



ICLG

The International Comparative Legal Guide to:

Competition Litigation 2018

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A practical cross-border insight into competition litigation work

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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

The Finnish private enforcement case law is limited, but a number of final judgments are expected in the near future. Several significant private damages proceedings are pending, and the size of the cases especially has increased tremendously during the past few years. In the cases known to us that were filed before 2008, the total aggregate interest is approximately EUR 13 million. In the cases filed after that, the total aggregate interest is approximately EUR 600 million. The cases have mainly concerned local infringements. However, in 2011, a local damages claim was brought against the Finnish member of the European hydrogen peroxide cartel, who is already facing a similar claim in Germany. The Finnish part was settled in 2014. In fact, the lack of public case law is partly due to many cases being settled out of court or solved in arbitration proceedings. Further, competition law issues are still, in practice, usually dealt with by the Finnish Competition and Consumer Authority and the Market Court in an administrative process which may lead to administrative fines, an obligation to deliver, or an obligation to terminate the restrictive practice. These administrative instances may not, however, award damages for breach of competition law.

Private damages claims can, in principle, be based on any type of anticompetitive conduct by business undertakings (including price fixing and other types of concerted behaviour between competitors, such as collusive bidding, abuse of a dominant market position, retail price maintenance and certain other vertical restrictions) prohibited by the national competition law or by the Treaty on the Functioning of the European Union (“TFEU”). However, certain sectoral activities are specifically excluded from the scope of application of national competition law, such as agreements relating to the primary production of agricultural products exempted in accordance with Article 42 of the TFEU or arrangements concerning the labour market.

Besides damages claims, competition law issues can be raised as a part of commercial disputes. One of the parties to an agreement may argue that a specific restrictive clause or arrangement, e.g., a non-compete or exclusivity clause, is null and void because it breaches national or EU competition rules and the court is requested to decide whether that clause or arrangement is enforceable.

An infringement of competition legislation does not constitute a criminal offence under Finnish law.

1.2 What is the legal basis for bringing an action for breach of competition law?

The legal basis for bringing a damages action can be: a breach of contract, Section 20 of the Competition Act or the Competition Damages Act. Section 20 of the Competition Act is applicable to harm caused between November 2011 and December 2016. According to Section 20, an undertaking or an association of undertakings that deliberately or negligently violates the prohibitions included in the Competition Act or in Articles 101 and 102 of the TFEU is liable to compensate the damage caused by such violation. Therefore, anyone who has suffered harm caused by a competition infringement is entitled to claim damages thereof on the basis of the Act. The Competition Damages Act is the national implementation of the EU Competition Damages Directive, and is applicable to harm caused after December 2016.

Competition law claims that are not damages actions would normally require a contractual relationship between the claimant and the defendant.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

Please see the answer to question 1.2 above.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

Private competition law claims are heard by district courts in the first instance with appeals to the courts of appeal and, subject to a leave to appeal, the Supreme Court.

For public enforcement, a national specialist court, the Market Court, has exclusive competence over competition matters. A case in the Market Court is typically commenced by a proposal for an infringement fine by the Finnish Competition and Consumer Authority or by an appeal against the Authority’s decision. The decision of the Market Court can be appealed against in the Supreme Administrative Court. The Market Court cannot consider damages claims.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

Anyone who has suffered harm caused by a competition law infringement has the right to claim damages on the basis of the Competition Act. This also applies to business undertakings further down the distribution chain if there is a causal connection between the infringement and the damage they have suffered.

It may be possible for the Consumer Ombudsman to bring a class action for damages on behalf of consumers. However, any claimants can authorise, for instance, a joint representative to bring an action on their behalf resulting in a type of opt-in claim.

In the *Timber Cartel* damages litigation, two claimant groups of 600 and 1,000 forest owners were formed by consolidating the claims to one law firm.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The Competition Act generally applies to conduct that restricts competition in the Finnish markets. A Finnish court has jurisdiction if the defendant is domiciled in Finland. However, a Finnish court could also hear a case against a foreign entity domiciled in the EU if the infringement or damage has occurred in Finland. The court will decide on a case-by-case basis whether the case has a sufficient link to Finland.

As a main rule, proceedings shall be instituted before the court of the place of domicile of the defendant. According to the Code of Judicial Procedure, claims brought at the same time against several defendants must be dealt with in the same proceeding if the claims are based on the same grounds for action. Such claims can be brought in any district court which has jurisdiction to deal with claims against one of the defendants. Once a damages claim has been brought in one district court having jurisdiction, a claim based on the same matter cannot be tried in another jurisdiction (*lis pendens* rule).

Competition law claims may also go before an arbitral tribunal. Pursuant to the Finnish Arbitration Act, any dispute in a civil matter which can be settled by agreement between the parties may be referred for final decision in arbitration. Parties to an agreement may also agree that disputes arising from the agreement shall be finally decided by one or more arbitrators, unless otherwise provided in statutory law.

In a recent judgment, the District Court of Helsinki considered itself competent to hear a damages claim despite the presence of arbitration clauses in the supply agreements that contained the alleged overcharge. Thus, it seems that claimants can choose whether to pursue their claims in court or through arbitration.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

Finnish private enforcement is still developing, so it is too early to assess its attractiveness. Relative to its size, Finland has a high level of private enforcement. So far, there is one instance where part of an international case was litigated in Finland (see question 1.1). It was settled for EUR 18.5 million.

1.8 Is the judicial process adversarial or inquisitorial?

The Finnish judicial process can be characterised as an adversarial process with case management by judges. In Finnish court proceedings the judge conducts the trial, but the parties bear the responsibility of presenting the evidence that they wish to be considered by the court.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

The interim remedies provided for in the Code of Judicial Procedure applied in civil proceedings are available also in competition law cases.

2.2 What interim remedies are available and under what conditions will a court grant them?

A district court may, pursuant to the Code of Judicial Procedure:

- (1) prohibit the deed or action of the opposing party, under threat of a fine;
- (2) order the opposing party to do something, under threat of a fine;
- (3) empower the applicant to do something or to have something done;
- (4) order that property of the opposing party be placed under the administration and care of a trustee; or
- (5) order other measures necessary to secure the right of the applicant to be undertaken.

Granting the above interim remedies requires the applicant to establish that it has a probable right against the opposing party and that there is a danger that the opposing party by action or omission or in some other manner hinders or undermines the realisation of the right of the applicant or essentially decreases its value or significance. When deciding on the interim remedy referred to above, the court shall ensure that the opposing party does not suffer undue inconvenience in comparison with the benefit to be secured. The court may also order attachment of real or movable property of the opposing party if the applicant can establish a probability that it holds a receivable (e.g., a competition law damages claim) that may be rendered payable by a decision that can be enforced, and if there is a danger that the opposing party hides, destroys or conveys his property or takes other action endangering the payment of the receivable.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

The most important final remedy in a private competition law claim is damages. The compensation for damages based on a breach of competition law covers compensation for the actual loss, i.e., overcharges, lost profits, expenses, and other direct or indirect economic damage resulting from the competition restriction.

Interest on damages can be claimed as of 30 days from the date on which the demand was first presented. The amount of accrued interest can thus be substantial and the interest provisions reinforce the principle of full compensation. In overcharge cases, claims can be made for interest to cover the proceeds that were lost while the overcharge was in the possession of the defendant. This type of interest has actually been awarded to damages in cartel damages judgments.

It is also possible to obtain a declaratory judgment confirming, for instance, that part of an agreement is in breach of competition law and therefore null and void.

Further, the interim remedies referred to in question 2.2 may be confirmed as part of the final decision.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Only actual loss and damages foreseeable at the time the damage is caused can be compensated. Punitive or exemplary damages cannot be awarded under Finnish law.

As a general principle, the amount of damages should correspond to the actual loss suffered. The claimant has the burden of proof regarding the amount of the actual loss and the causal connection between the defendant's behaviour and the loss. At the same time, the damages awarded should not be over-compensatory, allowing the claimant to benefit from the breach of competition law. The Competition Act refers to the Tort Liability Act regarding the possible adjustment of the compensation and allocation of liability between several liable parties. According to the Tort Liability Act, damages may be adjusted if full compensation is considered unreasonably onerous, taking into consideration the nature and extent of the damage, the circumstances of the parties involved and other relevant issues.

If the claimant can prove that it suffered harm but cannot prove the exact amount, Finnish courts are entitled to award damages based on an estimate of reasonable compensation.

So far, damages have been awarded in a number of judgments related to the *Asphalt Cartel* damages litigation. In 2013, the District Court of Helsinki awarded damages to 39 municipalities that had been overcharged by an asphalt cartel. The principal amount was EUR 37.4 million. Interest and costs orders increased the total to approximately EUR 66 million. The awards were considerably reduced by the Helsinki Court of Appeal in 2016, and the matter is currently pending in the Supreme Court.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

Courts have considerable discretion to determine the amount of damages. There are no specific provisions regarding the treatment of fines or redress schemes in the calculation of damages. In the competition damages judgments so far, courts have ruled that fines already imposed are not taken into account when calculating the award of damages. Any redress already paid should reduce the amount of compensable damage correspondingly.

4 Evidence

4.1 What is the standard of proof?

In theory, a preponderance of evidence is required in private enforcement cases. In practice, there are no specific provisions on the standard of proof in Finnish legislation concerning damages. The court can freely evaluate the weight and relevance of the evidence on a case-by-case basis.

4.2 Who bears the evidential burden of proof?

The claimant has the burden of proving that the defendant has intentionally or negligently breached competition rules. It can refer to an infringement decision of the competition authorities which establishes that a breach has occurred. The claimant must further prove that it has suffered an actual loss which has been caused by the defendant's competition law infringement. The difficulty of the defendant's burden of disproving the claimant's allegations will then depend on the strength of the claimant's evidence.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

There are no statutory evidential presumptions of loss. This was confirmed by the Court of Appeal of Helsinki in the *Car Spare Parts Cartel* damages case and the *Asphalt Cartel* damages case. However, the existence of a cartel can go a long way to fulfil the claimants' burden of proof.

The implementation of the EU Directive on Antitrust Damages Actions has introduced a rebuttable presumption of loss in cartel cases (please see the answer to question 11.1).

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

There are no restrictions concerning the form of evidence as such in Finnish legislation but certain rules exist for specific types of evidence. For instance, written witness testimonies are not accepted in district courts but they can be used in arbitral proceedings. Written and oral expert evidence is accepted, and experts will often provide both written and oral statements. The courts have free discretion to consider the weight of the expert evidence provided.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

The Finnish legal system does not recognise discovery as understood and applied in the common law system. In Finnish court proceedings, each party presents and discloses the evidence that it is going to refer to in the proceedings. According to the Code of Judicial Procedure, a court may, upon a request of a party to the proceedings, order any party or third party to disclose sufficiently specific documents in its possession, should the court consider the documents to be relevant as evidence. The Code of Judicial Procedure also includes rules on

documents and information that do not have to be disclosed, such as business secrets. The EU Competition Damages Directive has been implemented by referring to these existing rules on document disclosure. Most importantly, the existing rules do not contain provisions concerning the disclosure of categories of evidence, which is required by the Directive.

The Finnish Act on the Openness of Government Activities (“Openness Act”) empowers anyone to request copies of public documents from public authorities. According to the Act on the Publicity of Administrative Court Proceedings, the principles of the Openness Act also apply in the Market Court and the Supreme Administrative Court regarding trial documents. This means that documents on the Finnish Competition and Consumer Authority’s case file, and trial documents from public enforcement proceedings are, as a default, available. The main exceptions are corporate statements contained in leniency applications as well as business secrets and similar documents where a public or private interest prevents making them public.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Pursuant to the Code of Judicial Procedure, a witness can be called under threat of a fine. If a witness is absent without a valid excuse or leaves without permission, the fine shall be enforced and the court may order that the witness be immediately brought to the court, unless the hearing of the case is adjourned.

The party who has called the witness conducts the direct examination. Thereafter, the witness is cross-examined by the opposing party. Leading questions are allowed in cross-examination for the purpose of ascertaining the congruence between the testimony and the true state of affairs.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

Courts have reached different decisions concerning whether, and to what extent, an infringement decision by the Finnish Competition and Consumer Authority is binding in subsequent damages proceedings. The question is pending in the Supreme Court. Infringement decisions by the European Commission are always binding. Infringement decisions by authorities from other countries can be submitted as evidence, their evidentiary value to be evaluated by the court.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

As a general principle, court proceedings in Finland are public and proceedings can be conducted without public access only in very limited circumstances. Therefore, any documents submitted to the court are also generally public. However, at the request of a party the court can, at its discretion, declare documents or parts of documents containing business secrets as confidential if their publication would cause financial harm to a party.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

The Competition Act empowers general courts to request a statement from the Finnish Competition and Consumer Authority regarding the case. This possibility has been used a few times. These statements tend to be quite generic because the Authority has not actually investigated the case. A request for a statement has also led to the opening of a full investigation, rendering the initial statement moot.

On the basis of Article 15 of the Regulation (EC) 1/2003, national courts may ask the Commission for its opinion on the application of Articles 101 and 102 of the TFEU. Article 15 also empowers both the Finnish Competition and Consumer Authority and the European Commission to submit their observations regarding the application of Articles 101 and 102 of the TFEU to a national court. We are not aware of any cases where Article 15 would have been applied in Finland.

The above provisions relate to the existence of a competition law infringement. They are thus more important in stand-alone damages claims where the claimant has to prove the infringement without a previous infringement decision. In addition, the new Competition Damages Act enables a court to request a statement from the Finnish Competition and Consumer Authority concerning the amount of harm.

In addition, officials from the Finnish Competition and Consumer Authority have appeared as witnesses in damages cases.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

Using a defence of justification/public interest is not restricted in the Finnish legislation. However, it is difficult to assess the practical relevance of such defences due to lack of case law. It is unlikely that this type of argument would exclude liability for damages in clear infringement cases. The defendant could, however, attempt to justify an adjustment to the amount of damages.

5.2 Is the “passing on defence” available and do indirect purchasers have legal standing to sue?

We are not aware of any Finnish case law relating to the passing-on defence. In general, however, the claimant should only be able to recover actual losses. Indirect purchasers have a legal standing to sue but they need to prove that they have suffered damage. The new Competition Damages Act explicitly allows the passing-on defence and provides indirect purchasers the standing to sue.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Defendants may not join other cartel participants as defendants in the original claim. However, defendants may bring a contribution claim against them. The court will then decide whether to join the contribution claim with the original claim so that liability can be established and apportioned for all the defendants as part of the same proceedings.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

According to Section 20 of the Competition Act, unless a claim is filed, the right to claim damages expires 10 years from the date on which the infringement was committed or a continuous infringement ceased. In case the damage claim is based on a prohibition decision of the Finnish Competition and Consumer Authority or its proposal on the imposition of an infringement fine, the limitation period expires one year after the decision has become final. These rules entered into force with the Competition Act in November 2011 and apply only to infringements committed under that Act and before the entry into force of the Competition Damages Act in December 2016. Infringements committed before November 2011 are subject to the previous competition legislation where the limitation period was five years from the time the claimant became aware of the damage.

According to Section 10 of the Competition Damages Act, there are two concurrent limitation periods. Both can only be interrupted by filing a claim. The first limitation period is five years. It begins to run when the claimant knew or ought to have known about the breach of competition law, the harm and the liable person. This limitation period is suspended if a competition authority begins an investigation concerning the infringement. The suspension ends one year after the decision in the competition authority's investigation matter has become final. The second limitation period is 10 years from the date when the infringement happened or a continuous infringement ended. As long as either limitation period is running, the claim cannot become time-barred. These rules apply only to harm caused after December 2016.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

So far, follow-on claims are, by far, more common. In such cases the time taken by the infringement proceedings has to be taken into account. An investigation by the Finnish Competition and Consumer Authority may take two to three years. The Authority cannot impose sanctions but may make proposals for the Market Court to impose administrative fines. A case may be pending in the Market Court for another two to three years. The decisions of the Market Court can be appealed against in the Supreme Administrative Court where proceedings may take a couple of years.

Although the district court handling an action for damages is not obliged to stay the damage claim until a final decision has been issued in the administrative proceedings, it will in most cases be inclined to do so to avoid a contradictory judgment.

The length of the proceedings in a district court depends on the circumstances of the matter and the workload of the court. Competition law damages cases often involve complex multi-party litigation, and have taken two to four years at the district court level. In practice, it is rarely possible to expedite proceedings.

Unless a prior infringement decision exists, the district court has the possibility to request a statement from the Finnish Competition and Consumer Authority. Such a request is likely to cause a full-scale investigation either on the Authority's own initiative or by a parallel complaint submitted by the claimant.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

No permission is needed to discontinue the claims. Parties are allowed to withdraw their claims to stop the proceedings.

Permission of the court is also not required for a settlement. Adjournment of the proceedings is usually granted by the court if negotiations for settlement are pending between the parties. After settlement is reached, the parties confirm to the court that they no longer have any claims against each other.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

It may be possible for the Consumer Ombudsman to bring a class action for damages on behalf of consumers. The Consumer Ombudsman is also permitted to settle on behalf of the class. Also, if several entities have transferred their claims to one claims vehicle (such as CDC), that entity is permitted to settle alone. If a number of parties are merely represented by the same attorney, a separate consent for settlement is required from all the clients.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

The unsuccessful party will, as a main rule, be ordered to compensate the prevailing party's reasonable legal fees and costs incurred by necessary measures. The court is entitled to use free discretion when awarding the legal costs. The courts may also order partial compensation or make a decision that each party shall bear its own costs; the latter especially when the matter has been so unclear that both parties have had good reason to conduct the proceedings.

If some claims are decided in favour of one party and some in favour of the other party, the parties often bear their own costs.

8.2 Are lawyers permitted to act on a contingency fee basis?

Lawyers, in general, are not prohibited from acting on a contingency fee basis. However, members of the Finnish Bar Association are allowed contingency fee structures only on specific grounds. The most common fee structure in Finland is based on hourly rates.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Third party funding is not prohibited or restricted by law. However, we are not aware of any instances of use. The closest to third party funding so far is a case where two victims of a cartel sold their receivables to a third party that then began proceedings against the cartel members.

9 Appeal

9.1 Can decisions of the court be appealed?

Decisions of a district court can be appealed in a court of appeal and, should leave to appeal be granted, from the court of appeal to the Supreme Court. The threshold for granting leave to appeal is quite high.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Leniency rules were introduced to the Finnish Competition Act in 2004. Leniency applicants are not given immunity from civil claims.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

The Competition Damages Act requires that the corporate statements included in leniency applications shall not be permissible evidence, unless the leniency applicant itself discloses its own corporate statement.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

Due to contradictory judgments in different antitrust damages cases, it is difficult to say whether the Directive will introduce major

changes to the current law. The expected changes relate at least to limitation periods, presumption of harm in cartel cases, disclosure of evidence, and the application of joint and several liability.

11.2 Have any steps been taken yet to implement the EU Directive on Antitrust Damages Actions in your jurisdiction?

The Directive was transposed into the Competition Damages Act which entered into force on 26 December 2016.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

Matters that were pending when the Competition Damages Act entered into force will be decided based on the previous legislation. To the extent that the infringement happened before the entry into force of the Competition Damages Act, only certain parts of the new Act are applicable. The attempt is to only apply the procedural but not substantive parts of the new legislation to the infringements that happened before the Act entered into force.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

Not at the time of writing (8 June 2017).



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His work covers the full spectrum of EU and Finnish competition law: merger control; cartel investigations; horizontal and vertical agreements; abuses of dominance; litigation/damages cases; compliance programmes and training; public procurement; and state aid, across a wide range of industries.

Ilkka has been involved in various landmark competition cases, including by far the largest competition cases in Finland. He has also represented clients in numerous precedent-setting competition law related damages cases. He has acted as an expert concerning Finnish law aspects in antitrust damages litigation abroad.

Ilkka is one of the five members of the Competition Law Expert Group of the Finnish Bar Association. He is a regular chairman and speaker at competition law conferences and seminars. He is listed as a leading competition law expert in all major international ranking publications.



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He specialises in antitrust damages and represents clients in the first major cartel damages cases in Finland, including the precedent-setting Asphalt Cartel damages litigation. He has acted as an expert concerning Finnish law aspects in antitrust damages litigation abroad.

Toni participated in the Expert Committee appointed to draft Finland's new Competition Damages Act based on the EU directive on damages actions for infringements of competition law. He regularly lectures and publishes academic articles concerning antitrust damages. His publications include the first Finnish book on antitrust damages. He is also preparing a Ph.D. on antitrust damages at the University of Helsinki.

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