Putting Limits on Extra-Territorial Coverage of Competition Laws in the Age of Global Supply Chains: Comparison of the US and Japan

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Putting Limits on Extra-Territorial Coverage of Competition Laws in the Age of Global Supply Chains: Comparison of the US and Japan

Toshiaki Takigawa*

Abstract

This comment, through comparing two representative extra-territorial antitrust cases in the US and Japan, shows that, in the age of global supply-chains, competition agencies' enforcement on conduct overseas (based on the effect doctrine) needs to receive proper limitation. Each competition agency needs to limit its law enforcement to cases conducted overseas, which have direct (and substantial effect) on consumers of the agency's home country. Regarding this "direct" effect, price-fixing of components conducted in foreign countries would normally be interpreted as lacking in direct effect on home countries to which finished products are exported. Moreover, competition agencies of MNEs' home countries would normally be advised to refrain from extending protection under the competition law to the MNEs' foreign subsidiaries since the subsidiaries are entitled to seek protection under the competition laws of respective foreign countries where they are incorporated.

* Professor, Faculty of Law, Kansai University, Osaka, Japan. takigawa@kansai-u.ac.jp.

1 Introduction

The chapter by Jean- François Bellis excellently demonstrates the need for competition agencies to intervene into overseas joint-ventures performed by multinational enterprises (MNEs). The EU Commission (and German Cartel Office) intervened into the Rio Tinto/BHP Billiton joint venture, although the venture not only took place outside the EU but also involved only a small amount of the jointly produced products sold within the EU. Notwithstanding these facts, the Commission's intervention was deemed legitimate, Mr. Bellis indicates, on the grounds that production cut by Rio Tinto/BHP Billiton affected global supply-and-demand, resulting in raised prices in the EU. In short, the combination of a small degree of direct effect and a considerable indirect-effect legitimized Commission's intervention into this case. Nevertheless, the question remains as to how much (or direct) degree of effect should be deemed sufficient for legitimizing a competition agency's intervention into cartels or joint-ventures conducted outside the agency's home country.

This comment discusses on how to put limits on competition agencies' enforcement on conduct by firms located abroad. For this purpose, this commenter compares extraterritorial enforcement by the US antitrust agencies with that of the Japanese competition agency.

Putting limits on extraterritorial enforcement does not signify endorsement of inhibited law enforcement against international cartels/ joint ventures by MNEs. Still, competition agencies in developed countries (in particular, the US, the EU and Japan) need to bear in mind that considerable number of developing countries (e.g. Indonesia, Malaysia and Singapore) have equipped themselves with well-established competition laws, enforced by reputable competition agencies. Competition agencies worldwide, therefore, need to coordinate their enforcements on cartels. In order to facilitate effective coordination, competition law enforcement based on the effect doctrine needs to be supplemented by standards limiting the reach of the effect doctrine. This is because, in today's globally connected world, MNEs have established global supply-chains, through which MNEs' conduct affects entire world, triggering duplicated enforcement by

numerous competition agencies, which, without coordination, leads to wasted energies as well as confusion.

International coordination among competition agencies, therefore, is now called for. International cooperation in the enforcement on cartels, however, is at a nascent stage at international institutions, most importantly at the International Competition Network (ICN). Moreover, international coordination, in some cases, would be difficult due to divergent interests among countries. Therefore, while endeavoring to develop the international cooperation, competition agencies need to set limitation to the effect doctrine, regarding how much direct and substantial effect is sufficient for legitimizing a competition agency's law enforcement. A great portion of international cartels/joint ventures concern natural resources. Even so, the topic of this comment concerns cross-section industries.

2 Limitation to the US Antitrust Law Enforcement on Conduct Overseas: The Direct (and Substantial) Effect Requirement

The Foreign Trade Antitrust Improvements Act (FTAIA)¹ of the US offers the most prominent example of limitation to enforcement of competition laws on conduct overseas. Indeed, the US Congress inaugurated (in 1982) the FTAIA with the aim to prevent "unreasonable interference with the sovereign authority of other nations."² Competition agencies worldwide need to learn from the US's experience of enforcing the FTAIA.

The FTAIA, in essence, limits application of the US antitrust law to the following two situations: (1) "import commerce"; (2) the targeted conduct has "a direct, substantial, and reasonably foreseeable effect" on US commerce. Between these two requirements, the limiting effect on law enforcement stems mostly from the second one—the "direct effect" requirement.³

¹ 15 U.S. Code § 6a.

² *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004).

³ Substantial and reasonably foreseeable effect will be almost always identified when direct effect takes place.

Nevertheless, the “direct effect” requirement allows wide-range of interpretations. Typical discrepancies in interpretations occur in case of price fixing (conducted outside the US) of manufacturing parts, some of which are imported to the US, incorporated into finished products.

Broad and narrow interpretations of the “direct effect” coexist. The US antitrust agencies (Department of Justice [DOJ] and the Federal Trade Commission [FTC]) expressed the broad interpretation in their amicus brief for *Motorola versus Au Optronics*.⁴ In this case, Motorola claimed damages based on overcharges on liquid-crystal display (LCD) panels that were incorporated into Motorola cellphones sold in the US. Motorola alleged that the LCD panel manufacturers globally conspired to fix the price of LCD panels, in violation of the US antitrust law: Section 1 of Sherman Act. In Support of Motorola’s position, the DOJ put forth the broad interpretation of the direct effect: “direct” means only “a reasonably proximate causal nexus”; “the existence of several steps in the causal chain does not alone render an effect indirect or too remote.” The DOJ, on this basis, concluded that “the conspiracy’s effect on U.S. commerce in cellphones is direct.”⁵

Prior to the Motorola case, the broad interpretation of direct effect had also been expressed by the *Potash (Minn-Chem)* decision: the Circuit Court expressed that the Potash producers’ restrictions on Chinese purchasers is the “direct...cause of the subsequent price increases in the United States.”⁶

⁴ Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Panel Rehearing or Rehearing En Banc (April 24, 2014).

⁵ Id. at 18 (9)-19 (10).

⁶ *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 858-59 (7th Cir. 2012).

[Figure 1] **Posner Judgment** on Motorola's Claim for Damage regarding LCD Panels

In opposition to these governmental opinions, Judge Posner (and the other two judges), in the appellate court decision of the same Motorola case, denied the existence of “direct effect”, excepting for the LCD panels directly purchased by Motorola in the US (occupying merely 1 percent of purchase by Motorola and its subsidiaries) [See Figure 1].⁷ Regarding the rest (99 percent of purchase), the Judge opined, first, only the following LCD panels might support Motorola’s claim for damage: panels which are incorporated into Motorola cellphones (and other products), and then are shipped to Motorola and are sold in the US, for which Motorola “did none of the manufacturing or assembly of these phones⁸” (occupying 42 percent of purchase). The judge, then, concluded that Motorola’s claim regarding this 42 percent is barred by the “direct effect” requirement of FTAIA.

Judge Posner (and two other judges) in this initial decision had explained the reasoning for denying the “direct effect” as follows: The price-fixers sold the LCD panels abroad to foreign companies (the Motorola subsidiaries), and therefore “[t]he effect of component price fixing on

⁷ *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (2014) (7th Cir. 2014) (November 26, 2014; Amended, January 12, 2015).

⁸ *Id.*

the price of the product of which it is a component is indirect”.⁹ This reasoning is straightforward, denying all the claims on components assembled by foreign subsidiaries of US parent companies.

However, this case did not end here. In response to Motorola’s petition (as well as the DOJ’s amicus brief) for an *en banc* rehearing, Judge Posner (and two other judges) agreed to reconsider, vacating the initial decision. The ensuing new decision¹⁰ maintained denial of Motorola’s claim, but refrained from denying direct effect, noting that this case does not fall into a typical case for which direct effect is denied: the “situation in which action in a foreign country filters through many layers and finally causes a few ripples in the United States.”¹¹ In this case, “[t]he price fixers had [...] been selling the panels not in the United States but abroad, to foreign companies (the Motorola subsidiaries) that incorporated them into cellphones that the foreign companies then exported to the United States for resale by the parent company, Motorola. The effect of fixing the price of a component on the price of the final product was therefore less direct than the conduct in *Minn-Chem*, where ‘foreign sellers allegedly created a cartel, took steps outside the United States to drive the price up of a product that is wanted in the United States, and then (after succeeding in doing so) sold that product to U.S. customers.’ ”¹²

In consequence, Posner “assumed” that the requirement of direct effect has been satisfied. Still, he maintained the denial of Motorola’s claim, on the ground that Motorola lacked “antitrust standing” (i.e., having connection to the violation, to the degree sufficient to have right to sue). This is because it is the foreign subsidiaries (not Motorola) that suffered damage from the price-fixing, and therefore “Having submitted to foreign law, the subsidiaries must seek relief for restraints of trade under the law either of the countries in which they are incorporated or do business or the countries in which their victimizers are incorporated or do business. The parent

⁹ *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842 (7th Cir. 2014) (March 27, 2014).

¹⁰ *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (2014) (7th Cir. 2014) (November 26, 2014; Amended, January 12, 2015).

¹¹ Citing *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d at 860.

¹² *Id.*

has no right to seek relief on their behalf in the United States.”¹³ (Supreme Court denied *certiorari* for this case.¹⁴)

This commenter considers that the narrow interpretation of the “direct effect” together with the stance on “standing” (expressed by Judge Posner most forcibly in his initial decision, subsequently weakened but still largely intact in the new decision) is more appropriate than the broad interpretation (expressed by the DOJ). This is because Posner’s (rather than DOJ’s) standpoint appropriately takes into consideration the nature of global supply-chains adopted by today’s MNEs. Specifically, MNEs have foreign suppliers (including the MNEs’ foreign subsidiaries) produce parts, which MNEs incorporate into finished products (such as automobiles or smart phones); MNEs, next, export the finished products to numerous countries, including the MNEs’ home countries. Cartels conducted overseas on parts, therefore, invariably exert some degree of price-raising effect on finished products in the MNEs’ home countries. However, almost all of the effects on the home country are indirect, since the cartel concerned the parts (not the finished products), which took place in foreign countries, most of which have competition-law agencies. Hence, it is right to deny direct-effect (or alternatively “standing”) regarding the 47 percent of the alleged Motorola imports (See Figure 1).¹⁵

By contrast, the DOJ’s amicus opinion blurs the distinction between direct and indirect effects, resulting in treating virtually all effects as direct, regarding component cartels conducted overseas.

¹³ *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (2014) (7th Cir. 2014).

¹⁴ Supreme Court, June 15, 2015, available at http://www.supremecourt.gov/orders/courtorders/061515zor_32q3.pdf (accessed November 9, 2015).

¹⁵ Regarding basically the same facts of this 7th Circuit decision, the 9th Circuit judged on the criminal prosecution (which cover sales to not only Motorola but also Dell, Hewlett Packard, Apple and other US information technology companies) by the DOJ, sustaining the DOJ’s prosecution--*United States v. Hui Hsiung*, 758 F.3d 1074 (9th Cir. 2014). The 7th Circuit (Judge Posner) and the 9th Circuit decisions are not contradictory, since both decisions admit existence of either import trade (in case of the 9th Circuit decision) or direct effect to the United States for at least a part of the entire trade. Supreme Court denied *Certiorari* for both the 7th Circuit and the 9th Circuit decisions: *supra* note 14.

3 Lack of Limitation to the Effect Doctrine in the Japanese Competition Law Enforcement: The Cathode Ray Tube Case

In contrast to the US antitrust-agencies and courts, the Japanese competition-agency (and courts) has yet to establish any standard for limiting the reach of the Japanese competition law to conduct overseas.

The Japanese competition agency (the Fair Trade Commission: JFTC) has been enforcing the Japanese competition law (Antimonopoly Act: AMA) to conduct outside Japan, effects of which takes place inside Japan. The JFTC has never officially proclaimed adherence to the effect doctrine, but actual cases testify to the JFTC's adherence to the doctrine: Rio Tinto/ BHP Billiton joint venture (2010)¹⁶; Marine horse cartel (2008)¹⁷; and most prominently Cathode ray tube (CRT) cartel (2009 and ongoing).¹⁸

The problem about JFTC's extra-territorial enforcement is that the JFTC has not put any limit to its AMA enforcement on conduct overseas that exerts some effects on Japanese consumers (or customers). In other words, the JFTC has neither proclaimed nor practiced the "direct effect" limitation to the effect doctrine. I analyze this situation regarding the Cathode ray tube (CRT) cartel case.

¹⁶ JFTC Press Release on Rio Tinto/ BHP Billiton (October 18, 2010), Japanese version available at <http://www.jftc.go.jp/houdou/pressrelease/h22/oct/10101802.html> (accessed December 21, 2014).

¹⁷ JFTC Remedy order, *Marine horse* (February 20, 2008), 54 Shinketsushu 512.

¹⁸ JFTC Remedy order, *CRT manufacturers* (October 7, 2009), 56 (2) Shinketsushu 71. Samsung SDI and MT Display appealed the JFTC remedy order (and fine-imposition order) to the JFTC Hearing, which led to JFTC Hearing Decision (2015), followed by Tokyo High Court Decision (2016).

[Figure 2] JFTC's Charge against the CRT Companies on their Price Fixing

3.1 Cathode ray tube case—JFTC Remedy Order and subsequent Hearing Decision followed by the High Court Decision

The cathode ray tube (CRT) case concerns price fixing of CRTs, committed by CRT manufacturers incorporated and located in Southeast Asian countries. CRTs are used as a major component in televisions (hereinafter “CRT TVs”). The CRT manufacturers met in Indonesia (in 2002) and agreed to fix their prices.¹⁹ These price-fixers consisted of subsidiaries (incorporated in Southeast Asian countries) of Japanese parent companies (including the joint venture between Panasonic and Toshiba: MT Display Co.), as well as subsidiaries of non-Japanese parent companies (including Samsung SDI Co. and LG Philips Co.).

Majority of these CRTs had been purchased by subsidiaries (incorporated in Southeast Asian countries) of Japanese TV manufacturers (including Sharp and Victor), which incorporated the purchased CRTs into TVs, which are then sold to customers in Asian countries.²⁰ Although the Japanese customers are included among the TV customers, their

¹⁹ 56 (2) Shinketsushu 71, at 74.

²⁰ Id. at 73.

weight is exceedingly low, since only few Japanese customers purchase CRT TVs, which are technically superseded by liquid-crystal display (LCD) TVs.

The JFTC, in its remedy order, determined that the price fixing violated the Japanese competition law (the AMA), constituting illegal restraint of trade prescribed at Article 2 (6) of the AMA. The JFTC, consequently, inflicted remedy order on two companies incorporated outside Japan: MT Display [Japanese subsidiary] and Samsung SDI [Korean subsidiary]. At the same time, the JFTC imposed fines on six companies located (and incorporated) outside Japan, including three subsidiaries of MT Display.²¹

MT Display [Japanese subsidiaries in Indonesia etc.] and Samsung SDI [both the Korean parent and the Malaysian subsidiary] appealed the JFTC orders (the remedy order as well as the fine-imposition order) to the JFTC Hearing procedure, whereby independent Hearing Examiners conducted a court-like proceeding. The defendants insisted that the JFTC lacked jurisdiction on this case because purchasers of the price-fixed CRT resided outside Japan. However, the Hearing decision²² supported the JFTC for its jurisdiction, on the grounds of doctrine of single-entity between parents and subsidiaries: “CRT TV manufactures in Japan and their subsidiaries outside Japan has purchased price-fixed CRTs as an insepable single entity”.²³

The three defendants--MT Display, Samsung (parent) and Samsung (Malaysian subsidiary)—appealed the JFTC hearing-decision to the Tokyo High Court, which, in January and April 2016, issued three separate decisions for each of three defendants.²⁴

The High Court decisions basically supported the JFTC Hearing-decision; nevertheless the High Court expressed illuminating opinions on the AMA’s extraterritorial reach. First, the

²¹ 56 (2) Shinketsushu 175.

²² JFTC Hearing Decision of CRT Cartel Case (May 29, 2015), Japanese version only available at <http://www.jftc.go.jp/houdou/pressrelease/h27/may/150529.html> (accessed August 23, 2015).

²³ Id.

²⁴ Tokyo High Court Decisions (29 January 2016; 13 April 2016; 22 April 2016), Japanese version only available at the JFTC sites: < <http://snk.jftc.go.jp/JDSWeb/jds/dc005/DC005?selectedDocumentKey=H280129H27G09000037>>; < <http://snk.jftc.go.jp/JDSWeb/jds/dc005/DC005?selectedDocumentKey=H280413H27G09000038>>; < <http://snk.jftc.go.jp/JDSWeb/jds/dc005/DC005?selectedDocumentKey=H280422H27G09000036>>. The companies appealed the High Court Decision to the Supreme Court, whose proceeding is on-going (on July 2016).

AMA (for its article regarding price-fixing) is applicable when “Purchasers [of the price-fixed merchandise] are located in Japan.”²⁵ Second, “The core element of a purchaser is who decides the purchasing decision.”²⁶ Third, “Japanese parent companies have decided [purchasing conditions] of CRT tubes purchased by the subsidiaries located overseas.” In conclusion, the High Court supported the JFTC decision regarding the remedy- order against the defendants.

The Tokyo High Court also supported the JFTC’s imposition (and the amount calculation) of fines against the defendants. The High Court opined: The CRT tubes supplied outside Japan comprise the merchandise of illegal price-fixing; therefore the CRT tubes supplied outside Japan may not be excluded from calculation of fine amounts.²⁷

3.2 Is the effect on Japanese consumers direct enough to legitimize JFTC’s intervention?

In this case, not only CRTs but also CRT TVs (for which CRTs are major components) are manufactured outside Japan, in Southeast Asia. Therefore, showing of effect on Japanese consumers (or customers) is required to legitimize JFTC’s intervention. The effect, indeed, is witnessed regarding CRT TVs imported to Japan. Nevertheless, degree of the effect is miniscule, because only an exceedingly small portion of CRT TVs (manufactured in Southeast Asian countries) are exported to Japan; a vast majority of CRT TVs are exported to other Asian countries (See Figure 2).

Japan does not have the equivalent of the US FTAIA for limiting its extra-territorial application, thus lack of direct (or substantial) effect does not legally negate JFTC’s jurisdiction over conduct overseas. Nevertheless, policy-wise consideration would adhere to the standpoint expressed by the US FTAIA.

In this regard, the crucial point is whether the effect on the Japanese consumers (regarding the small amount of TVs exported to Japan) is direct (and substantial) enough. On this point, this case’s situation is the same as that of the US Motorola case (regarding the 49 percent

²⁵ Tokyo High Court decision of 13 April 2016 on MT Display.

²⁶ Id.

²⁷ Tokyo High Court decision of 29 January 2016 on Samsung (Malaysia).

portion—See Figure 1). In both cases, the component cartels are conducted outside the home countries (the US and Japan). Moreover, finished products (which incorporate the components) are also manufactured outside the home countries.

Just as in the case of the Motorola decision, the effect on Japanese consumers caused by the CRT price fixing is deemed only indirect as well as unsubstantial. This finding would lead to negating legitimacy of JFTC's intervention, if Japan followed the direct-effect requirement adopted by the US FTAIA. Moreover, the fact that the Southeast Asian countries (where CRT price-fixing took place and/or price-fixed CRTs were sold or exported) have established their own competition agencies (Indonesia, Malaysia, Thailand and other countries) further weakens the rationale for the JFTC's intervention into this case.

3.3 Is the amount of fines imposed on the foreign companies legitimate?

In accompaniment to the remedy order, the JFTC issued a fine-imposition order against four foreign companies, composed of three subsidiaries of MT Display (all are incorporated in Southeast Asian countries) and LG Philips (Korean company's subsidiary incorporated in a Southeast Asian country).²⁸

The JFTC calculated the amount of fines from the sales amount of the CRTs sold by the price-fixers to the Japanese manufacturing subsidiaries located in Southeast Asian countries.²⁹ These subsidiaries made use of the purchased CRTs to manufacture CRT TVs, which the subsidiaries exported to (1) Japanese parent company, and (2) customers in Southeast Asian countries (See Figure 2).

The problem with these fines is that the sales (from which the fine figures are calculated) include those to customers in Southeast countries, whereas harm to Japanese customers (consumers) is attributed only to TVs exported to Japan (See Figure 2). Even if the JFTC were legitimized to intervene into this case on the grounds of indirect effects on Japanese consumers, the effects needs to be restricted to those on Japanese customers, and only a miniscule percentage

²⁸ JFTC fine-imposition order against MT Picture Display Indonesia Co. *et al* (October 7, 2009), 56 (2) Shinketsushu 173.

²⁹ *Id.*

of TVs (in which price-fixed CRTs are components) are exported to Japan. The JFTC committed an evident error in coming up with the fine amount from the sales amount which includes those to customers outside Japan.

3.4 Is the JFTC's intervention legitimized for protecting the interests of Japanese parent companies?

The JFTC issued remedy order as well as fine-imposition order, regarding all the CRTs exported to the Japanese subsidiaries located in Southeast Asian countries. The JFTC, then, may have considered its intervention necessary, for the reason that Japanese parent companies share the same interest with their subsidiaries (TV manufactures) in Southeast Asian countries, and the subsidiaries, as customers to the price-fixed CRTs, suffered losses due to the price-fixing.³⁰ Indeed, subsequent Hearing decision³¹ affirmed the JFTC's jurisdiction on the ground of doctrine-of-single-entity between parents and subsidiaries.

However, this rationale for the JFTC's jurisdiction contains three weak points. First, competition laws are generally grasped to have as their objectives to protect consumer welfare, not producers' interests. The JFTC, by championing interests of Japanese manufactures (rather than consumers) has presented a standpoint markedly at odds with the general global trend.

Second, in this case, the protected manufacturers are not purely Japanese companies, but MNEs, whose interests are dispersed all over the world; overseas subsidiaries' interests are not identical with Japan's public interests.

Third, MNE parent companies, in utilizing global supply chains, hold subsidiaries worldwide: Legitimizing the JFTC's intervention into cases where Japanese MNEs' foreign subsidiaries suffered losses would end up broadening the area of JFTC's interventions worldwide. Moreover, for seeking compensation for the losses, the Japanese subsidiaries are entitled to seek interventions by the competition agencies (or bring damage suits to courts) in Southeast Asian

³⁰ See Ochi (2012), p. 53 (Commenting that a subsidiary's profit loss leads to loss for its parent company, and thus the competition agency may be deemed to have jurisdiction over the parent/subsidiary group.).

³¹ *Supra* note 22.

countries where the subsidiaries are incorporated and located. Judge Posner is right in denying single-entity doctrine for this circumstance: “Having chosen to conduct its LCD purchases through legally distinct entities organized under foreign law, it cannot now impute to itself the harm suffered by them.”³²

The Tokyo High Court decision affirmed the JFTC’s jurisdiction on the grounds that the Japanese parent-company (as well as the Korean parent-company [Samsung]) were responsible for the decision of purchasing the CRT tubes, without recognizing any amount of CRT TVs imported into Japan; therefore the decision essentially protects Japanese companies’ interest when the companies are responsible for the purchasing decision, although the purchase was conducted by their subsidiaries abroad. This stance on extraterritorial application has never been adopted by either American or European agencies or courts.

4 Conclusion

In the age of global supply-chains, competition agencies’ enforcement on conduct overseas (based on the effect doctrine) needs to receive proper limitation. Otherwise, each competition agency’s jurisdiction would be extended to worldwide. For this purpose, each competition agency needs to limit its law enforcement to cases conducted overseas, which have direct (and substantial effect) on consumers of the agency’s home country. Regarding this “direct” effect, price-fixing of components conducted in foreign countries would normally be interpreted as lacking in direct effect on home countries to which finished products are exported.

Moreover, competition agencies of MNEs’ home countries would normally be advised to refrain from extending protection under the competition law to the MNEs’ foreign subsidiaries since the subsidiaries are entitled to seek protection under the competition laws of respective foreign countries where they are incorporated.

³² *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 822 (2014) (7th Cir. 2014).

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