

INSOLVENCY OF MICRO, SMALL AND MEDIUM ENTERPRISES IN THE REPUBLIC OF SERBIA

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Abstract

Micro, small and medium enterprises (MSMEs) are the most numerous in the Republic of Serbia, as well as in the European Union. In their business activities, they are faced with both economic and national legislation challenges. After the crisis caused by the COVID 19 pandemic, a new one caused by the war conflicts in Ukraine followed. MSMEs were particularly affected by the consequences of the crisis, through the rise in energy prices, and then a wide range of products and services. In Serbia they represent the backbone of the economy and development. However, the legal framework for solving business crisis is not adapted to their needs, but rather to the standards of large companies. Recent strategic documents in the EU and the world emphasize the need to introduce a special legal approach to MSMEs. Those instruments refer both to the prevention of insolvency, and to the insolvency procedure and liquidation of MSMEs. The aim of this paper is to point out the need for a different legislative approach to MSMEs in the Republic of Serbia. Using the normative method, the authors start from the legislation in power in Serbia and the EU, and by applying the statistical method, they analyze the current state of MSMEs in Serbia, and by applying the comparative legal method, they consider possible improvements in legislative solutions. In addition, by using a case study, an insight is given into the results that a special approach to the insolvency of MSMEs gives in practice.

Key words: *Insolvency, micro, small and medium enterprises, Serbia.*

Introduction

Micro, small, and medium enterprises (MSMEs), as the most numerous enterprises in contemporary market economies, represent an important development incentive. Their character can be observed through the presence of private initiative and entrepreneurship, innovative industries, flexibility and adjustments to changes in the market. Such features promote the growth of employment, exports and competitiveness of the economy (Strategy for supporting small and medium enterprises and entrepreneurship development and competition for period 2015-2020). However, financial difficulties often firstly affect MSMEs, given the fact that they do not have solid and complex legal

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structure and sufficient financial resources to maintain the operations and overcome challenges caused by economic crisis, at the same time.

Legal framework for financial difficulties prevention, as well as for insolvency procedure and liquidation, has, more or less, been created according to standards which, as a rule, do not differentiate large and small business entities. This is the consequence of the fact that both legislation and the economy, primarily, regard the concentration of capital, i.e., the fact that more than 95 percent of capital is concentrated with the large economic entities. Nevertheless, the legitimate needs of MSMEs, as the important factor of every economy, should not be disregarded. Namely, MSMEs account for over 90 percent of economic entities in the European Union and they employ, in average, 3 – 4 persons (EU Commission, Single Market), while in the Republic of Serbia only micro and small legal entities account for 96.1 percent of all economic entities (Statistical Office of the Republic of Serbia, *Preduzeća po veličini i preduzetnici u Republici Srbiji*, 2023). Furthermore, by creating legal possibilities for foundation of business entities, primarily limited liability entities, with the foundation capital of minimum RSD 100 (less than 1 euro) (Law on Business Entities of the Republic of Serbia, Art. 145), the climate of their increase in number has been made, while, at the same time, their credit solvency as well as the protection of creditors have been decreased. In practice, particularly as concerns micro and small legal entities, the assets is often very small or is difficult to separate it from the personal assets of their owners - directors. Due to their limited capacities, sharp business competition and accessibility to the sources of financing, MSMEs are often confronted with the challenges, even with the threat to their survival. That was particularly the case during larger scale crisis, like those during COVID-19 pandemic and after breaking out the war in Ukraine, the consequences of which have still been suffered. Therefore, approximately 7 to 15 percent of MSMEs in Germany, France and United Kingdom are still in danger of possible insolvency procedure (Allianz Trade Insolvency Report, 2021). *Start-up* enterprises were particularly affected, as well as the enterprises in hotel and catering industry and foodstuff production (Accountancy Europe, *SME risk management Insolvency*, 2021).

MSMEs which are facing financial difficulties often do not have sufficient funds for paying large expenses to restructure their endangered businesses. In addition, the stigma which is traditionally accompanied with the insolvency procedure represents another obstacle for the failed debtor trying, possibly, to reach the agreement with its creditors. Having in mind insufficient assets and high expenses they are facing with in case of initiation of the insolvency procedure being unproportionally higher than the expenses the large enterprises are experiencing, it is more possible for MSMEs to bankrupt than to reorganize for recovery and maintenance of their operations. The consequence of this is the cessation of operations, (partial) collection of receivables solely by the insolvency procedure and loss of jobs of the employees. Therefore, the administrative and financial support of governments to MSMEs is not sufficiently effective, and the wider legislative and institutionalized support to MSMEs in the course of all operational

phases, during insolvency procedure as well, recovery and liquidation, would be of great help, both for MSMEs and economy and wider social community, as well.

MSME Legal Framework

Firstly, the prevailing Law on Accounting recognizes as micro legal entities those legal entities which, in their operations, do not exceed two, out of three, legally prescribed criteria. Such criteria include the number of employees being 10, operating income amounting to EUR 700,000 in RSD counter value and the average value of business assets (calculated as the arithmetic median value at the beginning and at the end of the business year) amounting to EUR 350,000 in RSD counter value. Further, legal entities which exceed two, out of three, legal criteria such as the average number of employees being 50, operating income of EUR 8,800,000 in RSD counter value and the average value of business assets (calculated as the arithmetic median value at the beginning and at the end of the business year) of EUR 4,400,000 in RSD counter value are recognized as small legal entities. Finally, the legislator recognizes as medium legal entities those legal entities which exceed two criteria, but do not exceed two, out of three, legal criteria such as the average number of employees being 250, operating income of EUR 35,000,000 in RSD counter value and the average value of business assets (calculated as the arithmetic median value at the beginning and at the end of the business year) of EUR 17,500,000 in RSD counter value. All legal entities which exceed those two criteria are recognized as large legal entities (Art. 6. Law on Accounting). However, the Law on Business Entities, as the main act regulating the foundation, operation and liquidation of business entities, does not differentiate micro, small, medium and large legal entities (Art. 8. Law on Business Entities), while the Law on Bankruptcy, as the main law regulating insolvency procedure of the companies, makes such difference only in determining the amount of certain expenses (Art. 59. al. 2. Law on Bankruptcy).

At the end of 2023, 110,808 companies were registered in Serbia. Out of that number, 93573 were micro enterprises, 14309 were small enterprises, while medium enterprises accounted for 2328. Adversely, large enterprises accounted for 598 (Statistical Office of the Republic of Serbia, *Preduzeća po veličini i preduzetnici u Republici Srbiji*, 2023). Only micro and small legal entities have 560,593 employees, and realize net result of RSD 210.8 billion (EUR 1,801,709,000).

The need to specifically regulate the approach to MSMEs is emphasized by the latest European Union regulations, documents of *UNCITRAL*, as well as the recommendations for business environment promotion made by the World Bank and various professional and *think-thank* organizations (*INSOL Europe*, *CERIL*, etc.). In that sense, the recently implemented EU Directive No. 2019/1023 on Preventive Restructuring Frameworks stipulates that the enterprises, and particularly MSMEs, should benefit from more coherent approach to preventive restructuring at the European Union level (EU Directive No. 2019/1023 on Preventive Restructuring Frameworks, Preamble, 17). Additionally, in 2022, *UNCITRAL* presented the Legislative Guidelines on Insolvency Law for Micro

and Small Enterprises (UNCITRAL Legislative Guide on Insolvency Law for of Micro- and Small Enterprises, 2022). In addition, the Draft Study of the World Bank *Business Enabling Project* for 2022, points out the introduction of specific and simplified restructuring and insolvency procedures for small and medium enterprises as the characteristic of qualitatively regulated insolvency procedure (World Bank, Business Enabling Project 2022). Serbian business and legal environment experience the growing need to additionally regulate, promote and adjust the regulations related to MSMEs operations. In that respect, the Strategy for Small and Medium Enterprises, Entrepreneurship and Competition Development Support for the Period from 2015 to 2020, established the policy of full recognition and implementation of all documents stipulating the European Union policy in respect of entrepreneurship and competitiveness, primarily Europe Strategy and Act on Small Enterprises. Such documents point out, as the possible promotion move, the additional simplification of the insolvency procedure (IBRD/The World Bank, A Toolkit for Corporate Workouts, 2022). Besides, certain prevailing legal instruments that could be used for prevention of business difficulties and decrease of business obstacles for MSMEs are not sufficiently promoted (UN Convention on Mediation, 2019). Certain progress can be noticed in changes and amendments to the Law on Bankruptcy from 2018 determining the highest amount of advance payment for covering the expenses resulting from the initiation of insolvency procedure based on differentiation of a certain legal entity as micro, small, medium or large legal entity (Art. 59. al. 2 Law on Bankruptcy). Thus, the amount of initial expenses MSMEs are facing with in case of initiation of insolvency procedure has been, to some extent, lowered.

Economic situation of the MSMEs in Serbia

According to data from the Business Registers Agency, in 2023, micro enterprises realized operating result of RSD 30.2 billion, small enterprises realized RSD 189.5 billion, while medium ones realized the amount of RSD 194,7 billion. Adversely, large enterprises realized operating result amounting to RSD 557.9 billion. Compared to 2022, micro enterprises recorded drop of RSD 13 billion (Business Registers Agency of the Republic of Serbia, Info diagrams, 2023).

Furthermore, micro enterprises have been lacking of net working capital amounting to almost RSD 900 billion in the last three years, while the capital which is lacking of amounts to almost RSD one trillion and 400 billion. Small enterprises are faced with a slightly more favorable situation, whereas, only the amount of lack of capital is negative and amounts to about RSD 250 billion, while net working capital amounts to about RSD 500 billion. As regards medium enterprises, the amount of lack of capital is negative and amounts to around RSD 350 billion, while net working capital amounts to around RSD 350 billion (Business Registers Agency of the Republic of Serbia, Info diagrams, 2023).

The same data contains the information of the companies' indebtedness for the period from 2020-2022 with the total liabilities of micro legal entities amounting to around RSD 3000 billion, while own sources of financing were insignificant. In 2020, micro legal entities operated with the negative net result of

RSD13.3billion. Total liabilities of small legal entities amounted to nearly RSD 4000 billion, while the same were higher as regards medium legal entities, whereas own sources of income regarding these two categories amounted to RSD 1800 billion (Business Registers Agency of the Republic of Serbia, Info diagrams, 2023).

Complexity of MSMEs Insolvency Procedure

Most of the issues related to MSMEs insolvency procedure refer to adoption of modular approach to MSMEs insolvency, simplification of procedures, reduction of expenses and duration of the actual procedure, to introduction of the debtor`s personal administration institute, together with the supervision of the court or of the administrator appointed by the court, efficient debt acquaintance for honest, but unsuccessful individual entrepreneur or owners of capital/managers leading MSMEs, as well as to the issue of reorganization procedure simplification providing fixed terms and less formalities to initiate the procedure, to the adoption of reorganization schedule and implementation of simplified liquidation procedure aimed at faster withdrawal procedure of failing companies from the market. Moreover, the introduction of additional out of court and court instruments for prevention of MSMEs financial difficulties is of great significance.

What are the possible legal measures that could meet the needs of MSMEs facing possible insolvency, or are already experiencing the bankruptcy procedure?

First of all, there is the introduction of early warning system referring to the signs of crisis and possible insolvency. Early warning system could comprise the following instruments: 1) warning that the debtor has not executed certain types of payment, 2) consulting services rendered by public or private organizations, 3) incentives for third persons who have relevant information on the subject debtor, such as accountants, tax administration office and organizations competent for social insurance, in order to warn the MSME debtor when the negative operating trends are spotted (Art. 3. al 2. EU Directive 2019/1023 on preventive restructuring frameworks). Inclusion of qualitative and objective external consultant or professional accountant can be helpful for the MSME management regarding fulfillment of the relevant obligations in a way that the assistance relating to prevention of payment incapacity risk would be rendered in the early phase. The role of such professionals could be crucial in prevention, implementation of business reorganization and new, fresh start of operations. Such persons are qualified to detect potential trends that could lead to greater problems if not solved in due time. Engagement of professionals could be regulated as voluntary in case the debtor is not already in bankruptcy. According to data of *Allianz Trade* company (former *EULER Hermes*), being one of the leading companies to deal with business credits insurance, as well as recognized specialist in the field of warranties, debt collection, fraud insurance, structured business credits and political risks, the data parameters for identification of payment incapacity risk are: profitability, capitalization and interest coverage

(Allianz Trade Insolvency Report, Three indicators can reveal SME insolvency risk up to four years in advance, 2019).

Further on, the important measure would be presenting necessary information for recognizing business crisis and reorganization schedule models complied with the needs of the relevant MSME. Such information could be available on the websites of the Chamber of Commerce and Industry of the Republic of Serbia, Business Registers Agency, Bankruptcy Supervision Agency (ALSU), Ministry of Economy, as well as the Ministry of Justice. The issue is about the schedule model to be prepared by the debtor which could be simplified compared to the schedule prescribed in the regular bankruptcy procedure. Such information (“checklist”) are already made available for the MSMEs in Germany (Bundesministerium der Justiz, Checkliste nach § 16 StaRUG).

The following measure could be the introduction of specific obligation of the company's management members in case of crisis and possible payment incapacity, in addition to already existing ones referring to persons liable to the company as prescribed by the Law on Business Entities (Art. 63. et al. Law on Business Entities).

Further on, as regards legal instruments for overcoming the crisis, the modular approach could be taken into consideration. This means that several flexible instruments should be made available to the potential debtors by the legislator, whereas such instruments could be implemented either separately or combined, depending on the complexity of the relevant case. In that respect, it is possible to enable MSME debtors to select either simplified or regular procedure. The flexibility in approaching the bankruptcy procedure of MSMEs is of special importance (EU Directive 2019/1023 on preventive restructuring frameworks, Preamble, 29).

In case the assets of MSME debtor is of small value, or there is no value at all, for division among creditors, the interest for initiating the bankruptcy procedure lessens. In large number of micro and small enterprises bankruptcy cases the only creditor is Tax administration office (Politika, Poreznici oterali u stečaj 188 preduzeća, 2015). Settlement of secured creditors' claims is more certain and they all prefer collection instruments out of the bankruptcy procedure. On the other side, creditors with unsecured claims have to wait for settlement in the bankruptcy procedure of the proportional amount and according to their repayment schedule. However, by the moment when MSME debtor initiates bankruptcy procedure, its operations are often not viable any more, which results in loss of value of the assets. New expenses incurred upon initiation of bankruptcy procedure affect further operations which is the consequence of implementing the legal and procedural security principle. Therefore, the institute of direct public sale instead of mandatory inventory listing and property value estimation would contribute more to the reduction of expenses. As regards the reduction of the sole bankruptcy procedure expenses, certain improvement is made by changes and amendments of the Law on Bankruptcy from 2018. Such reform limits the level of advance payment for MSMEs in order to simplify the initiation of bankruptcy procedure

and prevent unrealistic definition of advance payment amount (Art. 59. al. 2. Law on Bankruptcy).

Nevertheless, the debtor, as person entitled to submit the business reorganization plan, regardless of the size of the legal entity, still has to bear all the expenses of preparing and submitting of pre-packed reorganization plan, as well as the expenses of preliminary bankruptcy procedure. In some comparative legislations, in the process of creditors claims settlement, the MSME debtor is released from the obligation to form the classes of creditors, provided that two, out of three, criteria for MSME category are fulfilled (§ 29 Abs. 3, Österreichische Restrukturierungsordnung).

Since the duration itself of bankruptcy procedure influences the amount of expenses, shortening of legally provided terms could ease the MSME position. Thus, the shortening of term for reorganization plan submission should be considered. Comparative legislation offers solutions which provide half the relevant term i.e. 45 days (Wessels, Madaus, 2017).

Another issue is related to the MSMEs bankruptcy procedure expenses. In addition to regularly incurred expenses, possible public sale comprises high organizational expenses and the solution for covering such expenses could be found in the so-called *litigation funding* (Gurrea-Martínez, 2021). This term refers to practice of giving financial resources to companies, parties or law offices, in exchange of the compensation portion or some benefit arising from the submission of claim. Thus, third parties shall effect advance payments related to the litigation expenses and commission for the claim.

Additionally, more extensive implementation of contemporary information technologies would contribute to the reduction of bankruptcy procedure expenses, not only for the MSMEs, but to the benefit of all insolvency debtors. Therefore, the petition in bankruptcy, recognition and determination of receivables, creditors` hearings, submission of data on the relevant debtor and public sale could be realized electronically (Gurrea-Martínez, 2021).

Most difficult issue in the legislations which are favorably disposed towards creditors is the issue of the debtor`s personal administration. Undoubtedly, the objective of the bankruptcy procedure is the most favorable way of collective settlement of bankruptcy creditors by realizing the highest possible value of the insolvency debtor, i.e., its assets (Riz Mokal et al. Micro, Small, and Medium Enterprise Insolvency: A Modular Approach, 2018).

However, the question is whether the most favorable settlement of the MSMEs bankruptcy creditors can actually be realized by the regular bankruptcy procedure? Comparative analysis made in the United States all the way to Asia proves that is not the case (Wessels, Madaus, Rescue of Business in Insolvency Law, 2017). For example, it is worth to mention the case of *Lehman Brothers* in which the settlement of claims is, even today, realized by the out of court mediations procedure (Atkins, Luck, Mediation as a bankruptcy and insolvency game changer, 2023). Besides, new legislative tendencies in the European Union regulate the issue of personal administration of the debtor in the preventive

restructuring procedures. In order to prevent possible malpractice to the detriment of creditors and the company itself, the introduction of personal responsibility of the director is recommended, i.e., the responsibility of the insolvency debtor administration, for the damages arising as the consequence of negligence or misconduct (Gurrea-Martínez, 2021).

In addition, the use of negotiated settlement instruments (mediation), beside the one already prescribed by the law (Art. 115 Law on Bankruptcy), could be more extensively implemented and used as the preventive instrument (Djuric, Jovanovic,.. In 2019, Serbia opened the possibility of its implementation in economic relations with foreign elements (Singapore Convention on Mediation, 2019). France and Spain are sound examples of the mediation implementation in the bankruptcy procedure (IBRD/The World Bank, A Toolkit for Corporate Workouts, Washington, 2022), while Germany, in its new Law on Stabilization and Restructuring of Enterprises offered to the debtors the larger number of procedures for overcoming financial difficulties (out of court restructuring, court restructuring and recovery mediation) (StaRUG, § 17. ff., § 45. ff. and § 94. ff.).

The appointment of the insolvency administrator is related to the previous issue. Comparative legislation in preventive procedures intentionally uses the term insolvency administrator or professional in order to avoid the negative connotation of insolvency (Madaus, Leaving the Shadows of US Bankruptcy Law, 2018). Some countries will surely insist on the selection of the bankruptcy administrators from the public list of licensed administrators, but not necessarily on its actual appointment in the procedure. The appointment of the administrator is primarily related to rendering assistance to the debtor in preparing the reorganization plan and undertaking measures for establishing the repayment capacity, as well as to the protection of rights and interests of creditors (particularly those employed with the debtor). Eventually, the court is entitled to supervise the debtor, to approve inter-financing and new financing (fresh money). Nevertheless, the tendency prevailing in comparative legislation is to limit the participation of the court to checking the legality of the procedure for reorganization plan adoption and its confirmation in order to acquire the power of writ of execution.

Liquidation of MSMEs

In addition to establishment of the simplified liquidation procedure, it would be important for MSMEs to establish simplified liquidation procedure, as well. Regardless of whether the issue is about voluntary or court ordered liquidation of the company, the objective of creditors is to settle their claims out of the remaining value of the company`s assets, while the objective of the company`s members is to recover the largest possible invested value and to avoid the activation of joint and several liability for subsequent liabilities upon finalization of liquidation (Art. 2. Law on Bankruptcy). The establishment of simplified liquidation procedure related to MSMEs would also contribute to this objective.

Regardless of the trivial meaning, comparative legislations in Europe are familiar with the institute of submission of debtor`s affidavit on the fulfillment of all

presumptions necessary for simplified liquidation procedure (Art. 438 et al. Loi du 7 août 2023 relative à la préservation des entreprises et portant modernisation du droit de la faillite). Limitation for implementing such a procedure is lack of real estates of the company. In addition, simplified liquidation or short form of liquidation is implemented only if the MSME has one capital owner, and the decision on liquidation of the company is made at the assembly in the presence of public notary (Harneys Legal Guide, February, Voluntary Dissolution, 2023). Before that, the sole capital owner has to approve all financial reports at the moment of liquidation and submit them to the registry of commerce. The company is also obliged to obtain from the competent authorities and submit to the public notary three certificates, not older than three months, confirming that the company has fulfilled its obligations related to payment of social insurance contributions, as well as direct and indirect taxes. Immediately upon verification of the decision of liquidation, the company ceases to exist.

Dissolution does not follow the liquidation, but, by the force of law, the assets is transferred to the sole owner. In case an unknown or unpaid liability arises after dissolution of the company, the sole owner shall be jointly and severally liable for the settlement of the same. Simplified liquidation procedure is also provided in the EU Proposal for a Directive on Harmonising Certain Aspects of Insolvency Law (Art. 47 et al. Proposal for a Directive of the European Parliament and of the Council harmonizing certain aspects of insolvency law). Finally, as a contribution to flexibility, cost- effectiveness, and confidentiality, as well, out of court agreement on restructuring or reorganization and recovery mediation can be noted (StaRUG).

Conclusion

MSMEs absolutely represent the largest number of companies in Serbia and the most important segment of its economy. They influence its development, strengthen private initiative and entrepreneurship and bring innovations in the economy. However, although highly flexible, they are faced with serious challenges in business activity. That is particularly true for *start ups*, hotel and catering and food staff production industry. Government support for overcoming the consequences of crisis relaxed the position of MSMEs to some extent. Prevailing legislative framework for overcoming financial operating difficulties, as a rule, does not recognize the specificity of MSMEs, since it was tailored according to criteria of large companies. Therefore, it would be necessary for the legislation to establish more flexible and simplified approach, both for the prevention of insolvency and for the insolvency and liquidation of MSMEs. The comparative legislation already recognizes such specific insolvency and liquidation procedures. As an example, we can point to the USA, Australia and Singapore, while the European Union introduces a specific approach primarily through the procedures for liquidation prevention. In addition, the European Union presently considers Proposal for a Directive on Harmonising Certain Aspects of Insolvency Law. Financial difficulties and insolvency of MSMEs are, undoubtedly, the challenge for the economy of the Republic of Serbia, having in mind the number of such enterprises, income they realize and number of

employees. All stated measures and instruments represent possible legislative solutions for insolvency, restructuring and liquidation of MSMEs in Serbia *de lege ferenda*. Some of them would, certainly, be the topic of the legislative discussion in the Republic of Serbia, in the near future, with regard to both possible crisis in MSMEs operations and its formal obligation, as the candidate country for European Union membership, to comply its legislation with the EU *acquis communautaire*.

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ИНСОЛВЕНТНОСТ МИКРО, МАЛИХ И СРЕДЊИХ ПРЕДУЗЕЋА У РЕПУБЛИЦИ СРБИЈИ

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Апстракт

Микро, мала и средња предузећа спадају у најбројнија у Републици Србији, као и у Европској унији. У свом пословању суочена су како са привредним, тако и са изазовима у примени националног законодавства. Након кризе изазване пандемијом COVID 19, уследила је нова изазвана ратним сукобима у Украјини. Последице криза посебно су осетила ММСП, кроз раст цена енергената, а затим широког круга производа и услуга. ММСП у Србији представљају окосницу привреде и развоја. Ипак, правни оквир за решавање кризе у пословању није прилагођен потребама ММСП, већ је више изграђен према мерилима великих предузећа. Стратешки документи новијег датума у ЕУ и свету наглашавају потребу увођења посебног приступа ММСП и њима прилагођених правних инструмената. Ти инструменти се односе како на превенцију стечаја, тако и на поступак стечаја и ликвидације ММСП. Циљ овог рада је да укаже на потребу другачијег законодавног приступа ММСП у односу на велика предузећа у Републици Србији. Аутори у раду применом нормативног метода полазе од позитивног законодавства у Србији и ЕУ, па применом статистичког метода анализирају тренутно стање ММСП у Србији, те применом упоредноправног метода разматрају могућа унапређења законодавних решења. Поред тога, применом студије случаја, даје се увид у резултате које у пракси даје посебан приступ стечају ММСП.

Кључне речи: *Стечај, микро, мала и средња предузећа, Србија.*

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