FROM RED TAPE TO RED CARPET: CHANGE IN EASE OF DOING BUSINESS IN INDIA AFTER 2020 COMPANIES ACT AMENDMENT

BY TATHAAGAT S SIDDHARTTH

I. INTRODUCTION

In India, corporate entities are regulated through primary legislation, Companies Act, 2013.[1] Itis this comprehensive law intended to replace the previous Companies Act of 1956[2] that servesas a regulation of formation, management, mergers and winding up of companies in the country. However, a very important law of India's evolving business landscape is the Companies Act, 2013.[3] Over the past decades as the economy became more and more developed and diversified, the Act attempted to follow the times by adding new provisions thatencourage entrepreneurship, foster transparency and protection of the interests of shareholders, creditors and other stakeholders.

One of the main ways in which business ecosystem in the country has evolved post adoption of the Companies Act, 2013 is through streamlining of the incorporation process. The Act has simplified procedure of registering new companies, reduced procedural barriers and delays. And this has helped the country to grow the startups and small businesses. The Act also strengthened the norms of corporate governance, apart from other things, by laying down morerules regarding composition of boards, auditing and related party transactions. The aim is to generate investor faith in the Indian corporate eco system and to improve accountability.

The Companies Act, 2013 has also brought additional flexibility in the type of capital the company may issue through placement of shares, debentures or deposits. It has also lowered compliance requirements for some types of business. Notable is that since 2015, the Act was amended in 2017 and 2020 to help reduce regulatory burden on companies, ease of compliance and generally ease of doing businesses in India. The Companies Act 2013 has become so pivotal to the country's corporate existence given the fact that it allows for the Companies to sit bear their ability to adapt to the dynamically changing requirements within the business environment within the country.

[1] Companies Act, 2013, No. 13, Acts of Parliament, 2013 (India).
[2] Companies Act, 1956, No. 1, Acts of Parliament, 1956 (India).
[3] Companies Act, 2013, No. 13, Acts of Parliament, 2013 (India).

II. BACKGROUND

The Companies Amendment Act, 2020[4] was brought as a response to the growing gap between a more business friendly regulatory environment under the Companies Act, 2013. The principal purpose was to decriminalize certain provisions of the Act to make it easier to do business in India, especially for Micro, Small and Medium Enterprises (MSMEs) that often ran into problems because of multiple things such as harsh penalties and etc. Legislators understood that procedural or technical lapses should not be punished with severe criminal consequences, unless they specifically involve the elements of fraud or harm to the public interest.

For that reason, the Amendment intended to shift the balance between regulatory compliance and operational practicality by shifting minor offences into civil wrongs, so that companies and the judicial system don't bear the load of handling the same. Additionally, the amendments were consistent with the government's broader CSR and environmental sustainability strategy. For example, directors are now imperative of minimising adverse environmental impacts into account in discharging their fiduciary duties. This is a response to a growing recognition of the role that Environmental, Social, and Governance (ESG) factors play in corporate decision making.

III. RATIONALE

The Companies Amendment Act 2020 is based on the rationale that economic challenges such as the COVID 19 pandemic necessitate lightening the burden of compliance on corporations so as to create an enabling environment for business. The changes are meant to lower compliance costs thereby helping them concentrate on their main business operations which is necessary for the continuity of the operations in a downturn.

The Ministry of Corporate Affairs has highlighted the broader understanding of the economic landscape and the pressures on enterprises in terms of crises, which this initiative reflects. In addition, the Act promotes a principle-based approach to compliance regulation, with special emphasis on minor and technical defaults that would otherwise result in punitive measures. The Act, by shifting some adjudication powers to in house Adjudication Mechanism (IAM) reduces the need for companies to operate criminal court system for trivial offences, thereby reducing the burden on judicial resources.

IV. IMPORTANT CHANGES

[4] Companies (Amendment) Act, 2020, No. 29, Acts of Parliament, 2020 (India).

a. Listed Company

In the Companies Act, 2013, as per Section 2(52)5 a 'listed company' was defined as a company whose securities are listed on any recognized stock exchange. This broad definition included companies irrespective of the kind of securities listed, whether equity shares, debentures orother securities. This had a wide scope and included companies which had listed only their debt securities or preferred shares under the same regulatory framework as companies with listed equity shares. Further, it is with the proviso to this definition, in the Companies (Amendment) Act, 2020[5] and Section 2(80)[6], Companies Act, 2013, that the Central Government, on the advice of the Securities and Exchange Board of India (SEBI), may declare exempt any class of companies from being 'listed companies'. The regulatory paradigm of listed entities changed with this amendment.

This includes criteria and process for exclusion, carefully crafted to strike the proper balance between regulatory relief and the requirement that oversight be performed properly. Companies, which have listed non convertible debt securities or non-convertible redeemable preference shares on private placement basis, have been not included in the definition of listed companies. In this process also these companies need to make necessary declarations and follow some requirements stipulated by the Ministry of Corporate Affairs (MCA) and SEBI. It is a big break from the past framework where such companies were automatically listed entities and there were stringent compliance requirements.

Before the 2020 amendment, all listed companies, which are listed in equity shares or any other listed securities, were subject to very exhaustive regulatory regime including specialized board composition, mandatory committee formations, a higher level of disclosures norms and heavy investments in audit. However, as often happens with this one size fits all approach, disproportionate compliance burdens were borne by companies with little public exposure to selective security listings. The excluded companies have experienced a significant reduction in the compliance burden. For instance, they are no longer required to maintain the same level of independent directors or constitute various board committees that are mandatory for listed companies. This has led to significant cost savings and operational efficiencies for these organizations.

SEBI retains its regulatory authority over these companies with respect to their listed securities,

[5] Companies (Amendment) Act, 2020, No. 29, Acts of Parliament, 2020 (India).
[6] Companies Act, 2013, § 2(80), No. 13, Acts of Parliament, 2013 (India).

ensuring that investor interests remain protected while providing operational flexibility to the companies.

Under the Companies (Amendment) Act 2020 a new Chapter XXI-A has been introduced expressly dealing with Producer Companies. This amendment was of significant importance astill the enactment of the Companies Act, 2013, the provisions regarding Producer Companies were covered under Section 581[7]of the Companies Act, 1956 and the previous provision continued to remain in force. The 2020 amendment to incorporate these provisions into the 2013 Act[8] is an integrated effort to modernize and simplify the regulation of Producer Companies.

The new Chapter XXI-A defines a Producer Company as a body corporate having objects concerning production, harvesting, procurement, grading, pooling, handling, marketing, selling or export of primary produce of its members or import of goods or services for the benefit of its members. The amendment deals with various kinds of members such as primary producers, Producer Institution and Production Companies and enlarges the extent of participation in such enterprises. Chapter XXI-A is specifically tailored to provide for the unique requirements of Producer Companies' governance structure. The minimum number of directors shall be five and the maximum shall be fifteen and the directors shall be members of Producer Company.

The salient feature of the amendment is its unique approach towards a limited return on capital.In accordance with law, surplus funds are to be primarily used for the business of the Producer Company and, to the extent permitted, be distributed to members. That it also includes specific provisions regarding membership and voting rights. Unlike most other companies, the voting rights of Producer Companies are not proportional to shareholding, but each member generally has one vote. But there are exceptions to the rule: The law allows weighted voting rights in some instances, for example where Producer Institutions are involved in business activities.

The amendment requires certain financial management and mandates to maintain general and other reserves. General reserves should be worth at least 10 per cent of producer companies' annual net profit. In addition, they have to keep special reserves for special purposes to maintain financial stability and promote sustainable growth. These provisions have been of much adverse impact on the agricultural and allied sectors. The incorporation of Producer Companyprovisions in the Companies Act, 2013 has formalised the clear and certain incorporation to stakeholders of the agricultural sector. It has helped in creating more Producer Companies to enable small

[7] Companies Act, 1956, § 581, No. 13, Acts of Parliament, 1956 (India).
[8] Companies Act, 2013, No. 13, Acts of Parliament, 2013 (India).

and marginal farmers to collectively engage on the value chain activities.

The amendment has particularly helped farmers because it gives them a formal corporate structure, with cooperative principles. This hybrid model is a hybrid model combining the efficiency of corporate structure with the inclusive nature of cooperatives. Improved bargaining power and better realization of value for primary producers result from Producer Companies' access to markets, technology and credit.

b. Direct Listing in Foreign Jurisdictions

The game-changing reform introduced by the Indian Companies (Amendment) Act, 2020[9] enabled listed Indian companies to list their securities in foreign stock exchanges in such jurisdictions. This change to Section 23[10] of the Companies Act, 2013 eliminates the ironclad need for compliance of dual listing or reliance on Indian Depository Receipts (IDRs) by Indian companies seeking to tap global capital markets.

But Indian companies used to be able to list abroad only if they were both listed in India or went down the IDR route. This takes away this restriction and allows select companies to go directly to foreign exchanges, without a prior simultaneous Indian listing. It provides companies with a simpler and more flexible way into international capital markets. Now the Central Government has the power to specify the classes of companies covered under these routes and terms and conditions for such listings in future rules and regulations. It provides a directed path down the path, with oversight that does not lose flexibility in implementation.

Companies have to remain compliant with the laws of Indian and foreign jurisdiction at the time of listing abroad. It includes compliance with India's foreign exchange regulations, securities laws and any rules prescribed under the Companies Act, as well as foreign stock exchange requirements. That dual compliance provides regulatory balance and makes for smoother cross-border operations.

Direct foreign listing is based on strong governance eligibility. However, details of the specific criteria are yet to be defined, but companies must show strong financial performance, effective compliance systems and good corporate governance. This helps India be represented by only credible and well-governed companies in the global markets. The framework is also in the interest of investors. Companies have to disclose, following India as well as the foreign jurisdiction standards of transparency and Accountability with all the stakeholders. Indian and

[9] Companies (Amendment) Act, 2020, No. 29, Acts of Parliament, 2020 (India).
[10] Companies Act, 2013, § 23, No. 13, Acts of Parliament, 2013 (India).

foreign regulators will cooperate in enforcement and oversight.

This amendment will significantly broaden the horizon for Indian companies looking to internationalize through capital. The legislation gives straight access to bigger pools of foreign investors, which is great for industries including technology, pharmaceuticals and renewable energy, which attract more global interest. Additionally, companies may well be able to achieve better valuations in foreign markets. In sectors like technology and digital services where there are mature foreign markets with better expertise and comparable peers, you can actually get fairer valuation metrics than play ball. Especially for new age companies, where the business model is tough to understand and appreciate, this is an added advantage.

In summary however, the Companies (Amendment) Act, 202[11] has provided Indian companies with a means to explore the global capital markets with increased financial flexibility and global visibility. This change also aligns India's corporate pattern with the international practices and paves the method for a stronger and vibrant corporate setting.

c. Corporate Social Responsibility Amendments

Section 135[12]of The Companies Act, 2013 introduced new concepts and many changes in the Corporate Social Responsibility (CSR) framework that are all introduced in The Companies (Amendment) Act, 2020[13]. The changes aim to make CSR spending clearer, more flexible and more accountable but to also solve problems facing the companies.

The move from a 'comply or explain' regime to mandatory CSR spending was a big one. Nowadays, companies must spend at least 2% of their average net profits on CSR activities. The amendment also dealt with how unspent CSR funds should be treated, specifically as to ongoing and non-ongoing projects. Unspent funds for ongoing projects should be transferred to an 'Unspent Corporate Social Responsibility Account' within 30 days after the financial yearand spent in three years. If this fails, the amount has to be transferred to funds as mentioned in Schedule VII of the Act. The law requires that other unspent amounts be transferred to ScheduleV funds within six months.

The amendment offers the opportunity to draw on international organisations for the designing, monitoring and evaluation of CSR projects and the adoption of global best practice. Excess CSR spending can now be set off against future obligations, encouraging more ambitious, long-term

[11] Companies (Amendment) Act, 2020, No. 29, Acts of Parliament, 2020 (India).
[12] Companies Act, 2013, § 135, No. 13, Acts of Parliament, 2013 (India).
[13] Companies (Amendment) Act, 2020, No. 29, Acts of Parliament, 2020 (India).

projects. A penalty framework is rationalized to ensure proportionate consequences for non-compliance. The companies can be penalised to the extent of twice the amount unspent or

₹1 crore, whichever is less and officers in default can be fined one tenth of the amount or ₹2 lakh, whichever is less.

CSR implementation with these reforms has become more structured and transparent. The establishment of the Unspent CSR Account and strict timelines for utilization of the fund have increased the accountability. Companies are, as a result, starting to take due strategic and sustainable approaches to CSR, to increase society impact and the trust they have get from their stakeholders.

V. DECRIMINALIZATION AND PENALTY RATIONALIZATION

On enactment of the Companies (Amendment) Act, 2020,[14] India's corporate governance landscape was subjected to major change. This reform was an effort to find that balance between facilitating ease of doing business and keeping a check; and between accountability and ease of doing business. This amendment was one of the critical parts that prohibited someoffences to be decriminalized and the penalty rationalization under the Companies Act, 2013.[15] The amendment brings a more pragmatic and business-friendly regulatory framework away from a strongly punitive approach to compliance.

The amendment reclassified some of the offenses from criminal, to the civil domain, a major change. Prison and criminal fines were replaced with civil penalties or in house adjudication by the Registrar of companies (RoC) for selected violations. Decriminalisation of key offensessuch as minor procedural lapses, e.g. delays in filing returns, holding annual general meetings, updating statutory registers, was also made. Defaults on Corporate Social Responsibility (CSR) obligations now attract monetary penalties rather then criminal prosecution. Lapses in the filing of other filings to the RoC were also removed from the scope of criminal proceedings.

Such changes in the rationale are to reduce the where-warranted criminalization of directors and officers for inadvertent procedural errors. The amendment distinguishes between intentional fraud and unintentional noncompliance to reduce undue litigation and allow businesses to concentrate on growth rather than fearful of unnecessary burdensome regulations. This thoughtful recasting of penalties makes the penalties fair, efficient and supportive of building a thriving corporate ecosystem.

VI. REDUCTION IN PENALTIES FOR VARIOUS DEFAULTS

[14] Companies (Amendment) Act, 2020, No. 29, Acts of Parliament, 2020 (India).
[15] Companies Act, 2013, No. 13, Acts of Parliament, 2013 (India).

Along with decriminalizing certain offences, the Companies (Amendment) Act, 2020[16] eased the penalties imposed for a slew of defaults. It also meant changing penalties structures so fines were appropriate in proportion to offense and company size. Certain defaults, such as lapses in filing resolutions or failing to appoint independent directors were ineligible for imprisonment provisions. Acknowledging their limited resources and capacity relative to larger corporations, small one person businesses benefited from reduced penalties.

The amendment went on to create an in-house adjudication body to look into minor offenses. In compliance cases that are inconsequential, this streamlined approach cuts out the lengthy court proceedings freeing up both time and resources for the judicial system. The amendment does so by emphasizing remedial measures—penalties for late filings rather than criminal punishment of directors—without weakening an otherwise punitive regulatory environment.

These reforms have helped make India's business landscape much more friendly towards business, enabling action in line with the government's vision of India becoming a globally competitive business ecosystem. In addition to lowering litigation, the transfer of minor defaults to the civil field has enabled courts to concentrate on major economic crimes and lower the dispute resolutions timelines. India has attracted foreign investors by offering simplified compliance procedures and lower penalties in comparison to other countries, which values predictable and playing the field regulatory framework.

These changes encourage startups and small businesses, especially small businesses, to be more growth oriented and less worried of being criminally prosecuted for simple procedural mistakes. Less regulatory hurdles for the entrepreneurs and a cooperative relationship with regulators create favourable relations and help their compliance voluntarily. Such reforms bring the regulatory framework of the country into line with global practices of imposing civil penalties for minor noncompliance. The amendment has, overall strengthened the business environment by making this balance between accountability, fairness and economic growth.

VII. OTHER SIGNIFICANT CHANGES

As a part of the range of reforms introduced by the Companies (Amendment) Act, 2020, the legislative reform covered a number of aspects focusing on strengthening the corporate governance and regulation, and simplification of compliance. These included director remuneration changes; changes to financial reporting; changes to tribunal powers; and beneficial ownership disclosure – which together were aimed at closing existing gaps and

[16] [8] Companies (Amendment) Act, 2020, No. 29, Acts of Parliament, 2020 (India).

bringing this area into full alignment with global best practice.

a. Non-remuneration Provisions for Non-Executive Directors

Prior to the amendment, NEDs (including independent directors) were generally compensated with fees, or profit based commissions. Often they were got by them without recompense, when companies lost money or were not at their best paid. This amendment rectified the same by permitting the payment of remuneration to NED during such periods of office provided under Schedule V of the Companies Act. By this, directors are paid fairly for performing their important and valuable role as a member of the board of directors and decision maker, especially at the time of financial crisis. Companies are guaranteed remuneration, which can attract and retain skilled professionals, and this stabilizes candidate governance.

b. Listed and unlisted Companies: Periodic Financial Results

Unlisted companies, unlike those on the list, were less burdened by requirements to make periodic financial disclosures, consequently creating a concern over transparency. The amendment now requires that certain unlisted companies have to prepare and file periodic financial results as defined by the government. The aim of this reform is to improve financial transparency for investors and creditors in larger or systemically important unlisted entities. The amendment sets these requirements to the global standards to bolster trust and accountability in what are significant unlisted businesses.

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c. Powers Enhanced of NCLAT

In shifting to make the working of NCLAT more expeditious and effective, the said amendment brought in provisions such as formation of various benches for quicker disposal of cases and expanding the scope for case appeals against regulatory bodies like the CCI. Virtual hearings were permitted under this amendment to address the logistical challenges and give the process a shot in the arm for prompt dispute resolution. These provisions do help lessen the court's

[17]Companies (Amendment) Act, 2020, No. 29, Acts of Parliament, 2020 (India).

backlog of cases, especially under the IBC,[18] and strengthen its ability to handle complex corporate disputes. They easily go ahead to promote ease of doing business and other attendant benefits for easy access to justice by litigants.

Section 242(8)[19] deals with powers of the National Company Law Tribunal to pass any appropriate order to meet the ends of justice when a petition by a minority shareholder has been initiated to seek reliefs in a case of oppression and mismanagement. The Amendment Act amends and substitutes the punishment from imprisonment of 6 months to levying a fine of Rs 1,00,000. Pertinently, adjudication of oppression and mismanagement on merits arises from assessment of series of acts resulting in oppression and mismanagement by the majority shareholders and directors respectively.[20]

d. Changes in Beneficial Ownership Reporting

The amendment brought a fine-tuning of rules for beneficial ownership to coax up the elements of transparency and prevent misuse of corporate structures. The definition of SBO was made clear and was aligned with those of international standards such as those set by the FATF. It is now mandatory for anyone who holds at least 10% of a share, voting rights, or aggregate control over a company to disclose their ownership. The penalties have been made stricter to ensure as much compliance as possible. In one word, these changes act strongly against money laundering and terror financing and instil confidence in both the regulator and investor alike. The amendments also bring India's laws in line with global standards and improve the country's standing in international markets.

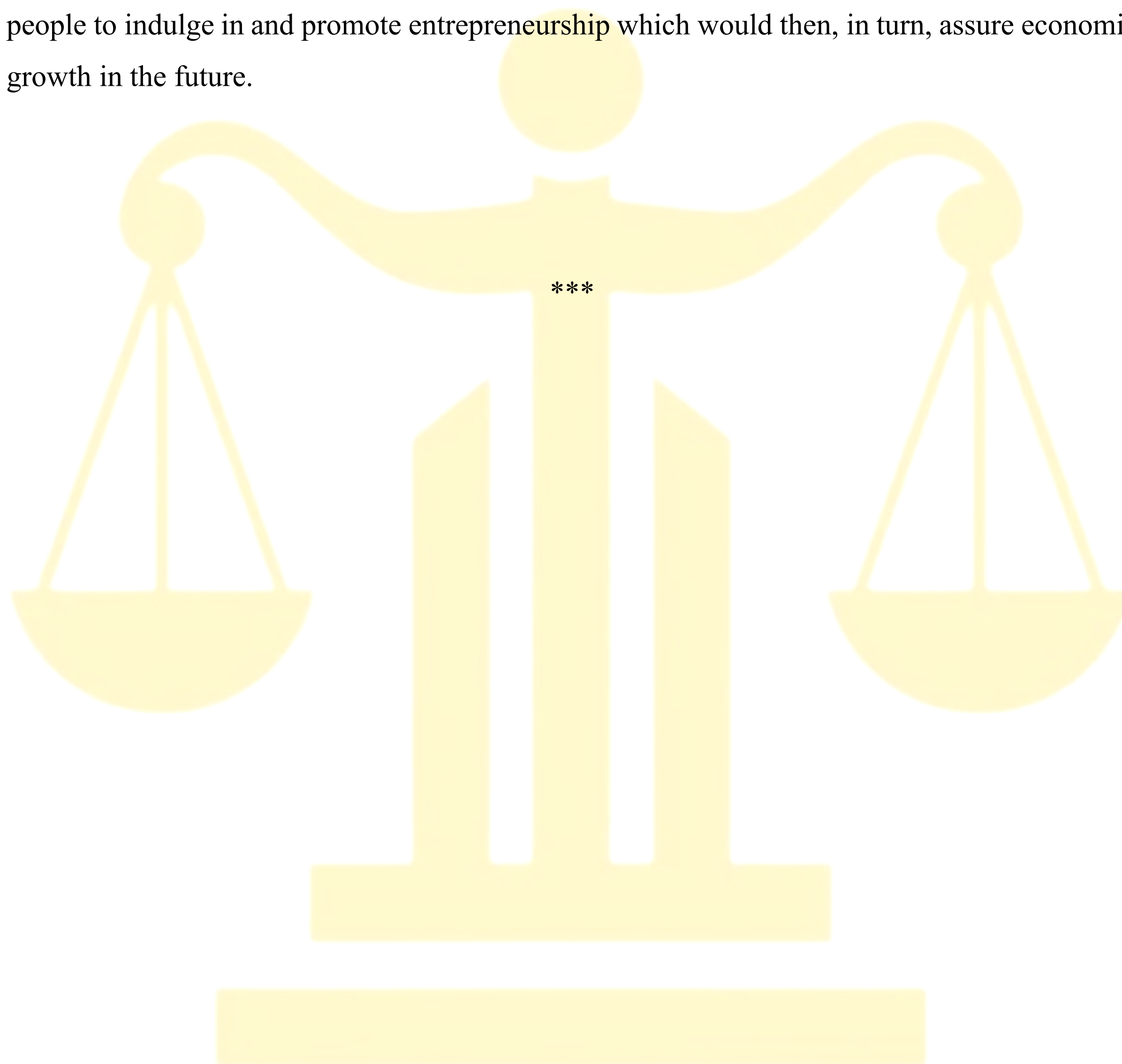
VIII. CONCLUSION

The enactment of the Companies (Amendment) Act, 2020 represents a qualitative change in the approach of regulation shifting the emphasis from the more rather imposing regulatory regime to the far more crafting regulatory regime which is an adjustment from ‘red tape to red carpet’. Amending the Companies Act of 2013 is in accordance with the Government of India’s efforts to ease the compliance burden without putting the necessary checks and balances in place. In support of this legislative measure to encourage growth, the government has for instance removed breaches punishable by law for Companies, introduced measures such as without prejudice settlement of fines, easier CSR obligations, and developmental assistance to

[18] Insolvency and Bankruptcy Code, 2016, No. 26, Acts of Parliament, 2016, (India).
[19] Companies Act, 2013, § 242, No. 13, Acts of Parliament, 2013 (India).
[20] Mohanlal Ganpatram v. Sayaji Jubilee Cotton and Jute Mills Co. Ltd., (1964) 5 GLR 804.

producer Companies. These structural changes serve to streamline the processes faced by the entities but also facilitate the change, foreign direct inflows into the country and increase the country's competitiveness internationally.

Lastly, amendments that of the CAA 2020 cannot be ignored as they represent a complete reorganisation of corporate policy as well as a departure from the combative nature of the government with respect to business. While such a notion may be idealistic, India's geographical positioning, along with such factors, would surely attract, if not enable, its own people to indulge in and promote entrepreneurship which would then, in turn, assure economic growth in the future.



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