre-notification runs the risk of being declared incomplete by the Commission, in particular if the notification does not address all "plausible" market segments, even though the notifying party does not believe that such segments are separate product markets.

For simple cases with no significant overlaps, the Commission's case team will typically take no longer than a week to review and comment on the draft Form CO submitted in the pre-notification process, and usually not more than two or three rounds of comments are to be expected. Pre-notification for more substantive cases can take several months.

19. What is the basic timetable for the authority's review?

Phase I: 25 working days from receipt of complete notification, which can be extended to 35 working days if remedies are offered or a referral request is received from national competition authorities.

Phase II: 90 working days from the day that follows the decision to carry out an in-depth inquiry (6(1)(c) decision). This period is extended by 15 working days if the companies offered remedies after the 54th working day following the initiation of the in-depth inquiry.

The Phase II review period can be extended by a further 20 working days if requested by the notifying parties within 15 days of the opening of the in-depth investigation. Likewise, the Commission may extend the review period with the agreement of the notifying parties at any time following the initiation of proceedings, but the total combined duration of all extensions should not exceed 20 working days.

20. Under what circumstances may the basic timetable be extended, reset or frozen?

In addition to the extensions described above, the Commission can also "stop the clock" and effectively freeze the timetable for the review of the transaction. The Commission can do so if it requested the provision of information from the parties with a formal decision and the parties failed to provide it. The Commission can also stop the clock "owing to circumstances for which one of the undertakings involved in the concentration is responsible" or to order an inspection pursuant to Article 13 EUMR.

The parties can informally suggest "stop the clock" provisions if they would like to give the Commission more time to review a particular aspect of the transaction (e.g. proposed remedies package) without any time pressure. The parties would do that if they believed that granting the Commission more time in the short term would result in a shorter review (or less burdensome remedies) in the long term.

21. Are there any circumstances in which the review timetable can be shortened?

Due to internal decision-making procedures, it is not possible to shorten the 25-working-day review period significantly. If merger-specific reasons for a swift clearance exist and the case is simple, the Commission may be able to shorten the process by a few working days.

22. Which party is responsible for submitting the filing?

In the case of acquisition of sole control, the acquirer alone must notify the transaction. In the case of acquisition of joint control, the notification must be jointly submitted by the undertakings acquiring joint control.

23. What information is required in the filing form?

Transactions must be notified using the standard Form CO or, in the case of transactions with less potential for any competition concerns, the Short Form CO. Their content is set out in Implementing Regulation 802/2004. Both forms require the provision of information on the transaction and the parties' activities, definitions of the relevant markets, and a detailed description of the parties' presence in any overlapping or vertically-related markets.

If the overlaps between the parties have a combined market share of 20% or above, a standard Form CO will have to be submitted. The additional information that needs to be submitted with this form relates to the competitive situation in relation to each of the affected markets, including information on the structure of demand, product differentiations, closeness of competition, market entry and exits, R&D, cooperative agreements, etc.

24. Which supporting documents, if any, must be filed with the authority?

This depends largely on the complexity of the transaction. The EUMR requires submitting all documents which relate to the transaction and which have been prepared for or by senior management–typically, the deal documentation and various reports supporting the market estimates. A full Form CO needs to provide the contact details of competitors, customers and trade associations so that the Commission may reach out to them and ask for their views.

In the last few years, it has become standard practice in Phase II cases to require the production of all internal documents (including emails) for a large number of businesspeople. In larger and more complicated transactions, this can result in the production of millions of documents.

25. Is there a filing fee?

No.

26. Is there a public announcement that a notification has been filed?

High-level information about new notifications is published both on the Commission's website and in the EU Official Journal (which is also available online). In the Form CO, the Parties have to propose the language to be used for this purpose.

Pre-notification discussions are not made public and the Commission protects confidentiality of such discussions. We know of no instances where this confidentiality has been breached.

27. Does the authority seek or invite the views of third parties?

The Commission will proactively contact the Parties' competitors, customers and trade associations. In Phase II proceedings, the Commission will publicly invite third parties to submit their comments on the transaction.

28. What information may be published by the authority or made available to third parties?

The Commission will only share with the public a summary of the notification form drafted by the notifying party itself. The public will eventually have access to the non-confidential final Commission decision. The parties have the possibility to claim confidentiality over some of the information provided to the Commission and the Commission will not share such information with the public at any stage of the proceedings without the parties' prior permission. This information will be redacted from the final decision.

Third parties demonstrating a "sufficient interest" can apply in writing with the Commission to be granted the status of "interested third party". Such parties will get access to additional information with the view of informing them of the "nature and subject matter of the procedure". However, the information shared with interested third parties will also be redacted to reflect any confidentiality claims.

29. Does the authority cooperate with antitrust authorities in other jurisdictions?

The Commission works closely with European National Competition Authorities through the European Competition Network ("ECN"), which aims to ensure the effective and consistent application of European competition rules. The Commission also works with the International Competition Network ("ICN") to address practical antitrust/merger enforcement and policy issues globally.

The Commission has also entered into collaboration agreements with non-EU authorities, such as Brazil, Canada, China, India, Japan, South Korea, Mexico, Russia, South Africa, Switzerland and the United States. The purpose of these agreements is to facilitate cooperation between the authorities on general issues, but also to exchange information on specific transactions, though the Commission can only share information with non-EU authorities if the parties give the Commission a special waiver to do so.

30. What kind of remedies are acceptable to the authority?

Remedies have to make the transaction compatible with the market (i.e., remove any significant impediments to effective competition), either in the form of behavioural, structural, or quasi-structural remedies (e.g., offering access to a network or other infrastructure) or changes to existing contractual arrangements. For policy reasons, the Commission typically prefers structural or quasi-structural remedies rather than behavioural remedies, which are more difficult to monitor. For example, in 2021, the Commission accepted structural remedies in the context of Essilor/Luxottica. However, recent cases (such as *Meta/Kustomer, Google/Fitbit, PKN Orlen/Lotos and BASF/Solvay's EP and P&I Business*) involved a combination of structural and behavioural remedies. . Thus, in spite of the general preference for structural remedies, the recent decisional practice of the Commission might indicate more willingness to accept behavioural remedies in the right circumstances and gives the merging parties more flexibility as to the tools for addressing the competitive concerns. Within structural remedies, the Commission has recently shown to be relatively open to so-called "mix and match" remedies, i.e. the sale of assets from both merging parties, accepting such remedies in *Cargotec/Konecranes*.

31. What procedure applies in the event that remedies are required in order to secure clearance?

Remedies can be proposed during the Phase I investigation to avoid a Phase II, or during the Phase II investigation to avoid a prohibition of the transaction.

Parties must submit their proposed remedies within 20 working days from the notification date in a Phase I proceeding, and within 65 working days after the opening of Phase II. The timeline for the review gets extended if the Parties offer remedies (after the 54th day in Phase II).

If the Commission has concerns that a proposed transaction threatens to significantly impede effective competition, clearance will most likely be given only if the Parties divest a part of their business. The divested activities must consist of a viable business that can compete effectively with the merged entity on a lasting basis. Furthermore, the divested activities must be transferred to a suitable independent purchaser possessing the financial resources, proven relevant expertise, and the incentive and ability to maintain and develop the divested business.

32. What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?

The Commission has powers to impose fines up to 10% of the aggregate worldwide turnover of the parties if they intentionally or negligently fail to notify a merger with an EU dimension, irrespective of whether clearance is ultimately obtained. The Commission and national competition authorities have recently increased the prosecution of such breaches. In 2014, the Commission fined Marine Harvest €20 million for acquiring a 48% shareholding without notifying the Commission; the Commission found that the large minority shareholding already conferred *de facto* control at the shareholders' meeting of the target. In April 2018 the Commission fined Altice €124.5 million for taking charge of the target company before receiving merger control clearance. Additionally, in June 2019, the Commission fined Canon €28 million for implementing the first step in a so-called warehousing transaction. The Commission clarified that the "*first step contributed to the acquisition of final control over TMSC, which occurred with the second step*". This was sufficient to constitute gun jumping.

33. What are the penalties for incomplete or misleading information in the notification or in response to the authority's questions?

The Commission may impose a fine of up to 1% of the aggregated turnover of companies for intentionally or negligently providing incorrect or misleading information to the Commission. Very recently, in May 2021, The Commission fined Sigma-Aldrich €7.5 million for the provision of incorrect or misleading information (the investigation against Merck was dropped on 1 July 2020). In April 2019, the Commission fined General Electric €52 million for providing incorrect information during the Commission's investigation of GE's planned acquisition of LM Wind. In May 2017, the Commission had also fined Facebook €110 million for providing misleading information during the review of its acquisition of WhatsApp. At the time, Facebook stated that it would be unable to establish reliable automated matching between Facebook users' accounts and WhatsApp users' accounts, although it did exactly that two years later. The Commission argued that the technical possibility of matching accounts already existed at the time of the notification, which Facebook acknowledged. These cases show that the provision of accurate information during the notification process will be watched carefully by the Commission. While this is not objectionable as such, the Commission should bear in mind that the sheer amount of information requested is becoming increasingly unmanageable for notifying parties: on top of the notification form (which can be several hundred pages long, with thousands of annexed documents and market data), the Commission has copied the US-style 2nd request approach in Phase II cases, resulting in the production of millions of internal documents.

34. Can the authority's decision be appealed to a court?

Yes. The Parties can appeal the final clearance or blocking decision to the General Court of the European Union within two months after the decision. Third parties can also lodge an appeal if they can show that the decision has a direct and individual impact on them.

35. What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment

See the overview.

36. Are there any future developments or planned reforms of the merger control regime in your jurisdiction?

In May 2022, the Commission published a new version of the Implementing Regulation and of the Notice on Simplified Procedure, following a consultation carried out in 2021. The overarching purpose is to broaden the scope of the Simplified Procedure. Alongside the Simplified Procedure, the Commission now also envisages a "super-simplified" procedure, which would allow the parties to by-pass pre-notification. Finally, the Commission has proposed a revised Short Form CO and is proposing to make the electronic notification system a permanent element of EU merger control. The rules are expected to be adopted in the course of 2023.

In July 2021 the Commission published its findings on the evaluation of the Market Definition Notice. According to the evaluation, areas where the Market Definition Notice might not be fully up-to-date include: (i) the use and purpose of the SSNIP (small significant non-transitory increase in price) test in defining relevant markets; (ii) digital markets, in particular with respect to products or services marketed at zero monetary price and to digital 'ecosystems'; (iii) the assessment of geographic markets in conditions of globalisation and import competition; (iv) quantitative techniques; (v) the calculation of market shares; and (vi) non-price competition (including innovation). On 8 November 2022, the Commission launched a public consultation on its draft revised Market Definition Notice. The new Notice provides detailed explanatory guidance based on recent case law of the Commission and the European Court of Justice. It takes into account the latest market developments, in particular, competition on non-price elements (such as innovation and quality), the development of digital and innovation-intensive markets and increasing globalisation.

On 1 November, 2022, the DMA entered into force. Article 14 will require "gatekeepers" to inform the Commission about acquisitions where the merging entities or the target of concentration provide core platform services or any other services in the digital sector or enable the collection of data, irrespective of whether the transaction is notifiable to the Commission under that Regulation or to a competent national competition authority under national merger rules. These concentrations will likely be referred to the Commission through Article 22 EUMR. This obligation will begin to apply no earlier than 2024.

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