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**TRANSPOSING IN UKRAINIAN CONTEXT FOR COMMUNICATION
CHANNELS BETWEEN EUROPEAN SECURITIES MARKETS AUTHORITY
AND THE ENERGY MARKET PARTICIPANTS¹**

The findings indicate that European Securities Markets Authority’s (ESMA) communication structure, reflecting the EU *acquis*, is crucial for Ukraine as it implements these regulations domestically and delegates authority back to EU supranational bodies. Ukrainian energy markets are being transformed by the undertakings the Association Agreement with the EU and Ukraine’s candidate country path since 2022 application for the EU membership. ESMA’s commitment to open dialogue and stakeholder collaboration is central to its mission, ensuring regulatory actions meet community expectations and foster public understanding and confidence. To increase cooperation and interaction with EU institutions, ESMA would be first mirror to be adapted to as the NSSMC will be required to communicate with the ESMA and, eventually, become an integral part thereof. Financial aspects of the energy markets became a part of the NSSMC mandate almost simultaneously with the candidacy status and, therefore, the government of Ukraine should double down on its communications model that must span horizontal, sectoral and transversal boundaries in order to impose appropriate risks management standards and practices in the commodity markets. Aside he NSSMC’s engagement

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with the ESMA, particularly concerning energy product futures and forwards, communications with national competent authorities across the Member States will be a part of the *modus vivendi* for Ukrainian regulator and market participants. NSSMC transparent and unbiased communication, should also follow practices of its peers in the EU to simplify compliance by the Ukrainian market participants. In a series of articles, we explored other robust commodity market authorities such as Germany's BaFin, Belgium's FSMA, and the Netherlands' AFM, concentrating in this paper specifically ESMA's communication practices. We argue that material difference in communication strategy creates a ground for regulatory arbitrage, even if in soft law and identify here, based on the content analysis, areas for replication in Ukraine to enhance effective communication in dynamic commodity markets.

Key words: *regulatory communication, European Securities Markets Authority (ESMA), energy markets, wholesale energy product, National Securities and Stock Market Commission (NSSMC).*

Гайцман Я. Д., Загнітко О. П., Транспозиція в контекст України каналів комунікації між Європейським органом з ринків цінних паперів та учасниками енергетичного ринку

Отримані результати свідчать про те, що комунікаційна структура Європейського органу з ринків цінних паперів (ESMA), що відбиває *acquis* ЄС, має вирішальне значення для України, яка має імплементувати законодавство ЄС як власне, а згодом, після отримання членства, мусить делегувати частину повноважень наднаціональним органам ЄС. Українські енергетичні ринки трансформуються завдяки зобов'язанням Угоди про асоціацію з ЄС 2014 року та шляху України як країни-кандидатки після подання заявки на членство в ЄС у 2022 році. Відданість ESMA відкритому діалогу та співпраці із заінтересованими сторонами є центральною частиною місії цього органу, гарантуючи, що його регуляторна діяльність відповідає очікуванням ринкової спільноти, сприяють суспільному розумінню та довірі, які у підсумку зміцнюють соціальну справедливість. На шляху до посилення співпраці та взаємодії НКЦПФР з установами ЄС відповідно до законів про організовані товарні ринки та їх державне регулювання, ухвалених у 2019 та 2024 роках, ESMA стане першим органом, практики якого потрібно віддзеркалювати, адже НКЦПФР повинна комунікувати з ESMA та, зрештою, після отримання Україною членства в ЄС, стати невід'ємною частиною Європейського органу з ринків цінних паперів. Фінансові аспекти енергетичних ринків стали частиною повноважень НКЦПФР майже одночасно з набуттям Україною статусу країни-кандидатки, отже, уряд України повинен подвоїти свої зусилля з розбудови інституційної моделі комунікацій, зокрема на енергетичних ринках, щоб такі комунікації поширювалися за кордони НКЦПФР як інституції в горизонтальних, галузевих та наскрізних (компетенційних) відносинах із метою запровадження належних стандартів та практик з управління фінансовими й кредитними ризиками на товарних ринках. Крім взаємодії НКЦПФР з ESMA, щодо ф'ючерсів і форвардів на енергетичні продукти зокрема, частиною *modus vivendi* для українських регуляторів і учасників ринку стане спілкування з національними компетентними органами держав-членів ЄС. В цьому аспекті прозора та неупереджена комунікація також має наслідувати практику національних відповідників НКЦПФР серед держав-членів ЄС, що спростить дотримання законодавства українськими учасниками ринку. У серії статей ми дослідили низку національних органів державної влади, що здійснюють державне регулювання на товарних ринках, таких як BaFin (Німеччина), FSMA (Бельгія) та AFM (Нідерланди), натомість у цій роботі



ми зосередилися на комунікаційних практиках саме ESMA. Ми стверджуємо, що істотні відмінності національних та наднаціональних комунікаційних стратегій створює ґрунт для регуляторного арбітражу, навіть якщо це стосується лише «м'якого права» та неформальних каналів комунікації, і визначаємо в цій статті, на основі контент-аналізу, царини ефективної комунікації на динамічних товарних ринках, які варто відтворити в Україні.

Ключові слова: комунікація регуляторних органів, Європейський орган з ринків цінних паперів (ESMA), енергетичні ринки, оптовий енергетичний продукт, Національна комісія з цінних паперів та фондового ринку (НКЦПФР).

Introduction. Ukrainian energy markets have been undergoing severe transformations to become more competitive and harmonize with the EU rules under the Association Agreement [1]. Since Ukraine was qualified to become a candidate for the EU membership in 2022, the trend towards seamless cooperation, exchange of information and other interaction between Ukraine and the EU institutions have accelerated both on Ukrainian and the EU side. A key part of the energy market reform was separation of financial side from physical side in trading transactions, which led to a series of new risks, similar in nature to the capital markets risk. The mandate was regulatory overview of the financial risk management in the industry, therefore, was centralized in the hands of capital markets and organized commodity markets authority, National Securities and Stock Market Commission (NSSMC), while the physical side operational risks are handled by the neutral dispatcher and the transmission system operator. The NSSMC interactions with the EU in relation to futures and forwards of the energy products require understanding of the external communications by the relevant EU authority, that is, the European Securities Market Authority, a body that unites and coordinates all national competent authorities in the Member States [2].

Research background and objectives. NSSMC takes its mandate to oversee the commodity markets, in particular, energy market from 2019 recast of the statute on the capital markets [3] and 2024 recast statute of the NSSMC status and powers [4], a topic not researched in depth by Ukrainian and world academics, partially due to the fact that the reform became effective in late 2021, just a few months before the 3rd phase of invasion by Russia and Belarus, partially to its little effective implementation through secondary and tertiary legislation before the markets were brought to almost a halt in February 2022. The ESMA, on the other hand taps its powers and procedures from ESMA Regulation, that mandates transparent and unbiased communication [5], the authority and soft law has already been subject to a number of academic studies, commentaries and treatises, to name a few published just in English language in recent years, Niamh Moloney (2018) [6], Annetje Ottow (2015) [7], Marloes van Rijsbergen (2021) [8], Eilis Ferran et al. (2023) [9]. None of those were analysis from the angle of cooperating with Ukrainian authority, least of all to transpose and replicate the practice to the NSSMC. To demonstrate that institutions shape and control life within organizations through communications, Meyer and Scott (1983) identified institutional sectors and fields of organized activity (such as education), where beliefs and values predominated; in contrast with technical sectors (such as manufacturing), where market forces and techniques were more influential. [10]. This spawned institutional communications theory that was well summarized by the proposition that “institutions operate in organizing through formal communication” [2] and central role belongs to the application of formal rules (codes, ordinances) to organizational practices that drives the decision-making [11].

Failed institutional communications, therefore, creates uncertainty, increasing the risks and incentivizing complacency. This article examines the practices of the institutional communication framework by the ESMA and the EU market participants, identifying areas for replication in Ukraine and filling the gap for effective communication in the dynamic commodity markets. While the EU supranational frameworks can provide valuable references, the authors undertook, in a separate article, to analyze best communication practices of the competent authorities at the robust commodity markets such as Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)



[12], Germany, Financial Services and Markets Authority (FSMA), Belgium [13] and the Dutch Authority for the Financial Markets (AFM), The Netherlands [14] – all catering for the financial risks in the organized commodities markets, in particular, energy products, save those exempt under REMIT [15] from definition of the markets in financial instruments under MiFID II [16], such as wholesale energy products.

Findings. The European Securities and Markets Authority (ESMA) reflects in its communication structure the EU *acquis* that Ukraine needs to implement on the domestic market and on its path to the EU membership first and then delegate back part of the authority to the supranational bodies of the EU. ESMA is committed to fostering open dialogue and collaboration with all stakeholders to shape evidence-based regulation and policy. Central to this commitment is promoting public understanding, confidence, and acceptance of ESMA's decisions. As an EU authority dedicated to openness and transparency, ESMA actively encourages interaction with market participants and broader stakeholders. This engagement is integral to ESMA's mission to ensure that regulatory actions align with the needs and expectations of the broader community.

Stakeholder Relations. ESMA's stakeholder engagement is guided by its strategic objectives of investor protection, orderly markets, and financial stability. ESMA uses the two-tier governance: the Board of Supervisors consisting of the heads of the national financial markets regulators in twenty seven EU member states, and the executive Management Board that runs the functions centralized by ESMA under the EU *acquis*, in particular development and implementation of a long-term work programme, budget and staff resource matters under the leadership of Executive Director [17]. To ensure alignment of its strategic objectives, ESMA follows key principles in its interactions with stakeholders: efficiency and prioritization, balanced interaction, transparency and accessibility. The principles are followed in the boundary-spanning of the institutional communication by ESMA.

Efficiency and prioritization mean that ESMA strives to optimize its resources by prioritizing stakeholder engagement activities according to the objectives outlined in its strategy for 2023–2028. ESMA senior management and staff respond to stakeholder requests and speaking engagements based on these priorities, maximizing measurable efficiency in external communications.

ESMA strives for *balanced* representation of interests and prioritizes engagements that offer the most value in advancing topics outlined in its annual work program. Additionally, ESMA proactively engages with stakeholders, including those with limited resources or organizational capacity (e.g., retail investors), and ensures geographical diversity by reaching out to local stakeholders whenever feasible. In case of Ukraine, ESMA officers were interested to offer their opinion early on after the candidacy status, even prior to the commencement of negotiations on the Ukraine's membership in the EU.

To enhance accessibility and promote equality of access, ESMA leverages digital tools and virtual meetings for consultations and communication efforts. The publication of forward-looking calendars and planned consultations ensures transparency regarding ESMA's upcoming activities. ESMA also regularly publishes details of its meetings with stakeholders, including those of its Chair, Executive Director, and CCP Supervisory Committee, providing stakeholders with insight into ESMA's engagement efforts. Any member of the public, such as journalists, anti-corruption activists, lobbyism monitoring groups, independent sociologist can see and use the data from the dairies of ESMA, similarly to other agencies of the EU's government executive branch.

Through those three basic principles, communications by ESMA are fostered to increase efficacy, transparency, and aligned with strategic objectives through various types of the stakeholder engagement, main of which are listed below.

Formal Groups. ESMA structures interactions with stakeholders through formal groups and targeted outreach efforts.

The **Securities and Markets Stakeholder Group** (SMSG) is established by ESMA's founding regulation and serves as a formal platform for engagement with stakeholders. SMSG members represent financial market participants in the EU, their employees' representatives, consumers, users of financial services, representatives of SMEs, and top-ranking independent



academics [18]. SMSG meets at least four times a year in accordance with the timetable agreed between SMSG and ESMA; on top of those four meetings, SMSG must meet with the Board of Supervisors regularly, at least twice a year. SMSG is led by the Steering Committee, selected by the peers from among the experts and consisting of SMSG Chair and two Vice-Chairs. And three voting members of the ESMA Board of Supervisors may request the Board of Supervisors to seek advice from the SMSG. The stakeholder group is also one of the five privileged complainants about a possible breach of (non-compliance with) the EU Law by the securities regulator of the EU Member State pursuant to ESMA Regulation article 17.2 [5]. The NSSMC's Consulting and Expert Board provided under recently recast law on the state regulation of the capital markets and organized commodity markets [3] could borrow major principles of arm's length interaction, transparency and planning from SMSG's rules of procedure.

ESMA Consultative Working Groups (CWGs) are organized by ESMA's standing committees and focus on specific policy areas and facilitate in-depth discussions with relevant stakeholders. The working groups are permanent, but the number of groups may vary following change of plans and priorities of the standing committees. There are four types of standing committees in ESMA, the bodies are divided unequally. Main kinds are the horizontal standing committees (eight) and sectoral standing committees (three), supplemented with the CCP Supervisory Committee and the CCP Resolution Committee, each of the last two constitute the type of the standing committee of its own. The committees are composed and operate similarly to the Board of Supervisors.

Currently, the following horizontal standing committees and their CWGs that are operational.

ESMA Risk Standing Committee (RSC) is tasked with coordinating financial stability and assessing the risks as well as trends of the market; its two CWGs are (a) **Financial Stability and Risk Monitoring Working Group** that focuses on risk for financial stability and orderly markets, and (b) **Investor Trends and Research Working Group (IRWG)** that deals with risk related to consumers, ESG and innovation. The RSC itself is tasked with risk monitoring and the analysis of economic, market, and financial stability developments across ESMA's remit (including macro-prudential risks) by establishing risk indicators and promoting joint analytical methods. It also works on sustainable finance, retail investor protection, and financial innovation analysis and trends.

ESMA Supervision Policy Committee (ESPC) covers policymaking and supervisory convergence activities related to ESMA's direct supervisory mandates (Securitisation, TR/STFR, Data reporting service providers, Benchmarks and Credit Rating Agencies), with the exception of CCPs. ESMA Supervision Policy Committee (ESPC) functions in a dedicated sectoral configurations, initially on benchmark administrators and the shared supervisory mandates where competencies of ESMA cross with national authority. ESPC has established a **temporary task force** to address issues regarding the implementation of the Regulation laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation (Securitisation Regulation) [19].

The Investor Protection Standing Committee (IPSC) has been established with the focus on the retail investors protection coordination and build further on the work of the Investor Protection and Intermediaries Standing Committee (IPISC), e.g., costs and fees charged to investors; the IPSC also acts the policy-setter for consumer protection: conduct of business rules, distribution of investment products, investment advice and suitability. IPSC also deals with financial innovation under the ESMA Regulation [5], including, in addition, all relevant aspects of distribution of financial products by intermediaries, coordination of financial education activities, policy and convergence aspects of financial innovation (for example, sales practices and distribution channels), and sustainability.

IPSC Working Group was established to “(i) contribute preparing policy work – as mandated by the IPSC – to help establish a single rulebook and to promote supervisory convergence among national competent authorities in the area of retail investor protection on a range of issues such as authorisation, conduct of business rules, systems and controls, firms' organisation, cross-border activities and sustainable finance; and to (ii) act as a hub for the ongoing sharing of supervisory



experiences on real cases, with a view to contributing towards building a common supervisory culture and consistent supervisory practices.” [2]

ESMA Sustainability Standing Committee (SSC) plays two roles (a) of a coordination and expert pool to other horizontal ESMA standing committees on sustainable finance and (b) transversal issues of sustainable finance such as taxonomy, greenwashing, green bonds, ratings for environmental, social and governance (ESG) corporate responsibility. SSC does not develop policy on the supervision, however, SSC rather promotes awareness and coordinated action on regulatory, supervisory and enforcement aspects for sustainability of finance markets. **CWG** for SSC is set to assist with the committee’s objectives to enable sustainable finance and ensure effective integration of ESG across all areas.

ESMA Digital Finance Standing Committee (DFSC) is tasked with addressing issues related to digital finance and technological innovation (such as issues relating to Regulation on markets in crypto-assets (MiCA), digital operational resilience for the financial sector (DORA), distributed ledger technology, artificial intelligence and cybersecurity. DFSC established **DLT Working Group** to address issues relating to the distributed ledger technology (in Ukraine often referred to as ‘blockchain’ technology) pilot regime.

ESMA IT Standing Committee (ITSC), formerly referred to as the IT Management and Governance Committee (ITMG) focuses on work on information technology governance, exchange of data & information between national authorities and ESMA. ITSC established permanent working group CISON, that stands for **Chief Information Security Officers Network**, besides, ITSC founded ‘temporary’ the **European Single Access Point Task Force (ESAP TF)**, that reports jointly to the Data Standing Committee (DSC) and the ITSC, has been established to address in particular all the issues related to the implementation of single access point within the EU.

ESMA DSC is covering any and all topics under ESMA Regulation related to data reporting, data disclosure and quality in respect to any type of data, including those under the mandate of other committees or ESMA ESPC, including trade repositories or securitisation repositories. According to its main tasks, DSC has established (a) the **Reporting Working Group (RWG)**, that addresses the mandates, *inter alia*, securitisation and trade repositories, investment funds and data reporting platforms under MiFIR, and (b) the **Disclosure Working Group (DWG)**, that is required to address, *inter alia*, publicly disclosed data such as issuers’ disclosure data including prospectus and European single electronic format (ESEF).

Among the sectoral committees, the following CWGs are operational. Issuers Standing Committee (ISC) that works on different regulatory aspects of issuer information as defined by the Transparency Directive [20], Accounting Directive [21], IAS Regulation [22] and Corporate Sustainability Reporting Directive (CSRD) [23]. ISC had established **Prospectus Working Group (PWG)**, **Shareholder Transactions Working Group (STWG)** with respect to takeover bids and major shareholding, **Financial Reporting Working Group (FRWG)** also known externally as European Enforcers Coordination Sessions (EECS), with respect to financial reporting and related topics. Moreover, ISC also has **Sustainability Reporting Working Group (SRWG)**, **Corporate Governance Task Force (CGTF)** to agree on the tasks concerning the Shareholder Rights Directive [24] and **European Single Electronic Format Project Team**. The site of ESMA also indicates two CWGs: (a) for corporate reporting and (b) for corporate finance.

The Markets Standing Committee (MSC) is responsible for transparency and efficiency of financial instruments secondary markets and commodity derivative markets, they oversee implementation of the post-trading processes and operations as well as market infrastructure resilience, integrity and surveillance. MSC established the following permanent working groups: **Secondary Markets Working Group (SMWG)**, **Commodity Derivatives Working Group (CDWG)**, **Market Integrity Working Group (MIWG)**, and **Post-Trading Working Group (PTWG)**.

Final sectoral standing committee, the Investment Management Standing Committee (IMSC) that deals with implementation of the investment vehicles, such as acquis on undertaking for collective investments in transferable securities (UCITS), alternative investment funds and their specialized management companies, (AIFM) and money market funds (MMF) has established



Consultative Working Group called **Operational Working Group (OWG)** established to support the IMSC to contribute to the ESMA strategic priorities and thematic drivers of the ESMA Strategy.

The Proportionality and Coordination Committee (PCC), that works on institutional tasks, which are transversal to all aspects of the mandate, such as supervisory independence, information exchange on fitness and propriety, equivalence monitoring and international cooperation. Although the PCC has the power to establish permanent working groups or temporary task forces or project team/drafting teams, the PCC does not report to have any neither in the procedure nor on the ESMA website.

The last but not the least is the CCP Policy Committee (CCP PC), that is tasked with the assessment of risks to investors, markets and financial stability, promotion of supervisory convergence and the central counterparty (CCP) technical advice. CCP PC established a CWG that assists with the policies on the implementation, the revision or potential extensions of EMIR [25] or similar reports related to other EU legislation for matters affecting CCPs.

Targeted Meetings. ESMA conducts bilateral and multilateral meetings with individual stakeholders or groups to discuss pertinent issues and reach out to targeted market participants. The meetings can be scheduled by the initiative of ESMA as well as by the stakeholders in the form of the strategic consultations, status meetings etc.

Open Hearings, Round Tables, Webinars and Workshops. These forums provide opportunities for all interested stakeholders to share their comments and perspectives on specific policy areas in an open and inclusive setting, they can be set ad hoc but primarily they are pre-planned on certain pressing issues and their regular reviews. ESMA organizes workshops where participants engage in discussions under conditions of equality, promoting mutual learning and idea exchange; roundtable workshops offer participants a venue to meet as equals to engage in mutual learning.

Transparency and Public Consultations. ESMA upholds the principles of openness and transparency outlined in the Treaty on the Founding of the European Union (TFEU). To ensure transparency in the policymaking, ESMA not only publishes the calendars of its meetings (see above) but also publishes on its website, at least three times per year, overviews of meetings held with external stakeholders at the staff level. Meetings with ESMA senior officers are published more frequently. The ESMA Chair ensures that meetings with external stakeholders are made public within two weeks. Similarly, the Executive Director, CCP Supervisory Committee Chair, and Independent Members adhere to transparency principles, with meetings at the Senior Management level published separately. The transparency principle has only a few exemptions, such as (a) meetings essential for ESMA's work (SMSG, CWGs, meetings related to ESMA supervisory mandates or ongoing media interactions) and recurring meetings (ESMA's meetings in international organizations/bodies), (b) encounters of a purely private, social, or spontaneous nature, and (c) members of the Board of Supervisors, the Management Board, or representatives of national authorities in ESMA Groups.

Public Consultations. The purpose of public consultation is to foster consensus among all relevant stakeholders on suitable legislative or regulatory measures, enhancing ESMA's decision-making process. ESMA may organize informal discussions and consult stakeholders at an early stage, ensuring that those consulted have sufficient time to respond. ESMA targets a broad spectrum of interested parties, including market participants, consumers, and end-users, by widely disseminating consultation proposals, primarily through its website.

ESMA publishes an annual work program in advance, offering interested parties the opportunity to make submissions and provide reasoned consultative proposals. ESMA engages stakeholders through public hearings, roundtables, technical workshops, and written consultations. Additionally, ESMA utilizes appropriate processes such as face-to-face meetings and conference calls to better target consultations to affected parties. Upon careful consideration of all responses received, ESMA, unless otherwise requested by the respondent, makes all responses to formal consultations public or provides a summary of the responses. ESMA also publishes its own feedback to the comments addressing all major points raised during the consultation process. If significant issues arise, ESMA may conduct a second round of consultations. All formal proposals and advice are also published.



Speaking Engagements and Ad Hoc Feedback. ESMA representatives participate in events and conferences in Europe and internationally, offering insights and engaging with stakeholders on regulatory matters. ESMA also cooperates with stakeholders for their requests regarding ESMA speakers, encouraging consolidation of requests for speaking appearances, particularly when inviting multiple ESMA speakers for the same event. ESMA is open to general and specific inquiries about its work, stakeholders can send email using the contact information on the web-portal, subscribe to ESMA's news alerts, follow ESMA on Twitter and LinkedIn for real-time updates and announcements.

Conclusions and implications. Through various interaction methods, ESMA ensures that stakeholders are actively engaged in the policymaking process, fostering collaboration, transparency, and dialogue. ESMA employs a range of communication practices to ensure transparency and consistency in legal and regulatory policy. These practices include open dialogue, public consultations, publication of documents, stakeholder engagement through working groups, targeted meetings (that are transparent to the public), transparent decision-making, use of digital platforms, openness to the publicity.

ESMA fosters open communication with stakeholders, encouraging interaction and feedback to shape evidence-based regulation and policy. Regular public consultations are held to gather input from market participants and other stakeholders, ensuring that diverse perspectives are considered in regulatory decisions. ESMA routinely publishes reports, guidelines, and regulatory updates to keep stakeholders informed about current and upcoming regulations and policies. Active engagement with market participants, national authorities, and other relevant entities to maintain a continuous exchange of information and experience. Clear and accessible explanations of regulatory decisions are provided to enhance public understanding and confidence in ESMA's actions. Leveraging digital platforms and social media to disseminate information swiftly and efficiently to a broad audience. Finally, ESMA is open to the speaking engagements on the basis of simple and non-discriminatory practices. The outlined practices collectively could benefit NSSMC as a part of the communication strategy, and the structure (committees, working groups, annual report sections, Q&As etc.) can be replicated by NSSMC to enable its mission of a transparent and consistent regulatory environment across the financial side of all products, debt, equity and commodity equally.

Further research in the area could address each communication channel terms of reference and codification in positive law and administrative process, quantitative reflection of the communications on the business activities (e.g., number of new registrations and transactions), qualitative appraisal of the communications channels and their relative efficacy from the rule of law standpoint. The research could be further segmented by the target audience, such as communications with other domestic regulators, with ESMA and national authorities, with resident and non-resident corporate sector, with consumers of various demographics.

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