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elni REVIEW

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If it ain't broke, don't fix it? Commission efforts to manage the definitions of waste, recycling and recovery, and to switch from a waste streams to a materials approach

*Geert van Calster**

1 Introduction

Discussion on the EU definitions of 'waste', as well as 'recovery' and 'disposal' of waste have been, to paraphrase a standing expression, plentiful and hard on each other's heels. Ever since the 1991 amendments[1] to the 1975 framework[2] directive,[3] attempts have been made to disprove the usefulness of the definition of waste, and to question the lack of proper definition of the concepts of recovery and disposal.

In order to assess the recently issued Commission Proposal for a (renewed) directive on waste,[4] this contribution will first of all, succinctly,[5] review the nature and limitations of the 'old' (existing) definitions, subsequently to review the proposed changes.

2 The law as it stands

2.1 The definition of waste

Article 1(a) of the amended framework Directive defines waste as *"any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard"*. And it proceeds "the Commission, acting in accordance with the procedure laid down in Article 18, will draw up, not later than 1 April 1993, a list of wastes belonging to the categories listed in Annex I. This list will be periodically reviewed and, if necessary, revised by the same procedure."

Before going into the details of the waste definition under the Directive, and how it has been interpreted by the ECJ, it may be worthwhile to sketch the general chain of events surrounding the 'waste' concept. Indeed lots has been made of the extensive case-law of the ECJ on the matter, which tends to leave observers in a state of confusion. Some of that confusion may be explained by what, in hindsight, turned out to be misconceived expectations of commentators, including the author of this contribution. Indeed most commentators focused on one goal of the 1991 reforms only: namely the search for a harmonised definition of waste. Hence one neglected the other main focus of the 1991 amendments, i.e. environmental protection. The ECJ on the other hand, with its recent case-law as reviewed briefly below, has firmly opted to emphasise the environmental protection credentials of the Directive. The ECJ preference has inevitably led to less harmony throughout the EC than one would have expected directly after the entry into force of the 1991 amendments.

Those searching for a harmonised, or closed, list of wastes at the EU level, swiftly become disappointed of course once one goes into the details of the directive. Annex I, to which the definition refers, famously includes the fit-all entry of "*Any materials, substances or products which are not contained in the above categories*". If a substance has been included in the list in so many words, the Community legislator considers it to be "waste", provided, of course, the other conditions of Article 1 are met: the holder discards or intends or is required to discard of the substance concerned. If a substance does not figure in the list, one must not assume that it is not to be regarded as waste. It falls under Q16, and it will be considered waste should it meet the aforementioned conditions.

The Commission is subsequently instructed by Article 1(a) to draw up what is referred to as the "European Waste Catalogue" (EWC) and did so by Decision 94/3.[6] The EWC was in a later stage merged with the Hazardous Waste list - which in itself is an outcome of the hazardous waste Directive, by Commission Decision 2000/532.[7] The latter

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1 Directive 91/156, OJ [1991] L78/32.

2 A qualification which the Directive gained precisely through the 1991 amendments.

3 Directive 75/442, OJ [1975] L194/39.

4 COM(2005) 667. issued within the framework of the Thematic Strategy on the prevention and recycling of waste, COM(2005) 666. Some will undoubtedly argue that the latter document's COM number hints at its nature.

5 More details in the author's Handbook of EU Waste law, Richmond, Richmond Law and Tax, 2006, forthcoming.

6 Commission Decision 94/3 of 20 December 1993 establishing a list of wastes pursuant to Article 1(a) of Council Directive 75/442 on waste, OJ [1994] L5/115.

7 Commission Decision 2000/532 of 3 May 2000 replacing Decision 94/3/EC establishing a list of wastes pursuant to Article 1(a) of Council

decision, just as the waste Annex of Directive 75/442, should be regarded as a confirmative list, albeit in more detail. Products figuring on the list should be regarded as waste, again, provided they meet the other requirements of Article 1.[8] But the list is not exhaustive. The EWC is a non-exhaustive list of wastes that is to be a reference nomenclature, providing a common terminology throughout the Community designed to improve the efficiency of waste management activities.[9]

So what then is "waste" and which substances are merely "products"? Taking the legal base and the purpose of the Directives into account, the European Court of Justice (ECJ) indicated even under the old version of the Directive, that the legislator envisaged a broad application of the Directive.[10] From the outset, Community Waste Directives were not just meant to create a level playing-field for producers of waste and for economic operators (Internal Market objectives). They were also designed to protect the environment. The type of environmental protection which the Community aims at is of course laid down in Article 174 EC: preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources; promoting measures at international level to deal with regional or world-wide environmental problems. Thus, Community waste policy is not just designed to prevent pollution, it also fosters a rational use of natural resources.

These considerations have led the ECJ to find national legislation to be incompatible with the waste Directives, if it excluded from the concept of waste certain substances which formed part of an economic chain, in other words, which had a positive economic value for someone.

The Opinions of Jacobs AG subsequently became the highlight of what we recalled above, i.e. the search for a harmonised, abstract definition of waste. It was however not to be, in that the ECJ moved away from its careful support for the Jacobs route of conceptualising the definition (i.e. trying to devise an abstract definition that would catch all) in *Arco Chemie* in particular. In *Arco Chemie*[11] the Court put the concept 'to discard' firmly back into the centre of the analysis, rejecting alternative methods of definition.

Arco Chemie most certainly did not end the controversy.[12] Generally, one would have to concede that, notwithstanding a majority of cases where the presence of waste is not contested, a hard core of strife remains. Most importantly, perhaps, one may have to accept that a fool-proof harmonisation of the concept of 'waste' is not within the Community's reach; neither, perhaps, would it be environmentally advantageous: a flexible regime allows for quick action in this sometimes fast evolving sector. Both Member States and the Commission, moreover, may always resort to amending the Community waste list, should practice so demand.

One particular concept which needs introducing, is that of the so-called *Palin Granit* route.[13] The Court considered an argument, that materials resulting from a manufacturing or extraction process, the primary aim of which is not the production of that item, may be regarded not as a residue (a secondary material and hence 'waste'), but as a by-product which the undertaking does not wish to discard, but intends to exploit or market on terms which are advantageous to it, in a subsequent process, without any further processing prior to reuse.

The Court found that this interpretation would not be incompatible with the aims of Directive 75/442. There is no reason to hold that the provisions of Directive 75/442 apply to goods, materials or raw materials which have an economic value as products regardless of any form of processing and which, as such, are subject to the legislation applicable to those products. However, the Court has regard to the obligation to interpret the concept of waste widely in order to limit its inherent risks and pollution. It held that the reasoning applicable to by-products should be confined to situations in which the reuse of the goods, materials or raw materials *is not a mere possibility but a certainty*, without any further processing prior to reuse, and as an integral part of the production process. In subsequent cases, it stuck to these conditions strictly.

Directive 75/442/EEC on waste and Council Decision 94/904/EC establishing a list of hazardous waste pursuant to Article 1(4) of Council Directive 91/689/EEC on hazardous waste, OJ [2000] L226/3, as amended.

8 See also the headnote of the Annex to Decision 94/3, at 4): "the inclusion of a material in the EWC does not mean that the material is a waste in all circumstances. The entry is only relevant when the definition of waste has been satisfied." Decision 2000/532 includes similar language.

9 Ibidem, at 3) and 6).

10 See Judgment of the Court of 13 May 1987 in Joined Cases 372 to 374/85, Openbaar Ministerie v Oscar Van Traen and others, [1987] ECR 2141 at 7.

11 Joined cases C-418/97 and C-419/97, Arco Chemie Nederland Ltd. v Minister van VROM, and Vereniging Dorpsbelang Hees & e.a. v Directeur van de dienst Milieu en Water van de Provincie Gelderland e.a., [2000] ECR I-4475.

12 The scope of this contributrion does not allow to go into detail.

13 Case C-9/00, Palin Granit Oy v Vehmassalon kansanterveystyön kuntayhtymän hallitus, 18 April 2002, [2002] ECR I-3533.

2.2 'Recovery' and 'disposal'

The framework Directive gives even less of an abstract definition for these two concepts than it does for the concept of 'waste': it simply refers to the Annexes, II.A, and II.B. Both annexes list a number of operations "*such as they occur in practice*", hence they take stock, they do not define exhaustively. Given the total absence of even an inadequate definition, it is perhaps all the more surprising that the Court has actually proceeded to provide for a proper definition of waste recovery operation.

In *Abfall Service*,[14] the Court held, upon suggestion by the Advocate General, that the essential characteristic of a waste recovery operation is that its principal objective is that the waste serve a useful purpose in replacing other materials which would have had to be used for that purpose, thereby conserving natural resources.

The Court's approach to the term 'recovery', whilst falling far short of a free-standing definition, did prove useful given the problems to which that term has given rise. The distinction between 'recovery' and 'disposal', had become crucial in particular within the context of the waste shipments Regulation,[15] where Member States are given more freedom to block shipments of waste if they are destined for disposal, rather than recovery operations.

3 The law as it may apply in future

As noted, the Commission has included a formal proposal for the renewal of the framework waste directive, as part of its thematic strategy on the prevention and recycling of waste.[16] There are many tantalising aspects to the strategy, however the reviewer will stick to his brief and look at the definition aspects only.

3.1 Core definition

In the proposed new directive, 'waste' is defined in Article 3(a) as "' *any substance or object which the holder discards or intends or is required to discard*" Notably, this definition leaves the core concept of 'to discard' untouched. With the intended specifications of some core contested areas (see below), Commission services and the majority of consulted parties are of the view that notwithstanding the frustration and uncertainty which the core definition has led to during the 1990s, the clarification brought about by the ECJ now makes this definition the best possible.

Readers will also notice that the proposed Directive no longer refers to an Annex of categories of waste. In particular given the existence of the European Waste Catalogue (EWC), the usefulness of this Annex indeed would seem to have reduced considerably.

The EWC itself is no longer referred to in the very article which defines 'waste'. Rather will it be established by virtue of Article 4 of the new Directive. This article will also sanction the merger between the EWC and the Hazardous Waste list – which was also necessary of course given that the new directive will integrate the Hazardous Waste Directive into the core Directive.

The absence of reference to the waste list in the definition of waste, serves to take away any impression that this list can serve any purpose other than a supporting one.

Article 2 of the new Directive will exclude a number of substances from the scope of the directive, along similar lines as the previous Directive. One notable addition to the exclusions, is "*unexcavated contaminated soil*". It is noteworthy that this exclusion will only apply "*as regards certain specific aspects of those categories which are already covered by other Community legislation*". The previous (i.e. currently applicable) Directive excludes a similar group of wastes from the scope of the directive, "*where they are already covered by other legislation*". In contrast with the current Directive, the new Directive, if so adopted, will only allow this exclusion to the extent that the waste at issue is covered by other *Community* legislation. The ECJ has held that, under the current Directive, both national and Community law can lead to such exemption.[17] The new provision also clarifies that the exclusion may be partial, i.e. only for those aspects which are covered by other Community legislation, will the wastes at issue be exempt.

Specifically for the exclusion of unexcavated contaminated soil, this proviso means that *excavated* contaminated soil will remain fully subject to the Directive. The exclusion of *un*excavated soil is of course driven by Member States' reaction to the *Vande Walle* judgment,[18] where the Court held that even unexcavated contaminated soil had to be regarded as waste, whether there is a duty to remedy the pollution or not. The suggested exclusion of

14 Case C-6/00, Abfall Service AG v Bundesminister für Umwelt, Jugend und Familie, 27 February 2002, [2002] ECR I-1961.

15 Regulation 259/93, OJ [1993] L30/1.

16 Whilst this strategy also announces future legislative initiatives, the proposal for the new framework directive, COM(2005) 667, is the only legislative proposal directly attached to the strategy.

17 Case C-114/01 AvestaPolarit Chrome [2003] ECR I-8725. See also Case C-121/03, Commission v Spain, not yet published in ECR.

18 Case C-1/03, Criminal proceedings v. Paul Van de Walle et al, [2004] ECR I-7613.

unexcavated soil will only kick in once the Community agrees a specific regime for such soil – which it intends to do within he framework of the soil protection strategy.[19]

Finally, the directive will notably also include a procedure which eventually should lead to a clarification of the concept of so-called 'full recovery'. The proposed Directive deals with this under the heading 'end of waste'. The ECJ in the pre-cited *Arco Chemie* case briefly also considered the concept of 'full recovery'. In particular (at 94), it noted that even where waste has undergone a complete recovery operation, which has the consequence that the substance in question has acquired the same properties and characteristics as a raw material, that substance may none the less be regarded as waste if, in accordance with the definition in Article 1(a), its holder discards it or intends or is required to discard it. Classification as a waste is *a fortiori* not excluded where the objects at issue are merely presorted or pre-treated, without the effect of transforming those objects into a product analogous to a raw material, with the same characteristics as that raw material and capable of being used in the same conditions of environmental protection (at 96).

UK practice in particular lays some emphasis on the notion of 'full recovery',[20] especially after the High Court judgment in Mayer Parry, which held inter alia that materials which are made ready for re-use by a recovery operation, cease to be waste when the recovery operation is complete.[21]

The proposed Directive foresees the drafting of guidelines, within the Directive's comitology procedure, so as to specify the moment when a waste has been fully recovered and hence ceases to be waste. Much like the future work on the very specification of recovery operations (see below), work on these guidelines undoubtedly will prove challenging.

3.2 'Recovery' and 'disposal'

The clarification of the notions of 'recovery' and 'disposal', is key to the proposed changes. Neither of these concepts is included in the definition part of the proposed Directive (which simply defines the over-arching idea of 'treatment' as meaning 'recovery or disposal').

It would certainly seem advisable, from a drafting point of view, to actually include 'recovery operation' in the definitions of Article 3, given that Article 5 of the proposed Directive actually defines 'recovery operations'. It denotes these as being "*operations that result in it* [i.e.. Waste, GAVC] *serving a useful purpose in replacing, whether in the plant or in the wider economy, other resources which would have been used to fulfil that function, or in it being prepared for such a use*".

This definition confirms more or less literally the ECJ's view in *Abfall*, where, as suggested by the Advocate General, the Court held that the essential characteristic of a waste recovery operation is that its principal objective is that the waste serve a useful purpose in replacing other materials which would have had to be used for that purpose, thereby conserving natural resources.[22] The currently suggested definition confirms the ECJ view that such use can be made either in the plant where the waste was produced itself, or in what the directive will now call 'the wider economy'.[23] The definition does also clarify that recovery operations include those operations which *prepare* the waste for such useful purpose.

Member States will have to at least regard those operations listed in Annex II to the proposed directive, as 'recovery operations'.

Article 5 of the proposed Directive further mandates the Commission to employ the comitology procedure (entailing a certain degree of Member States' input) to "*adopt implementing measures in order to set efficiency criteria on the basis of which operations listed in annex II may be considered to have resulted in a useful purpose (...).*" This proviso underlines the relative vagueness of Annex II, much like its current predecessor, Annex IIB of the amended Directive 75/442. Whilst Member States are already under the obligation to regard those operations listed in Annex II as 'recovery operations', thus making the comitology route from a legal point of view somewhat superfluous, in practice the definition of activities in this annex is such as to leave a lot of room for interpretation. Examples abound: each of the entries in the list, bar one (see below) uses generic terms (e.g. 'regeneration of acids or bases') which, failing Community harmonisation, fall short of warranted specificity. Hence the procedure foreseen to detail the minimum requirements for the operations involved truly to classify as 'recovery', cumbersome as it may prove to be, is certainly welcome.

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19 Communication of the Commission Towards a Thematic Strategy for Soil, COM(2002) 179, and follow-up: http://europa.eu.int/comm/environment/soil/#1 .

20 POCKLINGTON, D., 'The changing importance of "recovery" and "recycling" processes in EU waste management law', European Environmental Law Review, 2000, (272-276) 274.

21 Judgment of the High Court of 9 November 1998, Mayer Parry recycling Ltd v The Environment Agency, CH 1997 M No.2722, at 46.

22 Case C-6/00, Abfall Service AG v Bundesminister für Umwelt, Jugend und Familie, [2002] ECR I-1961.

23 Case C-235/02, Saetti and Frediani [2004] ECR I-1005.

One noteworthy inclusion in the list of recovery operations, are highly energy efficient municipal waste incineration facilities dedicated to the processing of such waste only (as opposed to facilities which were built with a different purpose, and which use i.a. municipal waste as a source of fuel – these typically, even under the old Directive, qualify as recovery facilities). The annex specifies the targets which need to be reached for the facilities concerned to be qualified as carrying out recovery operations. This proviso is the result of a series of landmark ECJ judgments,[24] which ruled out incineration of municipal waste as being a 'recovery' operation, if the installations concerned were built with the primary purpose of waste incineration.

Just as its predecessor (the current Directive), the new Directive will thus employ annexes of 'recovery' and 'disposal' operations. In contrast with the current Annexes, the newly proposed ones no longer include a Headnote which specifies that the recovery or disposal operations which they list, are those "*as they occur in practice*" and do not entail a judgment as to whether the very substances which are subject to these operations, are actually to be classified as waste. However even under the old Directive, that Headnote was superfluous really, in that annexes obviously cannot alter the very definition given in the body of the Directive. Superfluous, maybe, but useful, in particular given attempts to define 'waste' using the detour of the annexes.[25]

4 Is it broke? Do we need to fix it?

The Commission at any rate would seem to have decided that the core definition of waste, with its focus on the notion of 'discarding', may be faulty but nevertheless lacks alternatives. Case-law of the ECJ in particular has left a degree of clarification which most likely would be difficult to meet by any possible alternative.

By issuing guidelines, under the comitology procedure, the Commission may moreover (but it will be a cumbersome process) succeed in what has become a defining moment in a waste's life-span: the moment of it ceasing to be waste ('end of waste' or 'full recovery'), and the classification of the processing to which it is put as either 'recovery' or 'disposal'. It should be noted that the European Parliament has voiced concerns over the ever-increasing use of comitology procedures, for deciding seemingly technical but in practice overwhelmingly important issues.

5 From waste streams to a 'materials' approach

Existing EC waste law essentially has three legs: horizontal legislation, cutting across all waste streams and all waste treatment techniques; legislation dealing with specific waste streams; and legislation dealing with specific waste treatment techniques.

- Horizontal legislation, as noted, cuts across the waste sector and is essentially included in the waste framework Directive, the hazardous waste Directive, and the waste shipment Regulation.
- There are also a number of Directives applying to specific waste treatment techniques, such as landfill, and incineration.
- Finally, specific waste streams have a tailor-made regime applicable to them (not with the exclusion of horizontal or waste treatment Directives, however). These include waste oils, batteries, end-of-life vehicles, electric and electronic waste, packaging waste, PCPs. It is noteworthy that not all of this waste stream legislation is recent. Waste oils, for instance, have been regulated at the EC level since 1975.

There have been calls in recent years drastically to change the direction of European waste legislation, moving the focus away from waste streams, and towards waste materials. Thus, for instance, rather than identifying so-called 'priority waste streams' (end-of-life vehicles, say, or batteries, tyres…), one could identify materials needing specific attention, such as PVC, heavy metals, etc., regardless of the specific application in which they are being used. One way of dealing with such materials is to involve producers of the goods concerned, in phasing out or at least reducing the use of such materials at the manufacturing and design stage of the product. This concept of 'producer responsibility' was originally applied in an end-of-pipe sense (i.e. obliging producers to share part of the burden of the management of the waste), and it is now increasingly called upon at the design stage. Producer responsibility at the design stage lends itself better coherently to deal with one particular substance.

This having been said, the waste streams approach has certainly had its advantages in dealing with some particularly urgent waste issues, and it is unclear at the moment whether the EU will abandon the waste streams approach some time soon, in favour of a pure materials focus.

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24 See the author's 'Waste incineration cases spark heated debate on waste management priorities',Review of European Community and International Environmental Law (RECIEL), 2003, 340-344.

25 See the author's The EC definition of waste: The Euro Tombesi bypass and Basel relief routes', European Business Law Review, 1997, 137-143.

The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit-association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available of the public.
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The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

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The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.
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In many countries lawyers are working on aspects of environmental law often with environmental initiatives and organisations or as legislators, but have limited contact with other lawyers abroad, although such contact and communication is vital for the successful and effective implementation of environmental law.

In 1990 a group of lawyers from various countries therefore decided to initiate the Environmental Law Network International (elni) to promote international communication and cooperation worldwide. Since then elni has grown to a network of about 350 individuals and organisations from throughout the world.

Since 2005 elni is a registered non-profit association under German Law.

elni coordinates a number of different activities:

Coordinating Bureau

The Coordinating Bureau was originally set up at and financed by the Öko-Institut in Darmstadt, Germany, a non-governmental, non-profit making research institute. The Bureau is currently hosted by the University of Applied Sciences in Bingen. The Bureau acts as an information centre where members can obtain information about others working in certain areas thus promoting the development of international projects and cooperation.

elni Review

The elni Coordinating Bureau produces and sends to each member the elni Review twice a year containing members' reports on projects, legal cases and developments in environmental law. elni therefore encourages its members to submit such articles to be published in the Review in order to allow the exchange and sharing of experiences with other members.

elni Conferences and Fora

elni conferences and Fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to bring together scientists, policy makers and young researches, giving the opportunity to exchange views and information as well as developing new perspectives.

Publication Series

The elni publications series contains 12 volumes on different topics of environmental law.

- Environmental Law and Policy at the Turn to the 21st Century, Liber amicorum, Betty Gebers, Ormond/Führ/ Barth (eds.) Lexxion 2006.
- Access to Justice in Environmental Matters and the Role of NGOs, de Sadeleer/Roller/Dross, Europa Law Publishing 2005.
- Environmental Law Principles in Practice, Sheridan/Lavrysen (eds.), Bruylant 2002.
- Voluntary Agreements - The Role of Environmental Agreements, elni (ed.), Cameron May Ltd., London 1998.
- Environmental Impact Assessment - European and Comparative; Law and Practical Experience, elni (ed.), Cameron May Ltd. London 1997.
- Environmental Rights: Law, Litigation and Access to Justice, Deimann / Dyssli (eds.), Cameron May Ltd. London 1995.
- Environmental Control of Products and Substances: Legal Concepts in Europe and the United States, Gebers/Jendroska (eds.), Peter Lang, 1994.
- Dynamic International Regimes: Institutions of International Environmental Governance, Thomas Gehring; Peter Lang, 1994.
- Environmentally Sound Waste Management? Current Legal Situation and Practical Experience in Europe, Sander/ Küppers (eds.), P. Lang, 1993
- Licensing Procedures for Industria Plants and the Influence of EC Directives, Gebers/Robensin (eds.), P. Lang, 1993.
- Civil Liability for Waste, v. Wilmowsky/Roller, P. Lang 1992.
- Participation and Litigation Rights of Environmental Associations in Europe, Führ/ Roller (eds.), P. Lang, 1991.

elni Website: elni.org

The elni website at *http://www.elni.org* contains news about the network and an index of elni articles, gives an overview of elni activities, and informs about elni publications. Internships for young lawyers/law students at the Öko-Instituts environmental law division are also offered on the web.

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