A NEW APPROACH IN CROSS BORDER CASES - REGULATION (EU) NO 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 20 MAY 2015 ON INSOLVENCY PROCEEDINGS (RECAST)?

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Abstract

Following numerous attempts to recast Regulation (EC) No 1346/2000 on insolvency proceedings, the appearance of EU Regulation 2015/848 (recast) aims to solve the problems encountered in practice regarding rules establishing international jurisdiction in opening the main proceedings but preventing also fraudulent forum shopping , new ways to coordinate of insolvency proceedings relating to the same debtor or to several companies belonging to the same group, new design for secondary proceedings and also a more accessible way for lodging claims and obtaining information about cross border proceedings .At last, is also important to understand the need of the extension of the scope of this Regulation to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs.

Keywords: *Recast Regulation, COMI, secondary proceedings, groups of companies, publicity of proceedings*

Introduction

The phenomenon of international insolvency which determines internal legislator's approaches combined with the European legislator's logic or model norms developed by international bodies such as UNCITRAL, faces many regulatory problems because, beyond the accuracy of scientific research tools and methods and the fairness of the results of this research both at a national and a global level, especially regarding the free movement of persons, goods and services, it will always be impossible to predict entirely the attitude of the human factor and the way they understand to play the role they can find themselves in an insolvency proceeding or in related contexts, because, why shouldn't we admit that, the good faith, the speculation, the attempt to obtain, regardless of the means of a more favorable position, the constructive attitude of rescuing the joint contractor who is in a state of financial difficulty, are behaviors of meaning, even if sometimes condemnable from the perspective of positive law.

Council Regulation (EC) no. 1346/2000 of May 29, 2000[1] on insolvency proceedings(referred to in this paper as **Regulation**) succeeded in establishing a legislative framework for cross-border insolvency procedures being necessary, at an European level and in order to ensure a proper functioning of the internal market, at the level of the European Union, to introduce an instrument leading to an effective approach to the measures to be applied to the patrimony of an insolvent debtor whose activity has a cross-border effect.

This article proposes a centralized listing of problems which arose during the implementation of Council Regulation (EC) no. 1346/2000 and also highlighting solutions identified and introduced through the new version of the Regulation on Insolvency Recast Regulation 2015/848 (the "**Recast Regulation**[2]"), pointing out the advantages of these new provisions.

After 10 years of application of the European Insolvency Act (the Regulation is applicable as of 31 May 2002), the Commission has analyzed its practical effects and considered it necessary to amend for the reasons that will be detailed below. However, before analyzing these considerations, it must be mentioned that, besides technical corrections, the proposals came amid a deep economic crisis which led to a change of attitude at the level of the European Union. towards firms in difficulty and debtor's good faith[3].

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[1] Official Journal L 160 , 30/06/2000 P. 1.

[2] Published by the European Parliament and Council on 20 May 2015, came into force on 26 June 2015 and applies to relevant insolvency proceedings from 26 June 2017, Official Journal L 141 on 5 June 2015.

[3] The European Commission has included in its Work Program for 2012 the revision of the Insolvency Regulation in line with the review clause foreseen in Article 46 of the Regulation, the revision being in line with the Europe 2020 Strategy with the Small Business Act, with the Annual Growth Survey 2012 and the Single Market Act II, but it is important to remember, as is apparent from the very working document of the Commission Staff that accompanied the proposal for a revision of the Regulation - available at http://eur-lex.europa.eu / Legal / content / en / ALL / ies = CELEX: 52012SC0417, the fact that in the period 2009-2011, on average, approximately 200,000 bankruptcies were recorded annually at the European Union level. In this context, all communications from European bodies have always referred to a second chance for an honest entrepreneur - see 'A Second Chance for Entrepreneurs: Preventing Bankruptcy, Simplifying Bankruptcy and Supporting Business Re-launch,' ' Report of the Expert Group, European Commission, DG Enterprise and Industry, January 2011, Communication from the

The following categories of issues have been identified, and their enumeration is to be followed in the present approach by the amendments introduced in the Recast Regulation.

1. Lack of provisions regarding pre-insolvency procedures and debt discharge procedures for individual debtors.

Updating national laws on insolvency involved, in many Member States, including in the field of regulation the pre insolvency procedures, but these procedures are not included in the Annex A of the Regulation. If such methods are not covered by the Regulation, their effects will not be recognized at a European level. Thus, there will be no suspension of individual enforcement actions against the company, the procedures that do not involve the appointment of a liquidator but in which the debtor remains in possession of its assets, are not recognized at the level of the European Union, foreign creditors would not be willing to engage in restructuring negotiations, all of which lead in the vast majority of cases to the impossibility of reorganizing the debtor and implicitly to the impossibility of saving jobs.

In addition, regarding the insolvency of individuals, it was found that the non-inclusion of insolvency proceedings of individuals within the scope of Regulation blocks the possibility to obtain a discharge of debt, the debtor still remaining liable to foreign creditors, so that the honest entrepreneur cannot get second chances, which is in contradiction with the EU policies in the field of entrepreneurship.

In this context it was necessary to amend the scope of the Regulation, which stipulated in the 1st article 1st paragraph that it was applicable to collective proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.

Through the Recast Regulation, the 1st article was amended to include procedures that do not involve a liquidator but in which the debtor's assets and activities are subject to control or supervision by a court[4]. Furthermore, the procedures in which the debtor remains in possession of his assets and manages his / her business without being appointed a liquidator enjoys recognition at EU level. Additionally, there are procedures that allow the debtor to reach an agreement with its creditors in a pre-insolvency stage.

Another important element stated in the 7th recital of the Recast Regulation is the one inducing the method of interpretation of the Regulation in cases of regulatory gaps between it and Regulation (EU) no. 1215/2012 of the European Parliament and of the Council[5] insofar as bankruptcy, insolvency or other legal proceedings, amicable settlements, concordances or similar procedures and actions relating to such procedures are being excluded from the scope of this last Regulation. As stated in the final sentence of the 7th recital, 'the mere fact that a national procedure is not listed in the Annex A to this Regulation should not lead to its entry into the scope of Regulation (EU) No. 1215/2012 ".

2. Center of main interests and difficulties in determining jurisdiction to open insolvency proceedings. Identifying the most favorable legal forum ("forum shopping")

The Regulation does not explicitly required the court opening insolvency proceedings to examine international jurisdiction, and there is a risk that several main proceedings may be opened in parallel.

COMI really provides treating the case in a jurisdiction with which the debtor has a genuine link rather than in a jurisdiction chosen by the founders, COMI's approach being consistent with international developments, being chosen by UNCITRAL also as a standard review in its Model Law on cross-border insolvency. In order to determine the COMI, however, it is necessary to circumstantiate it, both for the legal entity and for the individuals(exercising or not an independent business or professional activity) and to clarify the ways in which the presumption regarding the identity between COMI and the registered office(principal place of business/habitual residence) can be rebutted.

As for the forum shopping, it should be noted that not all relocations are abusive and they can be considered a legitimate way of exercising the right to free settlement, all the more so as the differences in the regime between the national laws on insolvency are unquestionable. Establishing the fraudulent intention in delocalization is, indeed, a problem because there is a fine line between the flexibility of a national regime that would allow reorganization and call for a more favorable regime to the detriment of creditors who can

Commission to the European Parliament, the Council and the European Economic and Social Committee 'A New European Approach to Business Failure and Insolvency' - http:Eur-lex.europa.eu/legal content/RO/TXT/HTML/?uri=CELEX:52012DC0742&from=RO.

[4] This Regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:

(a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;

(b) the assets and affairs of a debtor are subject to control or supervision by a court; or

(c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b)

Where the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities.

[5] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (JO L 351, 20.12.2012, p. 1)

no longer execute their claims. In addition, all foreign creditors should be able to challenge the decision to open the proceedings as the court or the insolvency practitioner appointed should inform the known creditors who have their domicile or habitual residence in another Member State of the opening of the main proceedings.

According to the 13th recital of the Regulation, the "center of main interests" must correspond to the place where the debtor ordinarily carries out his interests and may therefore be verified by third parties, 3rd article (1) pointing that "In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary."

The experience of the Eurofood or Interedil[6] cases has led to the introduction of additional elements to help determine the COMI so that the content of the Recast Regulation both in the recitals and in the articles on the core of the main interests has been clarified in a fairly large proportion. Therefore, according to the 30th recital, as for a company, the presumption of the identity of the COMI within its registered office may be reversed if the central administration of the company is located in another Member State than that in which the registered office is located and if a comprehensive assessment of all the factors settles, in a verifiable manner by third parties, that the real management and supervisory center of the company and the center for the management of its interests are located in that other Member State. In the case of an individual not exercising an independent business or professional activity, it should be possible to overturn this presumption if the major part of the debtor's assets is outside the Member State where the debtor is habitually resident, or where it can be established that the main reason for the move was the opening of an insolvency proceeding before the new court and if such an opening would significantly affect the interests of the creditors whose business with the debtor took place before the move, indicating that the latter two hypotheses are provided as an example. The amendments also referred to the 3rd article, regarding the international competence, which states in the drafting of the Recast Regulation that "the center of the main interests is the place where the debtor usually manages his interests and which is verifiable by third parties", maintaining the presumption of the place where the registered office is located. In addition, in the same article determinations are added to the COMI for individuals exercising independent or professional activities (the principal place of business in the absence of evidence to prove the opposite), respectively for the individual (the place where the person has his/her ordinary residence in the absence of evidence to prove the opposite).

On the other hand, through the 4th article (Examination as to jurisdiction) and 5th article (Judicial review of the decision to open main insolvency proceedings) has been regulated the ex officio examination by the court of the jurisdiction pursuant to Article 3, and also the possibility that the debtor or any creditor may appeal in court the decision to open the main insolvency procedure for reasons of international jurisdiction.

Regarding the prevention of fraudulent use of the search for a more favorable lex fori , two temporal limitations have been brought forward, as we have seen in recital 31st of the Recast Regulation but also in the 3rd article, paragraph 1 thereof. Thus, the presumption that the center of main interests is the place where the registered office is located, the principal place of business or the habitual residence should not apply if, in the case of a company, legal entity or, respectively, individuals carrying on an economic or professional activity independently, the debtor has moved its registered office or principal place of business to another Member State within three months prior to the request for opening of the insolvency proceedings or, in the case of an individual who is not self-employed nor carries on a professional activity, if the debtor has moved his habitual residence to another Member State within six months prior to the request to open the insolvency proceedings(the debtor may present additional evidence in support of the idea that the new COMI is the real one) .

3. The matter of defining secondary insolvency procedures and coordinating them with the main procedure.

According to the 3rd article of the Regulation, when a main insolvency proceeding is opened, any subsequent insolvency proceeding initiated later on is a secondary winding-up procedure. This regulatory mode led to shortcomings in the restructuring of companies that have branches in several Member States. Although the secondary procedures were designed to protect the interests of local creditors, they often broke away from their purpose, sometimes being opened for the simple reason that the debtor had a seat on the territory of that state, without at least appreciating the opportunity to start such a procedure in a context in which a continuation of the debtor's activity would have been more profitable, including for local creditors, than a winding-up of assets located on the territory of that state. Also, it was necessary to increase the role of the liquidator in the secondary procedure and to maintain a continuous contact with the court and the liquidator in the main proceedings, as well as to establish a duty of cooperation between the courts of the two procedures.

From the perspective of the Recast Regulation, we will analyze only the two situations in which the court seized with the request to open secondary insolvency proceedings may refuse or postpone the

[6] Eurofood IFSC Ltd.C-341/04, Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA C-396/09, http://curia.europa.eu.

opening of the secondary proceedings at the request of the insolvency practitioner in the main proceedings. Thus, with the approval of the local creditors, the insolvency practitioner has the possibility to give them an undertaking that they will be treated as if a secondary insolvency proceedings had been opened (recital 42nd and art 36th). The assets would be considered as part of a subcategory of the insolvency estate in the main insolvency proceedings, following that, at the distribution, the insolvency practitioner in the main proceedings will comply with the priority rights that would have been borne by the creditors if a secondary insolvency procedure had been opened on the territory of that State. In this case, the court may refuse to open these secondary proceedings if it considers that the undertaking protects the interests of local creditors.

In a second situation (recital 45th and article 38th), the court is given the possibility to temporarily suspend the opening of a secondary insolvency proceedings when a temporary stay of the individual enforcement proceedings in the main insolvency proceedings had been granted in order to maintain the effectiveness of this suspension from the main proceedings. The period of suspension may be set for a maximum of 3 months, provided that adequate measures are in place in order to protect the local creditors.

It is also necessary to say, in regard of the new treatment of secondary proceedings, that the requirement that the secondary procedure be a winding-up procedure has been removed from the text of the Recast Regulation so in this context , the possibility given to the court, notified with a request to start a secondary proceedings , to open, at the request of the practitioner in insolvency of the main proceedings, a type of insolvency procedure listed in the Annex A other than the originally requested, will ensure a higher level of protection of the interest of local creditors and better consistency between the main and the secondary proceedings (art. 38th).

Additional provisions have been added in order to regulate the cooperation and communication between insolvency practitioners designated in the main and secondary insolvency proceedings (art. 41st), including the cooperation in the form of agreements or protocols. It has been legislated also according to art. 42nd, the cooperation and communication between courts, in several forms such as the coordination regarding the appointment of insolvency practitioners, the coordination of the administration and supervision of the debtor's assets and activity, the coordination of the court hearings and, last but not least, the cooperation and communication between the insolvency practitioners and the courts (art. 43rd). In the new regulation, we can only hope that the additional costs generated by the cooperation, language barriers and national procedural rules that prevent information disclosure will no longer be such an important source of difficulties in cooperation.

4.The insolvency of a group of companies

The proposal to amend the Regulation creates a specific legal framework for the insolvency of companies belonging to a group, while maintaining the approach underpinning the Regulation currently in force, according to which each company is treated separately. It introduces the obligation to coordinate insolvency proceedings concerning various companies of the same group by imposing an obligation on the liquidators and the courts involved to cooperate, similar to the duty of cooperation established in regard of the main and secondary proceedings. Liquidators should, in particular, exchange information and cooperate in drawing up a rescue or reorganization plan if appropriate. The opportunity to cooperate through protocols is referred explicitly to confirm the practical importance of these instruments and further promote their use. The courts should also cooperate by exchanging information, coordinating, as appropriate, appointing liquidators which must cooperate with each other and approving the protocols submitted by the liquidators. In addition, each liquidator will have a procedural status with respect to the other member companies of the same group with the right to participate in the creditors' meetings.

According to Recital 53rd of the Recast Regulation, the introduction of rules on insolvency procedures for groups of companies should not restrict the possibility for a court to open insolvency proceedings in one jurisdiction for several companies belonging to the same group if the court detects that the center of the main interests of these companies is in a single Member State. In order to maximize the results of the cooperation and communication in the procedures concerning those companies making up a group, according to 61st art., group coordination procedure may be requested before any Court having jurisdiction in insolvency proceedings of a member of the group by an insolvency practitioner appointed in open insolvency proceedings in relation to a member of the group.

According to the 66th article, where at least two-thirds of all insolvency practitioners appointed in insolvency of the companies in the group agree that the court of another Member State which has jurisdiction is the appropriate court for the opening of the group coordination procedure, that court has exclusive jurisdiction. Such a procedure shall be initiated if its opening is appropriate to facilitate the effective administration of insolvency proceedings concerning the members of the group and if no creditor of any member of the group whose participation in the procedure is expected is not likely to be disadvantaged by including that member in such a procedure.

5.Information for creditors and lodgement of claims

Although the Regulation includes an entire chapter aimed to informing creditors and registering requests for admission of claims (Chapter IV, Provision of information for creditors and lodgement of their claims) the set of rules relating to the right to register requests for admission of claims, the obligation to inform creditors, the content and the form of the request for the transmission of claims do not solve concrete problems linked, on one hand, to the differences between the national legal systems regarding the way in which insolvency proceedings are opened in the territory of a Member State and, on the other hand, to the lack of timely information on the opening of the procedure, the absence of which may lead to the loss of the possibility of recovery of the claim by registering it after the expiry of the time limits provided by the national law. Additionally, the costs of translation of documents or legal representation before a court in a Member State for filing an application for admission of claim are still an issue.

The reconsideration of this chapter in the Recast Regulation brings clarifications on the form of the notification of opening the procedure that will be sent to the creditor(it shall bear the heading 'Notice of insolvency proceedings' in all the official languages of the institutions of the Union), respectively on the standard claims form , indicates the information to be included in their content and makes the explanations regarding the costs. First of all, the standard forms will be available in all of the official languages of the European Union, thus reducing translation costs. Secondly, foreign creditors shall be offered at least 30 days from the date of publication in the insolvency register of the State where the notice of opening of the insolvency proceedings was opened, to file applications for admission of claims, regardless of the shorter time limits applicable under national law. Also, creditors will be informed if the claim is challenged and will be able to provide additional evidence on the existence and amount of the claim.

The Recast Regulation sets up, within the content of the 24th art., for a better information of creditors and for the prevention of the opening of parallel insolvency proceedings, the obligation of the Member States to publish a minimum set of information regarding the date of the opening of proceedings, the reference number of the case, the type of proceedings (main or secondary), the type of debtor, the important elements of the case in question (the deadline for filing the request for admission of claims, the deadline for lodging the appeal after the pronouncement of the decision of opening), the closing date of the procedure.

The information will be stored in publicly accessible electronic registers, following that through the European e-Justice portal shall be proceeded to the interconnection of such registers. It is also worth noting that according to article 27th paragraph. 1, the set of mandatory information will be available free of charge. With regard to the publicity on the opening of proceedings, according to the 28th article, paragraph 1, the insolvent practitioner may request that the notification of the decision to open the insolvency proceedings and, if appropriate, the decision by which the insolvency practitioner has been appointed, be published in any other Member State where the debtor has an establishment, in accordance with the publication procedures applicable in that Member State. In this context, honoring of a obligation for the benefit of the debtor has been regulated by reference to the time of providing the publicity stated in the 28th article. According to the 31st article where an obligation has been honoured for the benefit of a debtor(and not of the IP) who is subject to insolvency proceedings opened in another Member State, the person honouring the obligation shall be deemed to have discharged it if he was unaware of the opening of the proceedings (this person shall be presumed, in the absence of proof to the contrary, to have been unaware of the opening of insolvency proceedings if executed such liability before the publication provided for in the 28th article).

Conclusions

This article aims not to be critical of the changes made by the Recast Regulation, its intentions are to represent the first part of a series of comments on these changes. The authors considered it appropriate in this introduction to stop on the provisions that were the most important points in the list of shortcomings noted by the practice in applying the Regulation, specifying the current texts and also those which become applicable by the coming into force of the Recast Regulation.

However, we cannot conclude without leaning on the presented texts, raising a few questions or formulating some conclusions imposed by the very meaning of these provisions.

First of all, it should be said that the scope of the Recast Regulation imposes certain restrictive conditions even if it tries to resolve the failure to include particular insolvency prevention procedures on the list of those falling under cross border rulings. Thus, according to the 1st paragraph of the 1st article of the Recast Regulation, the procedures must be collective (according to the 2nd article 1st paragraph, procedures involving all creditors of the debtor or a significant part thereof, provided that in the latter case the proceedings do not affect the claims of creditors not involved in those procedures), public (such as confidential preventive procedures as for the ad hoc mandate of Romanian Law will not fall under the scope of the rule), based on the insolvency law. Only in the framework of these collective, public, based on the insolvency law procedures and only for the purpose stated in the European act, namely salvage, debt adjustment, reorganization or liquidation, are valid the assumptions setting out in points a, b, c of the 1st paragraph of this article.

In the presented hypothesis we can ask ourselves how to reconcile the content of the" collective procedure" definition that can only concern a significant part of the debtor's creditors with the temporary stay of an individual execution procedure granted, for example, according to the text of letter c) of the 1st paragraph of the 1st article, by the effect of the law, in the conditions under which the final sentence of the 2nd article (1) states that procedures must not affect (what will the interpretation of the term „affect" be in practice?) the rights of creditors who are not involved in the collective proceedings.

In order to avoid a possible tendency to expand the scope, in the context of the same 1st article, it should be added that the 16th Recital of the Recast Regulation clarifies that procedures based on the general law of the companies which is not exclusively elaborated for insolvency matters, should not be considered to be based on insolvency law.

Regarding the way of establishing COMI according to the provisions of the 3rd article of the Recast Regulation, the center of the main interests is the place where the debtor usually manages his interests and is verifiable by thirds. The Regulation indicates in its 3rd article 1st paragraph the administration of the interests and not the place of the proper location of the headquarters as the main determinant. However, the assumptions made regarding COMI raise issues particularly within the situation of individuals who are self-employed or carrying on professional activities or in the situation of any other individual because it is presumed that the center of the main interests is the main place of activity or the place where the usual residence is located.

If in the case of a legal entity the COMI is presumed to be the place where the registered office is located, till proven contrary, which is relatively accessible to the third party verification, in the other two cases, the verification is burdensome, especially since there are no criteria available at the level of the members states for this sort of identification.

In addition, the assumption that the center of main interests is the principal place of business, respectively the habitual residence, applies only if no movement occurs to another Member State in the 3 months respectively 6 months preceding the request for the opening of the procedure. However, in the case of a move will the main criterion be applied, namely the place where the debtor usually manages his interests and is verifiable by third parties? Correspondingly, the 28th Recital of the Recast Regulation induces the idea that, when determining whether the center of interest of the debtor is verifiable by third parties, creditor's perception of the place where the debtor manages his interests is of greater importance, in the case of the relocation of the center of main interests, being necessary to inform creditors at the most appropriate time of the new place where the debtor will carry on his activities.

Regarding the individual who does not carry on an independent professional or commercial activity, according to the 30th recital, overturning the presumption of COMI is done and exemplified as follows: " In the case of an individual not exercising an independent business or professional activity, it should be possible to rebut this presumption, for example where the major part of the debtor's assets is located outside the Member State of the debtor's habitual residence ", in which case we move away from the "management of interests" as the main determinant.

One last thing that we would like to mention is the one related to the secondary insolvency proceedings, namely that related to the so-called "secondary synthetic proceedings" whose mechanism is implemented by the 36th article of the Recast Regulation. While beneficial, the unilateral undertaking that the insolvency practitioner appointed makes in the main proceedings will raise a number of questions. Although it has the nature of a unilateral act, this commitment must be approved by the local creditors. Also from this perspective how much time is needed for its approval and how will the designated practitioner carry out the identification of assets and the communication with "the known" local creditors.

Moreover, according to the 36th article 1st paragraph, the undertaking specifies the "factual premises" on which it is based, notably on the value of the assets in the Member State referred, without any further indication as to their value, the only reference regarding not the value but the time of setting the assets is stated in the 36th article 2nd paragraph, which at its final sentence states that the relevant moment for the establishment of the assets is the moment of the undertaking. In addition, the question arises as to know how the known local creditors will be treated in comparison with the creditors in the main proceedings considering the provisions of the 36th article 1st paragraph, which take into account the fact that when distributing those assets or the income originated from their sale, there are to be respected the rights of distribution and priority under national law of which the local creditors would have benefitted from if there had been initiated a secondary insolvency proceedings in that Member State.

The amendments brought by the new Regulation are more than welcome after those years when the lack of provisions had been solved by interpretations of the practice and of the courts. Without considering that the problems stop when its implementation starts, we appreciate that at least at the level of an immediate regulation the European act represents a new path, more adapted to the market's requirements of our days.

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