

Reformulation of Digital Market Regulations Against Indications of Monopolistic Practices in the Digital Spaces (Indonesian Perspective)

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ABSTRACT

This research aims to analyze indications of monopolistic practices in the digital space and find formulations for digital market regulation to create a fairer digital ecosystem. Law No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition does not yet specifically regulate the prohibition of monopolistic practices and unfair business competition in the digital space, so the incompleteness of this regulation needs to be investigated further. This research was conducted using a normative juridical approach. The results of this research show that indications of monopolistic practices in the digital space are related to the unclear categories of business actors who sell at a loss in e-commerce and the combination of social media and e-commerce. Based on these weaknesses, the author obtains a formulation based on the Digital Markets Act regulations in the European Union which creates "gatekeepers" in the digital economy to create a healthy market.

Keywords: Digital Market, Indication, Monopolistic Practice

INTRODUCTION

The economy in Indonesia is one of the factors that increases from year to year. Starting with the existence of steam engines as the first industrial development, followed by the emergence of electricity as the second industrial revolution which resulted in steam engines being used less and less. Then developments in the third industrial revolution were carried out automatically with the emergence of moving and thinking machines, namely computers and robots. Next, the fourth industrial revolution which is very synonymous with complexity, scale, and scope will be broader, marked by the existence of the internet. As a result, this will have an impact on people's way of life. Currently, Indonesia has entered the era of Industrial Revolution 5.0, which is a refinement of several concepts from the previous revolutionary era (Suherman, et al. 2020: 6).

The era of Industrial Revolution 5.0 is an era where technology becomes part of humans themselves. The internet is not just for sharing information but for living life. The digital economy is a business carried out through virtual media, the creation and exchange of value, transactions, and relationships between mature economic actors with the internet as a medium of exchange (Nila Dwi Aprilia 2021: 246). The digital economy is an aspect of the economy that is guided by the use and empowerment of digital information and communication technology. Indonesia is a country that quickly adapts to technology. Five technologies have the potential to trigger digital economic growth, namely mobile internet, big data, internet of things, automation of knowledge, and cloud technology.

The development of the digital economy certainly includes e-commerce as the main focus. Changes in the form of digitalization including in the economy should also change business transactions which were previously manual but can now use the Internet. Quoting Afif Hasbullah's journal, Head of the Investment Coordinating Board

(BKPM) Bahlil Lahadalia (2020: 583) said that the Indonesian economy will only be ready to face a digital economic society in 2025, and can become the center of the digital economy in ASEAN. However, it cannot be avoided that digital developments have begun to be felt in the economic sector in Indonesia, especially in the field of trade in goods and services.

Currently, e-commerce technology is developing very rapidly, this is because it is easier to use without having to meet buyers and sellers (Osgar S Matapo and Moh Nafri 2020:129). According to Onno W. Purbo and Aang Arif Wahyudi in the book Dewi Sartika (2019:9) e-commerce can be said to be a broad scope of technology, processes, and practices that can carry out business transactions without using paper as a means of transaction mechanism. This can be done in various ways such as via e-mail or generally via the World Wide Web. Without the need to meet, it will make time more efficient. This is one of the positive impacts of e-commerce, but there are also negative impacts, one of which can lead to activities that are prohibited according to business competition law, such as monopolistic practices.

This prohibition on monopolistic practices is regulated in Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. The existence of this Law began with the drafting of anti-monopoly laws carried out between the International Monetary Fund (IMF) and the Government of the Republic of Indonesia which was implemented on January 15, 1998. In this discussion the International Monetary Fund (IMF) assisted the Republic of Indonesia in the amount of USD 43 billion to help overcome the economic crisis, but with the condition that Indonesia must implement certain economic reforms and economic laws. So, there is a need for anti-monopoly laws (Andi Fahmi Lubis 2017:33). Thus, Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition emerged to safeguard public interests and increase national economic efficiency as an effort to improve people's welfare.

Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition regulates several things, namely prohibited agreements, prohibited activities, abuse of dominant position, business competition supervisory commission (KPPU), legal handling procedures, sanctions, and exceptions. However, the existing regulations do not specifically regulate the prohibition of monopolistic practices and unfair business competition in the digital space. There are no regulations governing the digital market itself, considering that there are many differences from conventional markets and this digital market has great potential for development.

In practice, there are several indications of monopolistic practices in buying and selling activities in the digital space, which are often found, namely selling at a loss or what is also called predatory pricing, whether in the form of live shopping or giving discount vouchers and combining social media and e-commerce. So if viewed from Gustav Radbruch's theory, three legal aspects need to be considered, namely certainty, justice, and expediency. Reformulating special laws that regulate digital markets, will provide certainty that will create justice and benefit.

The purpose of this writing is to analyze, describe, and look for weaknesses in the regulation of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition regarding indications of monopolistic practices in the digital space and to know and find the right digital market regulatory formulation to prevent the practice. monopoly and unhealthy business competition.

METHOD

In this research, the author uses a normative juridical method. In this research, the law is conceptualized both as regulated in legislation and as rules or norms that measure people's behavior regarding what is considered appropriate (Jonaedi Efendi and Johnny Ibrahim 2016: 124). The approach used is a legislative approach by looking at regulations related to this research, namely Law No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, a comparative approach to European Union digital market regulations, as well as a conceptual approach based on views and teachings that developed in legal science.

The types of legal materials used are primary, secondary, and tertiary legal materials searching for legal materials through literature studies by looking at books, journals, and articles that can be verified as being true and related to indications of monopolistic practices in the digital market.

RESULTS AND DISCUSSION

1. Weaknesses in the Regulation of Law No. 5 of 1999 Concerning Prohibition of Monopolistic Practices And Unfair Business Competition Regarding Indications of Monopolistic Practices In The Digital Space

Business competition is one aspect that cannot be separated from marketing in the trading system. In English, competition is competition which is meant as competing and competition activities. According to Marbun (2003:276), in the management dictionary, business competition consists of two or more business actors, each of whom is active in obtaining orders by offering favorable prices or terms. This competition includes several forms such as sales promotions, price cuts, quality variations, packaging, design and market segmentation, and advertising.

Competition has always been seen as an act of individuals putting themselves first. By putting themselves first, competitors can do whatever it takes to succeed and achieve personal satisfaction. The strategy used to kill competing business actors is to act in inappropriate and deceptive ways to deter competitors, namely small business actors (Ayudha D Prayoga 2000:5). According to Khemani (2004:14) there are three scopes in business competition law, namely the first is provisions regarding procedures relating to business activities. The two structural provisions relate to business activities. And thirdly, provisions on procedures for implementing and enforcing business competition law.

In business competition, the legal basis is Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. This law is a tool of social control and a tool of social engineering, namely "a tool of social control and a tool of social engineering". A social control tool that safeguards public interests and prevents monopolistic practices and/or unfair business competition. Meanwhile, social engineering tools seek to increase national economic efficiency, create a conducive business climate through regulating healthy business competition, and seek to create effectiveness and efficiency in small business activities (Ayudha D Prayoga 2000:53). The existence of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition can be interpreted as a guarantee of legal certainty and equal protection for all business actors by preventing the development of monopolistic practices and/or other unfair business competition to foster a healthy environment. business-friendly, where every business actor can compete healthily (Devi Meyliana Savitri 2013:16).

Law Number 5 of 1999 broadly regulates the Prohibition of Monopolistic Practices and Unfair Business Competition. There are different definitions between monopoly and monopolistic practices. This monopoly is defined as control over the production and/or marketing of goods and/or use of certain services by one actor or one group of business actors. Meanwhile, monopoly practice is the concentration of economic power by one or more business actors which results in control of the production and/or marketing of certain goods and/or services, giving rise to unhealthy business competition and can harm the public interest. Unfair business competition is competition between business actors in carrying out production and/or marketing activities of goods and/or services which is carried out dishonestly or against the law or hinders business competition.

So it can be said that this monopoly practice is a practice carried out by business actors who want "real control of a market". This monopolistic practice can be carried out through agreements or prohibited economic activities. Prohibited agreements include oligopolies, price fixing, territorial division, boycotts, cartels, trusts, oligopsony, vertical integration, closed agreements, and agreements with foreign parties as regulated in Articles 4 to 16 of Law Number 5 of 1999 concerning Prohibition of Practices. Monopoly and Unfair Business Competition. Then prohibited activities include monopoly, monopsony, market control, and conspiracy as regulated in Articles 17 to 24 of Law Number 5 of 1999 concerning Prohibition of Monopoly Practices and Unfair Business Competition.

In identifying prohibited agreements and activities, the Business Competition Supervisory Commission (KPPU) utilizes a juridical approach and an economic approach. Juridically, there are two approaches, namely per se illegal and rule of reason. The per se illegal approach prohibits an act of unfair business competition without investigating whether or not there are consequences of the act. Meanwhile, the rule of reason approach prohibits an act of business competition by looking at the consequences of the act. The difference between the per se illegal approach and the rule of reason lies in the provisions of the rule of reason approach that certain conditions must be fulfilled by business actors to prevent monopolistic practices and/or unfair business competition from occurring.

Currently, carrying out trading activities in goods and/or services is not only done conventionally but can also be done by utilizing electronic means known as e-commerce. E-commerce is currently growing very rapidly and based on Statista Market Insight data, in 2023 e-commerce users are projected to reach 196.47 million and continue to increase from year to year. This e-commerce regulation itself has been regulated in Law Number 7 of 2014 concerning Trade, Law Number 11 of 2008 concerning Electronic Information and Transactions as amended by Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2016 2008 concerning Information and Electronic Transactions, as well as Law Number 8 of 1999 concerning Consumer Protection.

There are several types of e-commerce as a strategy for buying and selling on the digital market, namely 1) Business to Business (B2B), transactions carried out between business actors and business actors. 2) Business to Consumer (B2C), namely transactions between producers of goods or services directly to final consumers. 3) Consumer to Business (C2B), business actors who offer products or services to companies. 4) Consumers to Consumers (C2C), transactions between consumers and consumers. 5) Business to Government (B2G), a derivative of

business to business only involving government agencies. 6) Government to Consumer (G2C), the government develops and implements various information technology portfolios (Yoyo Sudaryo and Nunung Ayu Sofiati 2020:76).

The existence of e-commerce certainly provides benefits to both consumers and business people. Of course, consumers can shop 24 hours a day without needing to go to a shopping store, can carry out transactions easily anywhere, and get detailed information in a very short time. Not only does it provide benefits to consumers, this also makes things easier for business actors by reducing the costs of creating, processing, distributing, storing, and retrieving paper-based information, simplifying the supply chain, faster access to information, and being able to expand the market place to domestic and international markets.

However, despite the benefits of e-commerce, there are also challenges in the form of the potential for monopolistic practices and unhealthy business competition which may occur due to very high market penetration (KPPU 2020:29). This is because the increasing development of e-commerce as a form of digital market also causes problems in terms of competition. It will create problems with interconnection agreements between providers which will lead to vertical integration which will certainly reduce the benefits of internet access competition (Sukarmi 2020:41). The existence of e-commerce as a form of efficiency in buying and selling transactions can form new markets. So this can lead to a shift in business to become data-centric where companies can control their users' data. The consequence of this development is that there are predatory pricing activities by companies for the goods/services offered to the market. Until now, there are still many indications of predatory pricing activities with various activities in e-commerce such as flash sales, live shopping, and even giving discount vouchers.

Predatory Pricing or selling at a loss is a price-setting strategy by business actors to eliminate competitors from the relevant market to maintain their position as a monopoly or dominant (Suyud Margono 2009: 111). Predatory Pricing, which sells products or services at a loss, is very profitable for consumers in the short term. After business actors eliminate their competing business actors and prevent the entry of new competitors, dominant business actors will raise prices significantly. So that the losses incurred when selling at a loss will get a profit back.

This predatory pricing practice is prohibited and regulated in Article 20 of Law Number 5 of 1999 concerning Prohibition of Monopoly Practices and Unfair Business Competition, namely:

"Business actors are prohibited from supplying goods and/or services by selling at a loss or setting very low prices with the intention of eliminating or shutting down their competitors' businesses in the relevant market, which could result in monopolistic practices and/or unfair business competition."

The approach that can be used in predatory pricing in Article 20 of Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition is the rule of reason approach. The rule of reason approach prohibits an act of unfair business competition, proven by its impact. The main focus in this approach is the material elements of the action (Devi Meyliana Savitri 2013:16). Therefore, to determine whether an act can be called an act of predatory pricing, there must first be proof of the consequences resulting from the act.

Based on the databox in the first second quarter of 2023, Shopee is currently ranked first with the highest number of visits among other e-commerce. In the second

quarter, Shopee with an average of 166.9 million visits per month rose 5.7% compared to the first quarter, followed by Tokopedia with an average of 107.2 million visits, Lazada with an average of 74.5 million visits, Blibli with an average visit of 27.1 million, and Bukalapak with an average visit of 15.6 million. In the second quarter, apart from Shopee, Blibli also increased its visits from the first quarter, up 6.6%. Meanwhile, Tokopedia fell 8.4%, Lazada fell 10.5%, and Bukalapak fell 13.8%.

As one of the e-commerce sites with the most visitors, Shopee carries out one of its marketing activities using flash sales at certain times. This flash sale is interpreted as a way to increase the desire to shop online. The strategy used by Shopee in this flash sale is very bold because Shopee can provide discounts of 90% to 99% and can even provide a price of IDR 1. However, the implementation of this flash sale is limited and is usually held on twin dates and months, such as the 10th of the 10th month which is called the 10.10 Brands Festival flash sale, the 11th of the 11th month which is called the flash sale 11.11 Big Sale-Super Flash Day, and the 12th of the 12th month which is called flash sale 12.12 Birthday Sale.

This flash sale activity is an indication of predatory pricing. If guided by the rule of reason approach, it is necessary to prove that there are consequences of flash sales, namely monopolistic practices and/or unfair business competition. However, based on the implementation time, which is only carried out at certain times, it can be said that the purpose of the flash sale is not to create unhealthy business competition. This is because carrying out predatory pricing requires a long time until competing business actors are eliminated. Then, after its competitors leave the relevant market, the dominant business actor again raises prices significantly to cover previous losses (Andi Fahmi Lubis 2017:251). Then another important element is getting rid of competing business actors as a result of predatory pricing, but the existence of this flash sale does not get rid of competing business actors, namely other e-commerce. So flash sales cannot be categorized as predatory pricing. However, flash sales have the potential to trigger monopolistic practices and unhealthy business competition, as seen from low product prices and dominant business actors.

Apart from marketing activities with flash sales, Shopee also carries out activities with a live shopping feature. Live shopping is carried out by business actors broadcasting live via sales accounts on the Shopee e-commerce site. This live shopping activity is very popular because business actors promote it interestingly and business actors immediately explain in detail the products they will be selling. The period for business actors to carry out live shopping depends on the business actor himself. The thing that differentiates shopping with live shopping from shopping without live shopping is the product price. The prices offered are relatively cheaper and very low compared to prices outside live shopping.

This live shopping feature is an alternative promotion that can be carried out by business actors. Not only do they provide cheaper prices, but during live shopping, they also provide several discount vouchers that can be used, such as free shipping vouchers and cashback vouchers. This will of course make prices cheaper and lower. In the Shopee e-commerce application, several requirements must be met to be able to do live shopping, namely: a) streaming at least 1 day/week for at least 1 hour/day. b) stream at the time chosen by the seller. c) have a minimum of 2 products with $\geq 30\%$ discount on Shopee live basket. d) upload 1 post in the feed before streaming. And e) install the reminder setting feature a maximum of 2 days before streaming.

Guided by the rule of reason approach in determining an activity that is prohibited in terms of predatory pricing in live shopping, you must prove the consequences of the action (Andi Fahmi Lubis 2017:33). By providing low prices, of course, you have fulfilled one of the elements in Article 20 of Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, namely selling at a loss, but it also needs to be proven that the consequences of these actions are the existence of monopolistic practices and/or business competition. not healthy. In carrying out live shopping activities, it does not hinder other competing business actors or exclude other competing business actors. This means that the elements of creating unfair business competition are not fulfilled. However, similar to flash sale activities, this live shopping activity cannot be categorized as an act of predatory pricing, but this act has the potential to trigger monopolistic practices and unhealthy business competition seen from the presence of low product prices and dominant business actors.

Flash sales and live shopping are two activities that have indications of predatory pricing which triggers monopolistic practices and/or unfair business competition. This predatory pricing practice is an activity that is difficult to prove. Because the potential for predatory pricing activities often occurs in the digital market, namely e-commerce and this makes it difficult to prove activities that trigger indications of monopolistic practices and/or unhealthy business competition because e-commerce is a very large industry. Of course, this is one of the challenges of the development of the digital economy in e-commerce.

Indications of monopolistic practices in the digital space are also found in the case of combining social media with e-commerce. One example is the social media TikTok, which also includes the TikTok Shop. TikTok is a social media platform that provides the possibility for its users to be able to create short videos with a duration of up to 3 minutes which are supported by music, filters, and various other creative features. Then TikTok launched a new feature, namely online shopping, called TikTok Shop on April 17, 2021. Of course, the development of TikTok Shop cannot be separated from problems in Indonesia, especially for micro and medium enterprises (MSMEs) who do business offline.

On October 4 2023 at 17:00 WIB the TikTok Shop officially closed. This is because TikTok Shop does not have a trading permit as an e-commerce platform by regulations in Indonesia. Apart from that, the merger between TikTok as social media and TikTok Shop as e-commerce has the potential to give rise to monopolistic practices as explained by Fiki Satari, Special Staff to the Minister of Cooperatives and SMEs (MenKopUKM) for Creative Economy Empowerment, who explained that there are four reasons why there is a need to separate social media and e-commerce. First, it triggers monopolistic practices because the TikTok platform can control the market, set unfair prices, and different treatment, and set discriminatory prices based on existing data. Second, the TikTok platform can manipulate algorithms because social media and e-commerce together can easily encourage foreign products to always appear so that local products become discriminated against. Third, the TikTok platform can take advantage of the large social media traffic so that it can be used as a navigation or trigger for purchases in e-commerce. And fourth, related to data protection. The purpose of the data on social media is for entertainment, not for trading.

In response to this case, Minister of Trade Regulation (Permendag) Number 31 of 2023 concerning Business Licensing, Advertising, Guidance, and Supervision of Business Actors in Trading Through Electronic Systems was issued to minimize the potential for monopolistic practices and unhealthy business competition. Currently, the existence of Minister of Trade Regulation Number 31 of 2023 will make it difficult for the TikTok platform to compete in the digital market because the TikTok platform requires large costs to attract consumers. Then the rules for social commerce can only promote goods and services and are prohibited from providing payment facilities and buying and selling transactions. This was also clarified by the Minister of Trade, Zulkufli Hasan.

Coinciding with National Shopping Day 12.12, TikTok Shop is officially active again by acquiring with Tokopedia. However, transactions are still carried out on the same platform. Meanwhile, based on Minister of Trade Regulation Number 31 of 2023, social commerce, in this case, the TikTok Shop, is prohibited from trading and is only allowed for promotions. TikTok Shop is given 3 to 4 months to immediately transfer all its trade transactions to Tokopedia. Until now, ministerial regulations alone are not enough to overcome existing indications, so a law is needed that specifically regulates competition in the digital market.

Based on existing problems in the digital space related to the unclear categories of business actors who can be said to be selling at a loss or predatory pricing in e-commerce and the combination of social media and e-commerce which triggers monopolistic practices and unhealthy business competition. This is not regulated in existing regulations, namely Law Number 5 of 1999 concerning The Prohibition of Monopoly Practices and Unfair Business Competition. So this makes these regulations weak and creates legal uncertainty.

2. Reformulation of appropriate digital market regulations to prevent monopolistic practices and unfair business competition.

Based on the regulatory weaknesses of Law No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition regarding indications of monopolistic practices in the digital space, giving rise to legal uncertainty. Meanwhile, in the formation of legal regulations, legal certainty is one of the foundations of a basic legal value. According to Legal Theory, Gustav Radbruch suggests that there are three aspects of legal value, namely justice (philosophical), certainty (juridical), and benefit to society (sociological). Justice is a treatment that is fair, and impartial, takes the right side, is not biased, does not harm anyone, and provides equal treatment to each party by the rights they have. Legal certainty means that the provisions and decisions of judges must be based on rules that are clear, consistent, orderly consequential, and free from influence by subjectivity. Meanwhile, usefulness means that the law must provide benefits for every community that needs it, both for parties who feel disadvantaged and parties who feel they have not been disadvantaged. Both parties must be able to make every legal decision (Hari Agus Santoso 2021:329).

In Law No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, there are several indications of monopolistic practices in the digital space. However, this regulation does not specifically regulate it and the current regulations regulate more conventional markets so there is incompleteness. There are weaknesses in Law No. 5 of 1999 concerning the Prohibition of Monopolistic

Practices and Unfair Business Competition, the category of business actors who sell at a loss in e-commerce is unclear, this lack of clarity creates legal uncertainty, according to Utrecht, legal certainty contains two meanings, namely: First, the existence of general rules makes individuals aware of their actions. what can or cannot be done. Secondly, in the form of legal security for individuals from government arbitrariness because with general rules, individuals can know what the state can impose or do on individuals (Romi Haryono 2019:94).

One of the countries that already has regulations regarding digital markets is the European Union with the Digital Markets Act (DMA). DMA is a law regarding the regulation of online platforms or digital markets. Along with the Digital Services Act (DSA), this law is one of the two main pieces of legislation aimed at such platforms. The existence of this DMA outlines its implications for competition, technology companies in the United States, European economic growth and innovation, and transatlantic relations.

DMA aims to make markets in the digital sector fairer and contestable. There are “gatekeepers” or “guardian” arrangements as large digital platforms that provide core platform services, such as app stores, and messaging services. Gatekeepers here as control guardians of the digital economy must comply with obligations and what is prohibited. After the enactment of this Law, the commission has the right to appoint gatekeepers for core platform services. With the DMA, the European Union believes that strict regulation of large technology companies will result in more competition and choice, greater innovation, better quality, and lower prices.

Several countries have now begun to develop similar laws in their own countries, and perhaps other countries will begin to develop them. The rules related to gatekeepers as guardians of the digital economy could be good guardians if implemented also in Indonesia. Bearing in mind that gatekeepers themselves have obligations so that they are in line with the DMA's goals in the European Union to make markets in the digital sector fairer and healthier. So recommendations for regulatory formulations related to gatekeepers in realizing healthy business competition could become one of the reforms in digital market laws in the future.

With the development of e-commerce and social media as well as all existing technology and various activities in the digital market, this has triggered monopolistic practices and unhealthy business competition. According to the Minister of Cooperatives and SMEs (MenKopUKM), current regulations are not strong enough to regulate the digital market in Indonesia. So it is time for the government to issue more specific regulations related to digital market regulation in Indonesia.

CONCLUSION

From the discussion explained above, there are weaknesses in the regulation of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition regarding indications of monopolistic practices in the digital space related to the unclear categories of business actors who carry out selling at a loss or predatory pricing in e-commerce. Flash sales and live shopping marketing activities cannot be categorized as prohibited activities, however there are sales at low prices, thereby triggering monopolistic practices and/or unfair business competition. And the merger between social media TikTok and e-commerce TikTok Shop has triggered monopolistic practices. Based on these weaknesses, the government needs to issue regulations specifically related to digital markets and develop formulation

recommendations based on the Digital Markets Act regulations in the European Union which create "gatekeepers" as guardians of the digital economy to create a healthy market.

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