

January 2019

UK Competition Law Newsletter

2018 Highlights

- CAT quashes the CMA's record antitrust fine in *Pfizer/Flynn*, finding that the CMA misapplied the legal test for excessive pricing.
- CMA shines spotlight on digital platforms, conducting several Phase 2 reviews and considering further work in digital advertising.
- UK competition regime prepares for Brexit, despite significant uncertainty about how, when, or if it will occur.

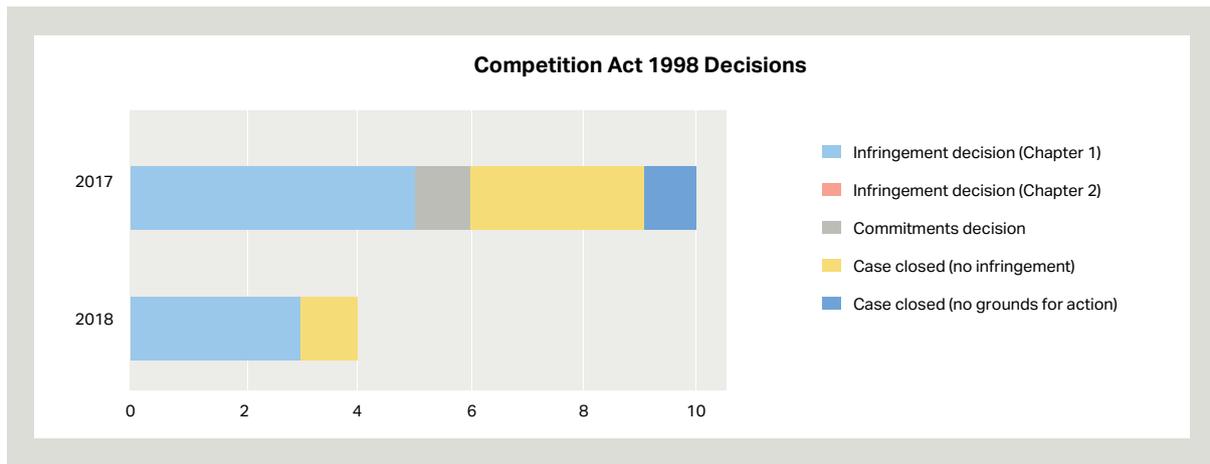
2018 Review

CMA Activity

As in 2017, the CMA leadership devoted much of 2018 to preparing for Brexit – publishing draft regulations, revising guidance, and increasing the CMA's workforce. The CMA has also continued efforts to enforce competition rules on a business-as-usual basis, although its activity dropped slightly compared with 2017, falling somewhat short of the aim set out in its last [annual plan](#) to “take forward a higher volume of cases.” In 2018, the CMA issued:

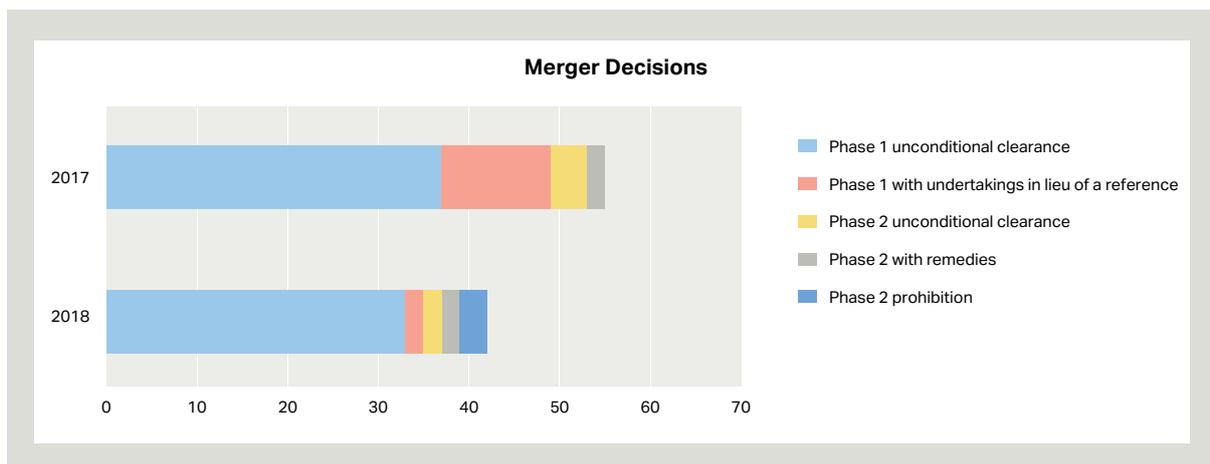
- Three Chapter 1 infringement decisions, compared with five in 2017;
- No Chapter 2 infringement decisions, as in 2017;
- One decision closing a case with no infringement finding, compared with three in 2017; and
- Fines amounting to around £6.7 million, compared with £11.8 million in 2017.

In line with its [intention](#) to use Brexit as an opportunity to “be a leading actor in global competition law enforcement,” the CMA stepped up its enforcement efforts, including by launching a [campaign](#) in October 2018 to encourage whistleblowers to expose cartels.



The CMA reviewed fewer mergers in 2018 compared with 2017, which may reflect a fall in M&A activity during the second half of the year. At Phase 2, two of seven cases were unconditionally

cleared, compared with four of six cases in 2017. At Phase 1, the proportion of cases that required a more detailed Case Review Meeting process (43%) was slightly lower than in 2017 (48%).



The CMA launched two market studies in 2018 (into statutory auditors and funerals) – the same number as in 2017 – and made no market investigation references.

According to its draft annual plan for this year, the CMA has a substantial volume of ongoing work: at the time of publishing, it was running 23 competition enforcement cases, five consumer enforcement cases, 17 merger investigations, two market studies, one market investigation, and one super-complaint. In addition, the concurrent sector regulators have a number of ongoing Competition Act enforcement cases, covering business parcel delivery (Ofcom), wholesale energy trading (Ofgem), and asset management (FCA).

Brexit

The CMA has continued efforts to prepare for Brexit even as its terms and timing remain unclear. As well as publishing draft regulations and revising guidance that would apply in the event of a no-deal Brexit, the CMA expanded its teams in London and Edinburgh, and created a new State aid group. Post-Brexit, the CMA expects to review an additional 30-50 Phase 1 mergers each year, leading to an additional six or so Phase 2 investigations, as well as an additional five to seven complex antitrust cases. To accommodate its enlarged teams, the CMA plans to relocate its London offices to Canary Wharf in September 2019. For a fuller discussion of the possible impact of Brexit, see our previous newsletters, especially

last year's [November/December](#) edition (as well as the [January](#), [February](#) and [June](#) editions).

Focus on Digital Markets

Like other competition authorities, the CMA has maintained a close interest in digital markets. In 2018, it subjected several mergers between online platforms to close scrutiny, including *Experian/ClearScore*, *Nielsen/Ebiquity*, and *PayPal/iZettle*. The CMA is currently [conducting](#) a research project into its assessment of past merger cases in the technology sector and has formed a new Data, Technology and Analytics Unit to bolster its expertise in this area. On the enforcement side, following its market study into [digital comparison tools](#) in September 2017, the CMA issued a [statement of objections](#) to CompareTheMarket in 2018 relating to the use of “wide MFN” clauses (clauses that prevent the insurer from selling the same product at a cheaper price through any other website) in contracts with home insurers.

Also in 2018, the CMA engaged closely with the [Furman Panel](#) established to assess competition in digital markets. Among other things, the Panel is exploring: (i) how new firms can adequately compete with established players in digital sectors, (ii) the aggregation of data by large companies and its consequences for the competitive process, and (iii) the implications of increased concentration in digital markets. According to its [annual plan](#), the CMA is considering conducting further work into digital advertising once the Furman Panel has concluded, although its ability to launch new discretionary work depends on the UK securing an EU Exit deal with a transitional period.

Public Interest Interventions

Public interest interventions continued to attract attention in 2018, with the conclusion of the CMA's review into the anticipated [acquisition](#) of Sky by 21st Century Fox (Fox). After a referral by the Secretary of State on public interest grounds, in May 2018, the CMA found that the transaction would raise concerns over loss of media plurality and recommended that Sky News should be divested to a suitable third party for the transaction to proceed. On July 12, the Secretary of State, Jeremy Wright, announced that he had

accepted undertakings from Fox to divest Sky News to Disney. Ultimately, Fox's bid for Sky was unsuccessful, after Sky's shareholders accepted Comcast's £30.4 billion rival bid in September 2018.

2018 also saw measures designed to enable the Government to intervene more readily in mergers that raise national security concerns. Updated [merger thresholds](#) published in June 2018 enable the Government to intervene in mergers involving firms that develop or produce items for military use, computer hardware, or quantum technology, where the target's UK turnover exceeds £1 million or the target has a UK share of supply of at least 25% (even where the share will not be affected by the merger). The Government is also [considering](#) longer-term reform to give it greater scope to intervene in transactions on grounds of national security.

Strict Enforcement of Procedural Rules

In 2018, the CMA showed a greater readiness to bring compliance cases for breaches of its procedural rules. In particular, the CMA made clear that it will strictly enforce compliance with initial enforcement orders (IEOs) that prevent companies integrating their businesses while the CMA's merger investigation is ongoing. The CMA almost always imposes IEOs in completed mergers to prevent companies taking action that might prejudice the CMA's ability to enforce remedies. The CMA may also exceptionally impose IEOs in anticipated mergers (for example, to prevent a target closing stores in areas of potential concern in *Tesco/Booker*).

The CMA imposed penalties on companies for breaching IEOs in two cases over the last year. In *Ausurus*, the CMA imposed a fine of £300,000 because Ausurus, among other things, directed the target's customers to make payments to its bank account. In *Electro Rent*, the CMA imposed a fine of £100,000 where Electro Rent failed to seek the CMA's consent before terminating the lease on its only premises in the UK. Electro Rent appealed the CMA's decision before the CAT in October 2018, arguing that it had informed the monitoring

trustee about the termination in advance. The CAT judgment, pending at the date of writing, should have ramifications for other enforcement cases.

The CMA's enforcement in *Ausurus* and *Electro Rent* follows the fine on *Hungryhouse* for failing to produce documents in response to an information request. Together, these cases confirm that the CMA takes procedural requirements seriously and will take enforcement action against companies that breach those requirements. Companies should therefore follow closely the CMA's guidance on [IEOs](#) and [document production](#).

Vulnerable Consumers

The protection of vulnerable consumers, such as those on low income or the elderly or disabled, is a stated priority for the CMA. On February 1, Martin Coleman, a Panel Chair at the CMA, explained that the CMA is “*increasingly focusing on whether our competition regime and remedies take sufficient account of the circumstances of vulnerable consumers.*” The CMA spent 2018 advancing a [research project](#) on how competition rules can help protect vulnerable groups, which is expected to shape the CMA's enforcement over the next few years.

The CMA has already taken enforcement action against [care homes](#) charging residents large upfront fees, and is [considering](#) launching a market investigation into the funerals sector, after its initial study found that the cost of a funeral has risen by three times the rate of inflation over the last ten years. The CMA's recent referral decision in the [Tobii/Smartbox](#) merger (discussed below) highlighted the potential harm to vulnerable consumers as justifying the reference.

Likewise, in December 2018, the CMA [announced](#) a package of reforms intended to protect vulnerable consumers who pay loyalty penalties to companies. The CMA found that in five sectors – cash savings, mortgages, household insurance, mobile phone contracts, and broadband – companies penalise loyal customers by (i) charging them higher prices than new customers, (ii) levying costly exit fees, (iii) imposing difficult cancellation processes, and (iv) automatically

renewing contracts. The CMA's reforms include recommending targeted price caps and publishing guidelines businesses should follow.

Stringent Oversight by the CAT

The CAT has [continued](#) to exercise close judicial scrutiny over the CMA. Most significantly, in June 2018, the CAT [quashed](#) the CMA's landmark 2016 decision to fine Pfizer and Flynn £90 million for charging excessive prices for phenytoin sodium tablets (an anti-epileptic drug). The CMA had [considered](#) that overnight price increases of 2,600% after the drug was de-branded were excessive and broke competition rules.

The CAT found that the CMA applied the wrong legal test for identifying excessive prices. It failed to identify the appropriate economic value of the drug. It also wrongly ignored the price of comparable products, such as the price for phenytoin sodium capsules. Unsurprisingly, the CMA has [expressed](#) disappointment with the judgment and is appealing it before the Court of Appeal. The CMA has other excessive pricing cases in the pharmaceutical industry in the pipeline ([Hydrocortisone](#) and [Lyothyronine](#)), and the direction of those cases may turn on the outcome of the appeal proceedings. Given the uptick in exploitative abuses in Europe (with cases at the EU Commission, Germany, France, and Italy), there is keen interest in the appeal, and the EU Commission has applied to intervene.

In March 2018, the CAT issued a 180-page judgment in the CMA's ongoing pay-for-delay case against *GSK*, relating to Paroxetine, an antidepressant. The CAT subjected the CMA's decision to a detailed legal, factual, and economic analysis, including on market definition, the approach to identifying potential competitors under Article 101 TFEU, and the effect of the pay-for-delay agreements. Given the similarity of the issues with those in the European proceedings in *Servier* and *Lundbeck*, the CAT referred several questions to the Court of Justice.

Expectations for 2019

Several significant ongoing merger investigations will conclude this year, including the Phase 2

reviews of *Sainsbury's/Asda*, *Experian/ClearScore*, and *PayPal/iZettle*. The approach taken in these cases may have significant implications for the future assessment of national and local competition, analysis of potential competitors, and the framework for reviewing theories of harm relating to loss of innovation.

The level of enforcement activity in 2019 will depend, in part, on the outcome of Brexit. As the CMA's [annual plan](#) recognises, a no-deal Brexit will require the CMA to divert staff from discretionary enforcement work to focus instead on mergers work returning from Brussels. By contrast, under an orderly Brexit with a transitional

deal, the CMA may find itself with an expanded workforce and the capacity to take on new and complex antitrust work.

Depending on the outcome of the *Pfizer/Flynn* appeal, the CMA may seek to progress the several pharmaceutical cases currently on its docket. In addition, the CMA has [stated](#) its intention to conduct further work into digital advertising following the conclusion of the Furman Panel. Finally, following publication of the CMA's [study](#) into pricing algorithms, further scrutiny is anticipated on the impact of artificial intelligence on competition law.

Judgments, Decisions, and News

Court Judgments

La Gaitana Farms SA and others vs. British Airways plc. On January 29, the Court of Appeal held that the English courts lacked jurisdiction to find a standalone infringement in respect of an alleged cartel concerning air cargo services between the EU and third countries before Regulation 1/2003 came into force. Prior to Regulation 1/2003, only the Commission and national competition authorities (NCAs) could find an infringement of Article 101 TFEU in respect of such services. Absent a prior finding by the Commission or an NCA, therefore, national courts had no jurisdiction to award damages for the period before Regulation 1/2003 entered into force in relation to an alleged infringement involving such services.

CMA vs. Concordia International RX (UK). In October 2017, the CMA obtained a warrant to enter Concordia's (now called Advanz Pharma) business premises and search for documents relating to suspected anticompetitive behaviour in the pharmaceutical sector. Concordia applied to have the warrant discharged because it had been cooperating with the CMA's investigation, and so there was no basis for the CMA to suspect that it would tamper with evidence. On January 16, the High Court rejected Concordia's application, holding that there were reasonable grounds for suspecting that Concordia might remove or

tamper with certain documents on its premises.

J Sainsbury PLC and Asda Group Limited vs. CMA. On January 18, the CAT quashed the procedural timetable set by the CMA in the Phase 2 review of the *Sainsbury's/Asda* merger. The CMA had given the parties a little over two weeks to respond to over 400 pages of working papers and scheduled the Main Party Hearings during the same period. The CAT found the deadlines were unreasonable and unfair given the volume and complexity of the papers, the CMA's failure to engage in a longer pre-notification period despite the parties' requests, and the overlap of the deadlines for the main hearing and response to the working papers. The CAT did not specify new deadlines, which were left to the CMA's discretion, having regard to the overall statutory review period.

The CAT also highlighted the potential harm to the public interest created by "unreasonably compressed" time periods in which large and complex mergers must be completed. The CAT warned that "this problem is likely to be multiplied" if, post-Brexit, the CMA sees an increase in the number of large-scale, international mergers on its docket. It also expressed a hope that the statutory deadlines could be revised "to provide for the greater flexibility that is available under the EU merger regime" and for the Phase 2 deadlines to be specified in terms of working days, rather than weeks, to account for public holidays.

Antitrust / market studies

Energy Market Investigation. On January 31, the CMA [launched](#) a review into the Energy Market Investigation (Prepayment Charges Restriction) Order 2016. This Order was intended to address certain adverse effects on competition for prepayment energy customers. The CMA's review will focus on Ofgem's introduction of the statutory default tariff cap, as well as the speed and scale of smart meter roll-out, following evidence of delays.

Liothyronine Tablets. On January 30, the CMA announced it had [issued](#) a supplementary statement of objections alleging that Advanz Pharma (formerly Concordia) charged excessive prices for Liothyronine tablets. The supplementary statement reduces the scope of the investigation by two years and narrows the allegation of price increase. (Previously the CMA alleged a price increase of 6,000%; it now alleges an increase of 1,605%.)

Vending Machines and Automatic Ticket Gates. On January 25, the Office of Rail and Road (ORR) [published](#) a discussion paper in its market study (launched in March 2018) into ticket vending machines and automatic ticket gates. The ORR's goal is to improve competition in the supply of vending machines and automatic ticket gates, which is currently characterised by limited competition primarily because of problems accessing Transport for London's network.

Investment Consultants Market Investigation. On January 25, the CMA [published](#) the timetable for implementing the remedies mandated in its market investigation into investment consultancy services and fiduciary management services. The CMA found that competition in this sector does not work well because, for example, pension trustees do not evaluate the quality of their existing investment consultancy even when a better deal appears to be available. The CMA has mandated several reforms including that in certain situations pension trustees who appoint a fiduciary manager must run a competitive tender. The statutory deadline for implementing the CMA's reform package is June 2019.

Energy Wholesale Trading. On January 11, Ofgem [announced](#) it had opened an investigation concerning a potential abuse in relation to wholesale energy trading activities by an unnamed company. The investigation is at the initial information and evidence gathering phase. Ofgem plans to provide a further update on the status of the investigation by the end of July 2019.

Merger Developments

PHASE 2 INVESTIGATIONS

Tobii / Smartbox. On January 25, the CMA [decided](#) to refer the completed acquisition by Tobii of Smartbox to Phase 2, unless the parties offer suitable undertakings in lieu of a reference. Tobii and Smartbox design and supply technology to enable people with complex speech and language needs to communicate. The CMA found that Tobii and Smartbox were leading suppliers in this sector and each other's main competitor. The CMA is concerned that the merged entity would be relatively unconstrained by other competitors, which could lead to a reduction in the range of products, higher prices, and fewer incentives to innovate.

PayPal / iZettle. On January 15, the CMA [published](#) an issues statement in the Phase 2 investigation into PayPal's acquisition of iZettle. PayPal is an online payments system that facilitates online transfers. iZettle is a financial technology company that allows small businesses to take payments on card readers. The CMA is concerned that the merger could: (1) reduce competition in the supply of offline payment services via mobile point of sale devices, in which the parties have a combined share of 80-90%; and (2) eliminate iZettle as a potential competitor in the supply of omnichannel payment services to small and very small merchants (a nascent but growing market).

Thermo Fisher Scientific/Roper Technologies. On January 7, the CMA [referred](#) Thermo Fisher's acquisition of Roper Technologies to a Phase 2 investigation. Thermo Fisher manufactures electron microscopes used in scientific research. Roper Technologies produces specialised add-ons for microscopes, including cameras and detectors that enhance their performance. The CMA is

considering both horizontal and vertical theories of harm, and will examine whether the merger will reduce competition in the markets for filters, direct detention cameras, and general imaging cameras.

TopCashback/Quidco. On January 7, the CMA announced that it had decided to refer TopCashBack's acquisition of QuidCo to a Phase 2 investigation. Quidco and TopCashback are the two largest cashback websites in the UK and each other's main competitor. The CMA is concerned that the combined entity may be able to decrease the amount of cashback paid to customers, and increase the price of advertising for businesses.

PHASE 1 CLEARANCE DECISIONS

Nasdaq Inc/Cinnober Financial Technology AB. On January 31, the CMA cleared the anticipated acquisition by Nasdaq Technology of Cinnober Financial Technology. Nasdaq provides trading, clearing, listing, information and public company services and Cinnober provides financial technology to brokers, exchanges and clearing houses worldwide.

ONGOING PHASE 1 INVESTIGATIONS

Parties	Decision due date
<u>CareTech Holdings plc / Cambian Group plc</u>	February 11, 2019
<u>eBay Inc / Motors.co.uk</u>	February 12, 2019
<u>Headlam Group / Ashmount Flooring</u>	TBC
<u>Headlam Group / Garrod Bros Business</u>	TBC
<u>Headlam Group / Rackhams</u>	TBC
<u>Ecolab Inc / The Holchem Group Limited</u>	TBC
<u>Global Radio Services Limited / Semper Veritas Holdings</u>	TBC
<u>Lakeland Dairies (N.I.) Limited / LacPatrick Dairies Co-Operative Society Limited</u>	TBC
<u>Ensco / Rowan</u>	TBC
<u>Rentokil Initial plc / MPCL Limited (formerly Mitie Pest Control Limited)</u>	TBC
<u>Core Assets Group Limited / Partnership in Children's Services Limited</u>	TBC

PepsiCo/Pipers Crisps. On January 30, the CMA cleared the anticipated acquisition by PepsiCo of Pipers Crisps. PepsiCo is active in the food, snack, and beverage industries, and Pipers Crisps provides a range of premium crisps.

Enforcement of IEOs

Ausurus Group/CuFe Investments. On January 10, the CMA fined Ausurus £300,000 for failing to comply with the requirements of an IEO. In August 2017, Ausurus completed the purchase of CuFe without notifying the CMA. In line with its usual practice, the CMA issued an IEO to Ausurus shortly after its initial enquiry letter (of September 2017) to prevent further integration of the two businesses while the CMA's investigation was ongoing. The CMA found that Ausurus breached the IEO by (i) directing customers of the target business to make payments into Ausurus' bank accounts without seeking the CMA's consent, and (ii) failing to give the target's managing director a clear delegation of authority to take decisions without Ausurus' permission.

Other Developments

Consultation On Effects Of A No-Deal EU Exit On The Functions Of The CMA. On January 28, the CMA [published](#) a consultation on the effects on the CMA's functions of a no-deal Brexit. The CMA has [published](#) draft guidance explaining how Brexit will affect its powers and processes, as well as the treatment of cases already under review by the EU Commission or CMA in a no-deal scenario. The guidance does not cover the CMA's exercise of State aid powers or functions that are not directly affected by Brexit, such as regulatory appeals, market studies, market investigations, or the criminal cartel offence.

The Competition (Amendment etc.) (EU Exit) Regulations 2019. The Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93) were [published](#) on January 24, having been adopted on January 22. The final version of the explanatory memorandum has also been [published](#). The adopted Regulations make no significant departures from the draft Regulations, which were discussed in our [November/December 2018 newsletter](#).

Draft State Aid (EU Exit) Regulations 2019. On January 23, the Government [published](#) the draft State Aid (EU Exit) Regulations 2019, together with a draft [explanatory memorandum](#). The draft Regulations transpose the EU State aid regime into domestic law, and transfer the function of regulating the regime in the UK to the CMA from the EU Commission. In the event of a no-deal Brexit, State aid notified to, but not yet decided by the EU Commission by March 29, will need to be re-notified to the CMA. In the meantime, the CMA will engage in informal pre-notification discussions with aid grantors expecting to notify State aid cases to the CMA in the first three months following Brexit.

CMA Publishes Final Updated Guidance On Competition Act Investigation Procedures.

On January 18, the CMA [published](#) updated guidance on Competition Act investigation procedures. The guidance sets out the procedures the CMA will typically follow when conducting investigations under the Competition Act 1998. Compared to the previous guidance (from 2014), the updated guidance seeks to improve the efficiency and speed of the CMA's procedures, for example, via a more streamlined access to file procedure and providing more flexibility on deadlines.

CMA Publishes Final Guidance On Internal Document Requests In Merger Investigations.

On January 15, the CMA [published](#) guidance on internal document requests in merger investigations, intended to clarify the circumstances and procedure under which the CMA will request the production of internal documents. The guidance applies to requests for internal documents in both Phase 1 and Phase 2 merger investigations, although in practice there is likely to be some difference in the extent and type of information requested in each of these investigations. The guidance also outlines approaches to IT issues, legally privileged material, and the required format of internal document requests.

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