Article:

E.U. Financial Transaction Tax: a concern for all members of the C-suite

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Executive summary

E.U. Financial Transaction Tax: a concern for all members of the C-suite
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In the last two years, French and Italian governments have introduced new taxes on financial transactions. A proposal for a broader E.U. Financial Transaction Tax exists, and its design could bring global financial institutions into its reach. The design of the tax will evolve during 2014; however, even if pared back, the consequences could still have major financial and operational ramifications for the industry, and will merit discussions at the Board level. This article explains the origins of the tax, the features of the tax as currently proposed and what might happen next. It also highlights some of the specific concerns for members of the Board, including the CEO, CFO, CRO and COO. We conclude with some practical advice as to what organizations can be doing now to prepare, recognizing that the scope and timeline for E.U. FTT remains somewhat uncertain.

E.U. Financial Transaction Tax: a concern for all members of the C-suite

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Abstract
In the last two years, French and Italian governments have introduced new taxes on financial transactions. A proposal for a broader E.U. Financial Transaction Tax exists, and its design could bring global financial institutions into its reach. The design of the tax will evolve during 2014; however, even if pared back, the consequences could still have major financial and operational ramifications for the industry, and will merit discussions at the board level. In this article, we explain the origins of the tax, the features of the tax as currently proposed, and what might happen next. We also highlight some of the specific concerns for members of the board, including the CEO, CFO, CRO and COO. We conclude with some practical advice as to what organizations can be doing now to prepare, recognizing that the scope and timeline for E.U. FTT remains somewhat uncertain.

1 The authors would like to thank Geoff Lloyd and Nigel Nelkon of EY LLP for their helpful comments. The comments made in this article are those of the authors and are in no way representative of the views of EY LLP, its members and partner organizations. All remaining errors are solely the responsibilities of the authors.

As governments around the world seek ways to repair their economies, politicians in a number of countries see taxation of the financial services sector as a politically favorable solution. Not only would it raise much needed revenue but it may be perceived by many as targeting those institutions largely responsible for the crisis. The implications are far reaching for financial institutions, and a cause for concern for all members of the C-suite.

This article examines the so-called financial transaction tax (FTT) and discusses its implications on financial services firms and the steps they need to take in preparation for its arrival.

The concept of financial transaction taxes is not new

Taxing financial transactions is by no means a new concept. Switzerland, for example, had introduced its Securities Transfer Tax (Umsatzabgabe) back in 1917. The tax was later revised in 1971. In 1986, the U.K. introduced Stamp Duty Reserve Tax on cash equities, supplementing its stamp duty charge which has been in place since 1694.

John Maynard Keynes wrote in 1936 that "It is usually agreed that casinos should, in the public interest, be inaccessible and expensive. And perhaps the same is true of the stock exchanges. The introduction of a substantial government transfer tax on all transactions might prove the most serviceable reform available, with a view to mitigating the predominance of speculation over enterprise in the United States."[2]

In 1972, James Tobin recommended during a series of lectures at Princeton University the introduction of a currency transaction tax.[3] He believed that such a tax would help reduce exchange rate volatility by reducing currency speculation, which was deemed essential in a post-Bretton Woods era, as well as help raise revenues and make national economic policies less vulnerable to external shocks.

From a European Commission perspective, a financial transaction tax is regarded as the preferred way to make the financial services sector pay for the recent and potentially future government bailouts, and of course help raise revenues. They are also hoping that such a tax would deter riskier behaviors, such as high frequency trading.

The E.U. FTT proposal has a further dimension. Generally, taxes have historically remained within the competence of the Member States rather than the E.U. However, the E.U. FTT is now being regarded as an opportunity to demonstrate that an E.U.-wide tax is workable. Hence, the European Commission has stressed that such a tax would help "harmonize" at an E.U. level existing transaction taxes already applied by individual Member States (such as France and Italy).

The first E.U. Commission proposal published in late 2011 required implementation by all Member States. However, this proposal was rejected by those E.U. Member States heavily reliant on financial services, including the U.K., Ireland and Luxembourg. Failure to achieve unanimous agreement amongst Member States was sidestepped by the use of a little-used mechanism called "Enhanced Cooperation." Under this procedure, nine or more Member States may adopt legislation to be applied by those states, but not by other E.U. Member States. In late 2012, 11 countries (Austria, Belgium, Estonia, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain) (the E.U.11), agreed to apply the enhanced cooperation procedure for an E.U. FTT. The introduction of E.U. FTT under enhanced cooperation requires unanimity amongst all the participating Member States; non-participating Member States have no formal right of veto.

Following the agreement amongst the E.U.11, the European Commission published a revised proposal in February 2013, which was based on the initial 2011 proposal but modified to take account of the fact that only 11 Member States would be participating.

Under that proposal, the E.U. FTT would apply not only to equities (as is typical for existing transaction taxes), but also to fixed income instruments and derivatives. A minimum taxation rate would be applied across all of the participating Member States, with the option to apply higher rates by individual countries if they wished to do so.

Apart from the range of instruments potentially in scope, careful inspection of the proposal reveals a number of design principles

2 Keynes, J. M., 1936, "General theory of employment, interest and money, Palgrave Macmillan.
3 Tobin, J., 1974, The new economics, one decade older (The Eliot Janeway lectures on historical economics in honor of Joseph Schumpeter), Princeton University Press.

that significantly extend the reach and impact of E.U. FTT beyond the ambit of most transaction taxes currently in force. These include:

- An issuance rule, with taxes becoming due on transactions involving instruments that were issued or treated as issued in one of the 11 Member States (e.g., German bonds, Belgian equities and, it would seem, derivatives traded on a German exchange)
- A residence rule, automatically bringing into scope all transactions entered into by a financial institution established in one of the 11 Member States (e.g., any trade entered into by a French or German bank)
- A deemed residence (or counterparty) rule, where a financial institution enters into a transaction with a counterparty that is established in one of the 11 Member States, irrespective of whether that counterparty is a financial institution (e.g., a trade entered into between a U.K. bank and either a French bank or a French corporate client)
- Taxation of both buy and sell side of in-scope transactions which, when applied in conjunction with the residence rule, effectively brings global financial institutions firmly within the grasp of the tax
- Lack of exemptions for market making, funding and intra-group trades
- Lack of netting and credit mechanisms (unlike VAT, there is a cascade effect where every intermediate step is taxed in full)
- Same day settlement for electronic transactions, with joint and several liability for unpaid tax
- Extensive anti-avoidance rules

If the tax were to be implemented broadly as proposed,[4] it would effectively become a broad tax on global financial institutions, given that most will have some dealings with counterparties and/or instruments that fall within the scope of the tax.

That said, it is widely thought that the architecture of the tax will change significantly between the draft published in February 2013 and the final piece of European legislation and its implementation into national law.

This viewpoint has emerged as a result of a number of factors:

- **Legal challenges and uncertainties:** the U.K. has brought a formal complaint about the E.U. FTT to the Court of Justice of the European Union (CJEU), alleging that both the issuance rule and, in particular, the counterparty rule are contrary to E.U. law and accepted norms of public international law. The CJEU has not yet considered the merits of the U.K.'s complaint. However, the U.K.'s challenge has been buttressed by an opinion rendered by the E.U. Council Legal Services, who expressed the viewpoint that the counterparty rule was contrary to E.U. law. Although the European Commission has since robustly defended its position, it is fair to say that the position is, at least so far as the counterparty rule is concerned, ambiguous.
- **Political deadlock:** matters have not moved on materially over the course of 2013 among the participating Member States since the EU Commission's draft proposal of February 2013. Reports from meetings involving only the participating Member States and those involving all Member States suggest that there has been significant disagreement among the participating Member States and that, generally, there has been a reluctance to drive through the proposal in the form proposed by the European Commission. Notably, France, which was a prime mover behind the enhanced cooperation process, is understood to have moved its ground, now throwing its weight behind a more narrowly focused equities-only tax rather than a tax applying to all instruments.
- **Significant advocacy efforts:** significant advocacy efforts have been undertaken opposing the tax — not just by global financial institutions, but also by end investors, such as pension funds, and participants in the non-financial sector, who would also likely bear much of the economic burden of an E.U. FTT.

As a result of these factors, the original timetable envisaged in the February 2013 proposal for the tax to be introduced on 1 January 2014 has been missed. The time it will take for participating Member States to reach an agreement and the process to transpose final European legislation into local law, as well as some allowances made for the time it will take FS organizations to implement the change suggests that a later date for implementation, in 2015 or even 2016, is more likely.

4 It is possible that a "work in progress" draft will be published in Q1 or Q2 of 2014, with the expectation that a number of changes and exemptions will be included.

The precise scope and shape of an E.U. FTT also remains unclear. Much will depend on progress made in the political discussions among the participating Member States.

- **Outcome of the German elections:** in late 2013, Angela Merkel's CDU agreed to form a "grand coalition" with the Social Democrats (SPD), who have been enthusiastic supporters of the E.U. FTT concept. The coalition agreement between the CDU and SPD expresses support for an E.U. FTT based on the Commission's draft of February 2013, subject to certain caveats. Following the election, many market commentators expect Germany to provide a stronger lead with respect to finalizing the tax.
- **Presidency of the European Council of Ministers:** the Presidency of the European Council will sit with two participating Member States throughout 2014: Greece, from 1 January to 30 June 2014) and Italy from 1 July to 31 December 2014, which may influence the pace at which E.U. FTT is debated and decisions reached.

Against that backdrop, the prudent approach would be to prepare for the introduction of an E.U. FTT, albeit that the timing and scope of such a tax still remain unclear. At the time of writing, it has been reported that the European Commission has expressed the hope that the participating Member States could reach agreement by the summer of 2014, with a compromise being facilitated through a "staggered" introduction of the tax.

CEOs will be concerned by the potential impact on profitability, and thus shareholder returns

There have been many estimates about the amount of revenue that E.U. FTT will generate on behalf of national treasuries at the expense of financial institutions. These range from the "official" Commission estimates of €34b per annum (after behavioral changes resulting from the tax), up to an eye watering €170b per annum (not taking account of likely behavioral changes)[5].

Modelling the financial impact from the tax is not trivial and, given the number of unknown variables, fraught with complexity. That said, the orders of magnitude are sufficient to place the issue on the CEO radar.

The primary concern will relate to the financial viability of lines of business, and competitive positioning. While there is arguably no such thing as a level playing field in the world of capital markets, E.U. FTT is likely to create overnight competitive advantages and disadvantages. At a minimum, it will require broker-dealers to revisit their strategies for both operating in the affected European countries and also their approach to trading impacted products.

If the counterparty rule remains in the final legislation (although we believe that there is significant pressure from key Member States, such as France, Italy and Spain, to remove altogether any sort of residence rule and move to an issuance-only basis of taxation), those institutions whose business is booked in legal entities outside of the participating Member States (principally London, Zurich, New York, Chicago, Hong Kong, Singapore and Tokyo) will be better placed to capture business from those established within the zone. It is conceivable that we may see subsidiaries take the place of branches of E.U. 11 domiciled legal entities.

For asset managers, in addition to shifting their businesses to counterparties outside the participating Member States, it is possible we may see, for example, some relocation of collective investment schemes away from the participating Member States as well as strategic changes to how assets of pension funds resident in the E.U. 11 (assuming not exempt from the E.U. FTT) are managed. Indeed, market reports indicate that there may have been a certain rebalancing of portfolios by fund managers following the introduction of FTTs in France and Italy; it remains to be seen whether a similar pattern will emerge if E.U. FTT is introduced. There may, of course, be other important structural changes by asset managers, depending on how dealings in fund units/shares and investments by funds are to be impacted by the Directive.

Those financial institutions disadvantaged in this way may then face the difficult decision of deciding whether to change their legal entity structures/domiciles and booking models. CEOs will need to weigh up the commercial reasons for doing so, versus the cost and any political ramifications of such a course of action.

5 Goldman Sachs, 2013, "Financial Transaction Tax: how severe?", 1st May

The CFO will be concerned about the implications for funding
Throughout 2013, we met with or spoke to more than 100 financial institutions globally to discuss the impacts of E.U. FTT. Their single biggest commercial concern was the potential impact on overnight funding through the taxation of repo transactions; this was confirmed during our industry survey in Q3 2013.[6]

ICMA's analysis[7] suggests that, assuming FTT was levied on both ends of a repo transaction at 0.10%, a repo market-maker would have to charge a spread on an overnight repo of 7,205 basis points. It goes on to suggest that the nearest horizon at which the tax might be tolerable would be greater than one year, and that even if repo activity beyond 6 months survived, the market would shrink by at least 66%. Given the importance of overnight repos to financial institutions' funding strategies, organizations will have to find alternative approaches. ICMA goes on to suggest that organizations may instead switch to unsecured deposits outside the E.U. 11, which in turn results in capital flight, a reduction in lending to the real economy and undermining of the single market.

It is clear that the full consequences of the lack of an exemption for funding repos were not fully considered by the Commission in making its legislative proposals. We have observed significant lobbying activity in this respect. Central Banks are believed to be concerned about this matter and, to this extent, our expectation at the time of writing is that the final tax is likely to provide exemptions or some other relief for repos used for funding purposes. Indeed, the Commission itself has already raised the possibility that the applicable tax rate for repos could be reduced from 10 bps to 1 bp.

A second concern for the CFO is the potential lack of an exemption for intra-group transactions. This may be a driver for legal entity rationalization.

The CRO will be interested to learn the impact for risk management and liquidity
The CRO will have four primary concerns with respect to EU FTT.

6 EY Financial Transaction Tax Industry Survey 2013. Lack of exemption for repo transactions was cited as the feature of the tax that presented the greatest impact, ahead of the counterparty rule and the implementation timeframe.
7 ICMA Group, 2013, "Collateral damage: the impact of the Financial Transaction Tax on the European repo market and its consequences for the financial markets and the real economy."

First, the tax applies to transactions regardless of their purpose. There is currently no planned exemption for hedging transactions (although the European Parliament, and indeed the French Finance Minister, has suggested that such a distinction be introduced); hence the cost of managing risk rises. Given that the minimum proposed rate of tax on derivatives is 1 bp as opposed to 10 bps for equities, financial institutions may look to hedge positions via derivatives rather than physicals. This may mean less perfect hedges and increased risk. Furthermore, banks may look to hedge positions with instruments that are outside the scope of FTT altogether.

Second, there is the impact on liquidity and potential market dislocation. Volumes in certain products and markets will be significantly reduced. Although, it is pretty much impossible to model the impact on volumes with any degree of certainty, the European Commission estimates that derivative volumes could fall by 70%, though other market commentators have suggested that a figure of 50% is more likely. The European Commission also expects volumes of bond and equity trades to fall by 15%. Interestingly, the reduction in volumes of French equities in 2012, following the introduction of French FTT over cash equities, was estimated by TABB group to be 26%.[8] In May 2013, Per Callesen, a National Bank of Denmark governor, suggested that FTT is a "tax on market liquidity", and conflicts with the global regulation to increase banks' liquidity buffers.

Third, there will be an increase in operational risk. The scale and complexity of the proposed tax, combined with the number of organizations impacted across each part of the financial services ecosystem — from banks to broker-dealers, financial market infrastructure providers, asset managers and pension funds — has caused many to worry about the industry's ability to implement the proposal in a safe and orderly manner.

Fourth, the potential increase in counterparty credit risk cannot be ignored given the existence of joint-and-several liability. Where both parties to a transaction are jointly and severally liable, and one party defaults on the tax liability, the tax authorities may be able to pursue the other for payment, albeit that this risk is arguably more likely where the party in default is outside the E.U.

8 Tabb Group, 2013, "European equities market: 2013 state of the industry."

COOs and heads of IT will play a major role in leading the organization's response

Some of the potential responses to E.U. FTT as described above will need to be led by the COO.

We would expect some organizations to change their booking models, routing business away from legal entities established in the E.U. 11 countries. Changes to legal entity structures will also need to be addressed by the COO from an operational and efficiency perspective.

Operational compliance with the E.U. FTT will be a step-change from any previous operational tax, including FATCA. The calculation, collection and payment of E.U. FTT will need to be integrated into the front to back product trade flows. As it is currently proposed, organizations will be challenged to assess the impact from execution onward, build a suitable collection/payment platform and then resource the ongoing process from already stretched operations resources. Against a backdrop of profit margin compression, other regulatory, risk and tax obligations and a commitment to automated STP (straight through processing), meeting the demands of E.U. FTT will not be an insignificant undertaking.

A further complication arising from E.U. FTT is in terms of trade execution, market making prices and spreads impacting front office algorithms and trading models. Clients will also need transparency on their execution data in order to amend their own trading strategies.

Most organizations solved for French and Italian FTT tactically but the features of E.U. FTT, notably overall volumes, product complexity and same day settlement for electronic transactions demand a more strategic response, founded on a scalable and flexible architecture that can cope not only with any variables arising from the fact that an E.U. level tax must be transposed by 11 different Member States (each with their own legal systems), but also with other transaction taxes in the event that other Member States sign up to the tax or, indeed, that other non-E.U. jurisdictions decide to follow suit and introduce their own transaction taxes.

Another significant concern for the European Commission, participating Member States, and market participants is that the mechanism for collecting and reporting that the tax has not yet been clearly defined. However, unwelcome the proposed tax is for financial institutions, the lessons learnt from French and Italian FTT experience suggests that an onerous or ambiguous collection reporting and collection mechanism will compound the problem.

Technologists will be able to build or buy sophisticated rules engines. However, the complexity of the rules and inherent challenges with respect to the quality and availability of transaction and reference data could result in numerous transactions needing to be investigated manually, thereby introducing further costs and delay to the trade lifecycle.

Chief Information Officers and their teams will quickly learn that E.U. FTT represents a substantial book of work in its own right. Given the asset classes in scope and the global reach of the tax, the number of source systems, data repositories and operational systems that will need to be reviewed and enhanced to cope with the tax will be significant. Clarity of rules and an implementation timetable that allows for a planned and structured solution to be established are both required.

Defining the technology solutions to address the requirements of E.U. FTT will touch on many areas already being addressed through other initiatives, and operations and technology teams will need to explore the commonalities between E.U. FTT and other regulatory initiatives (such as EMIR, MiFID II, KYC/AML, FATCA) that demand changes to trade reporting, transaction reporting, client onboarding and reference data.

Non-executive directors will play a key role as "the conscience of the Board"

Non-executive directors will observe the developments of FTT and advise the board in their independent and impartial capacity. Non-executive directors are often more attuned to matters such as reputational risk and external perception, and will legitimately challenge any responses to FTT that could have adverse reputational consequences.

What happens next?

The next major milestone will be the reaching of an agreement in respect of the architecture, scope and rates of tax amongst the 11 Member States. This will be an intensive process, as different

Member States have different agendas, and have different views and approaches to the impacts of the tax.

Certain countries, including France, Italy and Spain, are thought to be keener on restricting the tax to an issuance rule only, and are also supportive of removing bonds from the scope. As noted above, the German position is expected to be clarified, and be more obviously supportive of some form of E.U. FTT, following the recent election and formation of a "grand coalition" between the CDU and the SPD. Other countries, however, fear that changes in the scope or the reach of the tax may materially reduce the amount of revenue that they hope to collect.

Assuming a political consensus is reached, and the tax is then passed into E.U. law, it would then be necessary to transpose the E.U. rules into national law in each of the participating Member States. This process is naturally constrained by the shape of the legislation agreed in Brussels, although within the overall agreed framework there will still be considerable scope for local differences in terms of definitions, interpretation, and any parts of the law that need to be adjusted to fit with local jurisdictions.

A larger challenge will be how the enforcement and collection processes work, not just across the 11 Member States but globally. Little thought had been afforded to this during the initial work on the tax, and much remains unclear.

There are therefore a number of fundamental questions where detailed answers are yet to be provided.

Reporting and settlement of the tax

The reporting and settlement of the tax will be heavily dependent on the final scope of the tax. In the event that the tax ends up being "issuance only", with the residence rule removed, it would be reasonable to expect that the market infrastructure participants (exchanges, clearing houses, CSDs) in each of the 11 countries would likely play a key role in tax collection and reporting (in the same way that U.K. SDRT is collected through the CREST system by Euroclear, the Central Securities Depository).

If, however, the residence rule remains in the final version of the tax, it is far from clear how the tax would be reported and settled. While the proposal sets out a hierarchy as to which country is entitled to tax revenues from particular transactions, it remains largely silent on collection mechanisms. Financial institutions could be faced with the added complexity of reporting and settling to 11 different jurisdictions, each of whom may stipulate their own requirements.

Further grey areas exist around instruments that may fall within the scope of the tax, but where place of issuance would be unclear; for example, how is the place of issuance to be determined for an OTC derivative transaction?

A question of enforceability

There is considerable debate on the enforceability of an E.U. FTT outside the 11 participating Member States, and in particular, outside the E.U. itself. In July 2013, two U.S. politicians (Senator Pat Roberts and Representative Tom Price) introduced legislation in the Senate and the House of Representatives to block foreign governments from collecting taxes on securities transactions.

In the same way that certain countries' laws and jurisdictions prevent compliance with other tax legislation such as FATCA, we can anticipate similar complications in the extra-territorial enforcement of E.U. FTT. Non-E.U. 11 financial institutions in particular could potentially find themselves in an awkward position. They may, albeit reluctantly, feel obliged to pay their way under E.U. FTT, yet conceivably find themselves in a position where it may even be illegal in their home jurisdiction for them to comply.

To this extent, we expect enforceability to become possible only with international agreements with non-EU countries and non-participating Member States.

Notwithstanding the above, and whatever basis of taxation remains in scope, the joint and several liability feature of the tax architecture will be put to the test. While, say, a tier-1 bank in a major economy may agree to pay the tax, its smaller counterparty in an emerging market may choose not to. E.U. FTT, therefore, introduces a new type of risk; "tax credit risk." We would expect this to become a feature of client onboarding and KYC processes in the future — the question needs to be asked, "will my counterparty pay its share of the tax due on our trades?"

What should financial institutions be doing now?
The pace at which organizations need to start addressing the challenges of E.U. FTT depends very much on the implementation schedule and the propensity for further changes in the proposed tax.

The vast majority of financial institutions are already heavily weighed down by a commitment to deliver against a number of different mandatory regulatory initiatives. We would not expect organizations to defocus on more pressing deadlines in favor of E.U. FTT.

We are however observing the following activities in the marketplace:

Determine the impact
Firms are undertaking impact assessments. These vary considerably from those that are purely commercial, to those that follow the logic through to potential changes in booking models, legal entity reconfiguration and funding models.

The booking model and legal entity question is a challenging one, as there are many drivers for change, and the specter of E.U. FTT may not be the largest driver.

Firms will need to ensure their use of capital is optimized. At the same time, many will have views on where they wish to be regulated, and this will play a role in determining any strategy that is founded on subsidiarization. Bank separation and "too-big to-fail" agendas will also be relevant.

Raise internal awareness
Most firms are raising internal awareness. In most cases, the initial interest sparked in finance or tax. However, the potential commercial impact has alerted front office teams to the scale of the issue. Operations, risk management, technology, legal and investor relations functions are usually engaged to some extent.

Organize the response
Governance structures will vary from organization to organization. There is no single right answer. However, our view is that the governance structure should include all relevant stakeholders, including inter alia heads of desks, middle office, operations, risk, finance, tax, legal, compliance, technology and public relations. For organizations with multiple business lines (e.g., those with broker-dealer and investment management arms), it is necessary to determine the appropriate level of connectivity required internally.

It will be essential to determine the levels of delegated responsibility with respect to decision making, and the escalation process for making difficult decisions.

We expect that once details of the tax are agreed and ready to be transposed into law, implementation timescales are likely to be challenging (in order to expedite the raising of funds via the tax). Establishing momentum and appropriate cadence will be key.

Finally, we advise financial institutions to stay close to industry commentators and thought leaders to keep abreast of the latest developments as they happen. We expect many twists and turns in the E.U. FTT story as it unfolds, and staying well informed will help to make the challenging delivery journey as smooth as it can be.

Conclusion
At the time of writing, there is still considerable uncertainty as to how and when the E.U. FTT proposal is likely to be resolved. However, our point of view is that the political will behind the proposed tax should not be underestimated; and therefore it would be prudent for the market to assume that overall some form of an E.U. FTT is likely to happen in the next two years.

The tax is likely to merit board level discussion within financial institutions. The nature of the tax means, and its commercial, risk management, finance and operational implications, suggest that most members of the C-suite will have a role to play in determining a financial institution's response.

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