

**Response to the European Commission's
draft Consolidated Jurisdictional Notice
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1 General observations

We welcome publication of the draft Consolidated Jurisdictional Notice and in particular the proposal to draw together the material found in the existing concentration, full function joint venture, undertakings concerned and turnover Notices. While the new text is somewhat long, it will quickly become essential reading for practitioners.

Adoption of a new jurisdiction Notice is timely: some changes called for by the recast Merger Regulation are arguably overdue; others reflect recent court jurisprudence and the Commission's decisional practice. In this last respect, we warmly welcome the expanded and updated references to case law and to the Commission's decisional practice in the draft Notice and would indeed encourage the Commission to include more illustrations and case references in the Notice, particularly on new or unfamiliar concepts.¹ We would also encourage the Commission:

- to reconsider the passages on negative sole control in the draft Notice
- to abandon outright the proposal that shifts from negative sole control to positive sole control are notifiable as concentrations
- to overhaul the passages of the Notice on changes in the scope of a joint venture to address the perceived mischief (the misuse of "approved" joint ventures as vehicles for "unapproved" activities) rather than introduce rules that will be poorly understood and difficult to monitor.

In the attached Annex, we set out some detailed paragraph-by-paragraph remarks on minor points that we believe would benefit from clarification or rephrasing.

2 Control

2.1 Asset deals and outsourcing arrangements

In deciding whether the acquisition of assets constitutes a "concentration", the rule of thumb used by many counsel has been whether it was possible to ascribe, with a reasonable degree of certainty, turnover to the assets concerned. The new language in paragraph 22 of the Commission's draft Notice, stressing that the acquisition of intangible assets (e.g. a brand) can constitute a concentration if it transfers a turnover-generating activity is helpful, but we wonder whether the paragraph could be further clarified if it were to stress that intangible assets are capable of being the "object of control" only if they involve the transfer of customer relationships.

Likewise, we welcome the new language in paragraphs 23-24 of the draft on outsourcing arrangements, and agree with the Commission's analysis that an outsourcing arrangement that does not have any impact on the market does not give rise to a notifiable concentration. However we believe that the current text leaves a number of issues unresolved. Paragraph 24 talks in

¹ Frequently there is no public record of the decisions taken by officials on questions of jurisdiction; indeed if a case qualifies for treatment under the simplified procedure, there is no medium in which the decision can be publicised. To improve transparency, we would suggest that short notes of these sorts of issues be reported on an occasional basis in the Commission's *Competition Policy Newsletter* (anonymised if appropriate).

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general terms about the purchaser being able to “develop a market access within a short period of time”, but further guidance would be welcome.

There would also appear to be some potential for confusion between the concept of turnover-generating activity in paragraph 22 and, in the context of outsourcing, “access to market” in paragraph 24. Whilst we assume the two are intended to be distinct concepts, the draft does not make this clear and the issue merits clarification. Moreover, we consider the extension of the concept of potential market access to scenarios where the assets transferred in combination with the acquirer’s assets could constitute a turnover-generating business a step too far: the asset being transferred should *itself* be capable of generating a revenue stream now or in the near future; if not, it will be virtually impossible to distinguish this scenario from a simple asset acquisition. As a matter of policy, determining jurisdiction by reference to the substantive activities of the purchaser and the target business, rather than simply the turnover of the target business, would represent a shift away from turnover as the measure of jurisdiction and would be likely to undermine legal certainty (e.g. in auctions where the vendor wishes to understand any conditionality attached to rival bids).

2.2 Change of control on a lasting basis and interrelated transactions

It is widely accepted that the term “concentration” presupposes a lasting change in the structure of the businesses concerned. It is slightly unfortunate therefore that the term “lasting basis” used in the Notice can lead to differing results (cf. paragraph 15 on control on a lasting basis and paragraph 99 on the operation of a joint venture on a lasting basis). It would be helpful if the Commission could include some introductory clarification of the phrase and the different contexts in which it is used in the Notice, followed by an explanation of the situations where the presumption should be that the “lasting basis” criterion will not be met.

One issue that will be of practical interest to many practitioners and businesses is the treatment of warehousing and other interim structures by the Commission. We understand that pending the *Lagardère* judgement, the Commission does not feel able to indicate formally its position on warehousing arrangements, but would encourage the Commission to state its position as quickly as possible thereafter. As presently drafted, sections 1.4 (paragraph 26 et seq.) and 1.5 (paragraph 33 et seq.) suggest two alternative modes of treatment. Under paragraphs 28 to 32, the Notice provides that where a transaction takes part in several phases and the first phase is *intended* from the outset to be short-lived and temporary and where the second phase is legally bound to occur, the first phase does *not* constitute a concentration. As such, it does not need to be notified under the recast Merger Regulation and may close at once (assuming no other filings are required). The alternative approach, set out in paragraphs 33-44, would be that such transactions would be viewed as a series of inter-conditional transactions and, as such, constitute one single concentration. The notification requirement would arise at the first stage, the substantive analysis would cover both the first (intermediate) stage and the second (long-term) stage, but the first stage could not close until approval of the entire deal was secured. The approach taken in section 1.4 would be welcomed by businesses as giving them more flexibility in structuring transactions in a dynamic economy, and would not deprive the Commission of the ability to review the more problematic features of a transaction in due course. To the extent that, after the *Lagardère* judgment, the Commission is free to endorse the first approach, we would encourage it to do so.

More generally, we welcome the guidance provided on interrelated transactions, and in particular the confirmation that inter-conditionality of transactions is *not* sufficient in itself for a finding that they constitute a single concentration (e.g. to meet the thresholds in Article 1 of the recast Merger

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Regulation). This section is dense and sometimes difficult to follow (especially paragraph 43), and would benefit from clearer drafting.

2.3 Negative control

One of the more controversial features of the draft Notice is the prominence given in the text to the notion of “negative control”. Practitioners and businesses are familiar with the idea of negative control in joint ventures (typically through the exercise of veto rights), but the draft Notice seeks to formalise the concept so that negative control by *one* shareholder is always a concentration. It defines (or describes) negative control as the situation where “*only one shareholder* is able to veto strategic decisions in an undertaking” even though that “shareholder does *not* have the power, on its own, to impose such decisions” (paragraph 56, emphasis added). To address the argument that such a shareholder does not exercise decisive influence over the strategic behaviour of the other undertaking within the meaning of Article 3(2), the Commission draws a parallel with joint control cases and points to the ability of the sole shareholder to produce a deadlock situation.

The Commission’s statement in paragraph 57 that there may be a shareholder which “does not have to take into account the interests of other shareholders enjoying the same level of influence and to necessarily cooperate with them in determining the strategic behaviour of the company” is somewhat misleading. If there were “other shareholders enjoying the same level of influence”, the probability is that there would be joint control or no control (because of fluctuating alliances). Moreover the statement is contradicted in paragraph 81 (explaining why a move from “negative” to “sole” control constitutes a notifiable concentration) where the Commission concedes that “the shareholder having negative control has to take into account the interests of the other shareholders”.

We would therefore encourage the Commission to reconsider whether it is appropriate to have such language in this Notice at all. Further thought should be given to whether there is a gap between negative sole control as defined by the Commission in the draft Notice and, for instance, *de facto* sole control (based on attendance and voting patterns at recent general meetings), whether any such gap needs to be plugged and, if so, whether this can properly be done in a Commission Notice. We remain to be convinced that there is any need for the addition of a new stand-alone classification of *negative* sole control.

In the event that the Commission concludes that the notion of negative control does need to be drafted into the Notice, we would urge the Commission to reflect upon whether it should be presented as a third form of control, distinct from sole and joint control.

2.4 Changes in the quality of control

Move from negative to positive sole control

Having posited the idea of negative sole control, the Commission suggests at paragraphs 80 and 81 that a shift from negative sole control to positive sole control is a notifiable concentration. In our view, this is **incorrect** and represents an unwelcome attempt by the Commission to extend the law by way of Commission Notice rather than Council Regulation. Were it to be introduced, it would be impracticable to police, notably in cases where there would be no triggering event (e.g. a shift from negative control to *de facto* control). It would also, we fear, inevitably lead to “innocent” breaches of the law by undertakings which will struggle to understand how the Commission can conclude in a published decision that they exercise “sole control” over an undertaking and still be required to notify changes in the quality of that sole control to the Commission for approval.

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Move from one form of joint control to another form of joint control

The Commission's clarification that a move from three or more jointly controlling shareholders to two will not *automatically* be presumed to be notifiable is welcome. We endorse the view, expressed in paragraph 87, that a notification is required only if there is a qualitative change in the nature of the remaining shareholders' position ("additional veto rights or considerable more weight in the decision-making process"). This would, we understand, mean the Commission moving away from the position apparently taken in Case COMP/M.2493 *Norske Skog/ABITIBI/Papco* where a merely numerical shift was held to constitute a notifiable transaction and is supported by the case law cited in footnote 81, where the strategic positions of the shareholders post-transaction were qualitatively different.

We would nonetheless welcome a shift of emphasis in this paragraph to reflect the fact that a notifiable change in quality of control where joint control moves from three or more to two shareholders is the *exception* and not the rule. The burden of proof should rest with the Commission to demonstrate that there is a qualitative change rather than with the parties to demonstrate that the shift in the shareholding is merely numerical.

3 Joint ventures

3.1 Changes in the scope of the activities pursued by a joint venture

The scenarios described in paragraphs 102-104 relating to changes in the activities of the joint venture leading to a notifiable transaction raise a number of questions.

First, the statement in paragraph 102 that the obligation to notify may arise on the transfer of additional assets from the parents or the acquisition of whole or part of an undertaking that would on its own constitute a concentration may need to be re-worked. It should, we think, be clear that a transfer of assets may *only* give rise to a concentration where those assets constitute a business for which turnover can be clearly attributed (cf. paragraph 22 of the draft Notice). (We assume, incidentally, that term "assets" in this regard is to be interpreted as excluding capital.)

From a technical perspective, the attempt in paragraph 103 to draw a line between a decision taken or encouraged by the parents to enlarge the joint venture's activities (notifiable) and "organic growth" (not normally notifiable?) sits uneasily with the wording of Article 3(4) of the Merger Regulation which states that only the "creation" of a joint venture gives rise to a concentration. More importantly however we believe that it would prove *very* difficult to apply the proposed rules in practice. The transfer of a sales force active in a specific market from the parents to the joint venture, for example, could be considered enlargement. A positive decision at a shareholders' meeting that the joint venture be mandated to expand into new product or geographic markets could arguably be caught. But we are far from convinced that this is how decisions are made in the real world. Where is the dividing line to be drawn? What is the triggering event in these cases? Is it the Commission's intention under paragraph 103 that board resolutions or shareholders resolutions are to become notifiable and subject to the suspension obligation?

We understand from officials that the mischief that the Commission is trying to address in this section are cases where undertakings notify non-problematic joint ventures to the Commission, secure approval and then use the joint venture as a vehicle for the conduct of other "problematic" activities. We have genuine sympathy for that concern (especially if it is based on actual cases and not merely suspicion), but we do **not** believe that the language in the draft Notice provides practicable means to address this concern, and would encourage the Commission to re-think this section.

Paragraph 104 deals with changes to the scope of an existing joint venture that render it full function. Here too we are concerned that the change suggested by the Commission may be unworkable in practice and would inevitably give rise to considerable uncertainty. It is inherent in Articles 3(1)(b) and 3(4) of the Merger Regulation that the time at which the status of a joint venture as full function or not is assessed is when there is a change in control. While we acknowledge the potential concern that a joint venture may initially be set up as non-full function in order to circumvent the rules, with the intention of converting to full function soon thereafter, we believe this is a matter of evidence at the time the joint venture is formed. If internal papers requested by the Commission and/or the strategic rationale of the joint venture demonstrate the parties' intention to convert the joint venture to one that is full function in the near future, then the proper analysis is that it will be full function *ab initio*.

4 Community dimension

The addition in the draft Notice of detail as how to calculate of turnover is welcome. While the sector specific examples in relation to geographic allocation of turnover provide - or at least have the potential to provide - helpful clarification for practitioners and businesses, we understand that the Commission may have to revise its language on specific sectors to reflect recent developments.

4.1 Attribution of turnover under Article 5(4)

We welcome the Commission's efforts in paragraph 160 to distinguish clearly between "control" for the purposes of Article 3(2) of the recast Merger Regulation and "right to manage affairs" under Article 5(4)(b)(iv). This guidance is helpful but we are concerned that there may be an inherent contradiction in the drafting of paragraph 160 discussing the difference between "control" for the purposes of Article 3(2) and "right to manage affairs" under Article 5(4)(b)(iv). The current draft indicates that (sole) negative control scenarios as defined in paragraphs 56 et seq. will not satisfy Article 5(4)(b)(iv) but joint control based on individual veto rights will be covered. We find it difficult to see a qualitative difference between these two scenarios justifying different treatment and would be grateful for further clarification.

Additional clarification that the criteria for *de facto* control under Article 5(4) apply to parent and sister undertakings as well as downstream subsidiaries would also be of assistance here.

4.2 Investment funds

We consider that an opportunity has been missed by the Commission in the draft Notice to provide much needed guidance on the calculation of turnover for investment funds. Private equity transactions are common, the Commission has extensive experience of examining cases where the undertaking acquiring control is an investment fund, and a clearer account of the turnover rules as applied to investment funds would have been welcomed.

4.3 Credit and financial institutions

We note that paragraph 179 of the draft Notice differs from paragraph 54 of the Turnover Notice. The new draft suggests that turnover achieved from customer-related credit and financial activities is to be attributed to the place where the customer is located, but that where the banking business is not carried out for a direct customer, the turnover is to be allocated to the branch or division which receives this income. The rule in the existing Turnover Notice is in our view consistent with Article 5(3) of the recast Merger Regulation and easier to apply on the basis of published accounts. The draft new rule would mean that the turnover shown in financial institutions' annual reports may no longer be a reliable guide to determining whether the thresholds are met. A series of costly, more complicated - and arguably unnecessary - steps, undertaken on the basis of

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extensive non-audited information, may need to be carried out in order to determine whether filing thresholds would be met. It is not clear why the Commission proposes this change, and how it can be implemented despite the clear wording of Article 5(3) of the recast Merger Regulation, which refers to the turnover received by the branch or division. If this change is retained in the final form Notice, we would be grateful for some clarification of the reasons behind this shift.

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Annex to Response to the European Commission's draft Consolidated Jurisdictional Notice

This Annex contains a number of minor suggested drafting and clarificatory suggestions by reference to the paragraph numbers of the draft Notice.

- 1 **Paragraph 4** – The wording regarding guidance on the new jurisdictional provisions of the recast Merger Regulation is somewhat unclear here. We would suggest the following amendment after Regulation (EC) 139/2004: “but where detailed changes have occurred as a result, the Notice deals with them explicitly”.
- 2 **Paragraphs 8-9** - Given that Article 3(1)(a) of the recast Merger Regulation includes the concept of “change of control” in its definition of a concentration, it would be helpful if the Notice set out how the situation of legal merger described in these paragraphs constitutes a change of control (for instance, by two previously independent economic units coming under common management, and therefore control).
- 3 **Paragraph 12** - This explanation does not seem to cover the situation where undertaking A holds the rights but undertaking B exercises them, but A has other means of exercising control, a situation which frequently arises in the context of investment funds.
- 4 **Paragraph 14** - We suggest the addition of the phrase “constituting an undertaking” to the end of this paragraph.
- 5 **Paragraph 19** - The principal conclusion that an investment company (typically the “manager” or “adviser” to the funds) is usually the person acquiring control for Merger Regulation purposes is uncontroversial and reflects current Commission practice in assessing control in a “typical” private equity buy-in structure. It is also helpful that the Commission has clarified that the investment company in such a situation will acquire control notwithstanding that it itself does not have a majority of the shares in the companies acting as General Partner where these shares are held by individuals or by a trust. Further guidance would however be welcome to explain that the mere acquisition of an interest in a fund which does not bring about a change in its management does not constitute a change of control.

Some of the language could also be adapted to the reality of many investment funds. For example, it is somewhat odd to say at line 6 that “‘control’ is typically exercised by the fund itself”, since in a typical structure the investment fund is simply a pot of cash which has delegated control i.e. the making of investment decisions under contract to a corporate entity - usually to the investment company or an entity controlled by the investment company. These management rights would typically be considered to confer the ability to exercise decisive influence.

- 6 **Paragraphs 22-25** - The reference in paragraph 22 to a notification requirement arising where the transfer of intellectual property rights “seem sufficient” to transfer the ability to generate turnover appears to create less certainty than under paragraph 14 of the current Undertakings Notice (which refers to assets “which constitute a business capable of generating turnover”). Any reference to recent decisional practice to illuminate and justify this change would be of assistance. The concept of “part of an undertaking” has always been unclear and would benefit from some additional explanation.

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Clarification of the application of paragraph 22 to real estate transactions would be helpful, confirming that the acquisition of real estate *alone* will not normally be considered a concentration, unlike the acquisition of a real estate business managing a real estate portfolio.

The cross-references to paragraphs 93 and 96 on joint ventures regarding timing of access to market, whilst helpful, might be better stated explicitly here (i.e. a period not in excess of three years).

- 7 Paragraph 30** - This section would benefit from some redrafting. The first step of the transaction does *not* in our view create lasting structural change, but it does result in a change of control.
- 8 Paragraph 32** - We welcome the codification of recent practice in paragraph 32 stating that the start-up period (in which an initial period of joint control may exist before final sole control) should be limited to one year, rather than the previously stated three years. We would be grateful for clarification whether the length of the “short time” referred to in paragraph 29 can and should be equated to the start up period in paragraph 32. Is there not also a potential contradiction with the conditions in paragraph 15 for the duration of contracts constituting a structural change of control?
- 9 Paragraphs 33-44** - Interrelated transactions. We recommend the deletion of the words “notified to the Commission” in paragraph 34, since (i) the evaluation of whether a series of transactions should be viewed as one concentration does *not* depend on whether each transaction is or is not notifiable to the Commission and (ii) in any event, this assessment precedes any filing. We welcome the additional text in **paragraph 38** relating to *de facto* inter-conditionality but any further examples (for instance, one credit provider for both transactions providing funding only on the basis that both transactions proceed) would be helpful.
- 10 Paragraph 43** - This paragraph is dense, sometimes difficult to follow and would benefit from being broken down into smaller sections. Given that it deals with the main teleological point that different combinations of businesses or assets have to be treated as separate concentrations because they have different and separate effects on the market, we consider it should be placed at the start of this section.
- 11 Paragraph 46** - It is not clear whether the intention here is that, when two transactions within a two year period between the same parties are considered as a single transaction, then review of the second transaction reopens review of the first. The phrase “single concentration” seems to imply this but we would argue strongly against this interpretation of Article 5(2), which is intended to be jurisdictional in scope rather than substantive. Assuming this is not the intention, a clarification would be helpful. Confirmation that this rule applies regardless of the economic sector of the transactions concerned (assuming this is the Commission’s intention) would also be of assistance. It should also be clear here that transactions which fall short of being a concentration (for instance, a non full function joint venture) may not be aggregated with another transaction (which does constitute a transaction) as a result of Article 5 (2).
- 12 Paragraph 48** - We would be grateful if the Notice could make it clear that this paragraph does not apply to a case where a State-controlled financial holding company takes control of two undertakings owned by the same State in wholly separate sectors, when those undertakings retain separate management post-transaction.

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- 13 Paragraph 53** - The Commission appears to have shifted the focus of its review of voting patterns for the purpose of establishing whether a minority shareholder has *de facto* control to a “prospective analysis”. This is in contrast to the situation under the previous Notice where past shareholder action was used as the basis for review. This change gives the Commission some discretion to take jurisdiction and will inevitably leads to uncertainties. We would be grateful for clarification from the Commission that it will continue at the very least to look at *past* voting patterns as an indication of future voting patterns in making its evaluation.
- 14 Paragraphs 58 et seq** - In this section on joint control, we consider it would be more consistent to replace “permanent” with “on a lasting basis”.
- 15 Paragraph 67** - We would be grateful for some additional detail as to the situations where veto rights over investment decisions can indicate the existence of joint control as the description in this paragraph is somewhat vague.
- 16 Paragraphs 70-76** - It would bring greater clarity to this section (and what we believe is the correct emphasis) if the general rule - that a shifting majority does not constitute sole or joint control and is therefore not notifiable - was stated first, before any discussion of the exceptions to this rule.
- 17 Paragraph 78** - It would be of assistance if the Notice could deal with the situation where a casting vote is attributed in turn to each of the controlling companies for a specified period of time.
- 18 Paragraph 94** - We warmly welcome the clarification given that a case-by-case analysis of full functionality is only required where a joint venture achieves less than 50% of its turnover with third parties (or where the alternative 20% of turnover threshold where the parent companies are offered the same commercial terms as third parties is not exceeded). However this paragraph would benefit from clarification that this threshold only applies after the end of the start up period.
- 19 Paragraphs 105-110** - We consider that further detail and examples are required if this section is to be applied properly. Is it, for example, the Commission’s intention that an acquisition by a company 100% owned by a qualifying credit institution should fall within the exception? Equally, what if the acquiring company is a qualifying credit institution but its parent is not?
- 20 Paragraphs 111-115** - We would be grateful if the Commission could confirm whether the intention that this section should replace the DG Competition Information Note on Article 6(1) second sentence of Regulation 139/2004, which contains virtually identical text. It would also be helpful if the Commission could use this section to address the issue of abandonment of concentrations in Phase I. We understand from experience that in practice the formal withdrawal of notification is sufficient in this regard to end proceedings, but we would suggest that the Notice is the appropriate forum to codify this practice.
- 21 Paragraph 142** - This section helpfully revises the wording of paragraph 26 of the old Turnover Notice, which referred to “audited or other definitive accounts”. Since the CFI’s judgment in T-417/05 *Endesa v Commission*, it is now clear that alternative accounts should be used *only* where no audited accounts exist for the preceding financial year. In relation to adjustments of audited figures, it would be helpful if the Commission could also set out the particular sections of the recast Merger Regulation to which it refers (paragraph 142 refers to adjustments “required by the provisions of the Merger Regulation”).

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- 22 Paragraph 143** - The new wording in this section: “verifiable external economic events” in relation to the appropriate set of accounts to be used requires some further clarification. What sort of event might qualify? Can the Commission provide any examples? It would be helpful if this paragraph referred to the jurisprudence in *Endesa v Commission* on the concept of “exceptional circumstances”, which is helpfully defined by the CFI as “significant and permanent changes in the economic reality of the undertakings concerned”. We note that this wording is incorporated into paragraph 145, but consider it would be more helpfully placed here.
- 23 Paragraph 145** - We would be grateful for guidance on whether adjustments to the accounts are required where the purchaser itself is acquired by another undertaking.
- 24 Paragraphs 151 and 153** - The use of the words “companies and undertakings” is confusing here. What is the intended distinction?
- 25 Paragraph 160** - Whilst we understand the distinction the Commission seeks to draw between the “right” and the “power” to manage, we believe that the use of these expressions is likely to generate more confusion than it resolves. Further clarification and simplification of this paragraph would be helpful.
- 26 Paragraph 165** - The newly formulated test in this paragraph that turnover should be allocated “where the characteristic action under the contract in question is to be performed” is helpful, and welcome.
- 27 Paragraph 167** - We suggest that this paragraph should be amended to read: “Where goods are purchased by and deliver **on the instructions** of the central purchasing organisation”. As currently drafted, this paragraph does not reflect the reality of multinational centralised purchasing.
- 28 Paragraph 205** - Whilst this paragraph is merely a restatement of current policy, we consider it would be helpful if the Commission tackled the practical difficulties of this approach. In practice, this requires a shareholder entering a joint venture to obtain the agreement and participation of all other shareholders, regardless of their lack of involvement in the notifiable transaction. This can create very real difficulties where a shareholder is uncooperative and we would therefore ask the Commission at the very least to indicate that in such circumstances it would look favourably about a request for a waiver from the notifying shareholder.

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