Date: Early 2019

To: Mr. Benedict Maximov

***Privileged and Confidential***

***Subject to Attorney-Client Privilege***

Dear Mr Maximov

***Advice on Efwon Group Restructuring & Potential Investment by KuasaNas***

1. **Introduction**
2. You have asked us to consider the following:
3. how to facilitate the proposed fresh funding/investment by KuasaNas (in excess of USD 200 million annually) into the Efwon Group, which is made up of the following entities:
4. Efwon Investments, incorporated under the laws of Delaware;
5. Efwon Trading, incorporated under the laws of England and Wales;
6. Efwon Romania, incorporated under the laws of Romania, and a wholly-owned subsidiary of Efwon Trading.

1. Whether one or more formal insolvency proceedings will have to be commenced, and if so, in which jurisdiction(s);
2. the likely impediments (if any), as well as advantages or disadvantages, associated with the proposed approach in (b) above;
3. how the European Insolvency Regulation and/or the UNCITRAL Model Law (“**Model Law**”) would assist / affect implementation of the proposed approach; and
4. the possible effect of Brexit, if any.
5. In preparing this advice, we have assumed that this advice is being sought as of early 2019, and that our client is you, Mr. Benedict Maximov (rather than any of the specific companies in the Efwon Group). In that regard, we understand that you are the 100% shareholder of Efwon Investments, and that the USD 250 million syndicated bank loan obtained by Efwon Investments is secured partly on your personal property (located around the world), worth approximately USD 75 million. Therefore, the Restructuring Proposal is designed to protect your *personal* position, in addition to being a restructuring of the Efwon Group.
6. Separately, this advice is also subject to the key assumption that the relevant contracts for the KuasaNas funding will be approved by the Malaysian government, given that the KuasaNas funding is critical to the restructuring of the Efwon Group.
7. This advice is structured as follows:
8. We set out first, based on your instructions, what we understand to be the key objectives of the restructuring. These objectives guide and dictate the detailed approach laid out in the proposed approach for the restructuring (the “**Restructuring Proposal**”).
9. Next, we set out our detailed proposed strategy under the Restructuring Proposal, taking into account the key objectives.
10. **Key Objectives**
11. Given that the KuasaNas funding is critical to the restructuring of the Efwon Group, it is important to highlight the conditions for KuasaNas’ funding:
12. KuasaNas would like to acquire a majority stake (51%) in the Efwon race team;
13. The Efwon race team is to be relocated to Malaysia, where a deal could be secured to use the Sepang GP race track for practice and training purposes and new drivers sufficiently qualified to obtain Super Licences could be engaged; and
14. The insolvency issues affecting the Efwon Group are to be resolved before the deal can go ahead. We understand this to mean that KuasaNas would like to invest into a “*clean*” structure with no outstanding debts, or at the very least, a structure that has a sustainable debt load.
15. In relation to paragraph 5(c) above, one of the key considerations here is the ongoing litigation claims brought by the drivers against Efwon Romania. Given that there is significant uncertainty over the amount of time it would take to resolve the litigation, as well as the potential contingent liability for “*substantial compensation*”, this issue will likely need to be resolved ahead of KuasaNas’ funding. Further, the existing freezing injunctions will also prevent the company’s assets and income from being freely dealt with as part of any deal with KuasaNas.
16. In addition to the above, the Restructuring Proposal seeks to minimise or limit your personal exposure arising out of the security you gave to the bank syndicate over your personal properties worldwide, as well as preserve your equity interests (as much as possible) in the Efwon Group.
17. **Executive Summary**
18. We propose the following approach:
19. All three of the Efwon Group corporate entities file petitions to commence US Chapter 11 proceedings;
20. If deemed necessary, that you (i.e., Mr Maximov) also commence US Chapter 11 proceedings;
21. As part of the US Chapter 11 process:
22. there be a sale of Efwon Romania’s assets pursuant to Section 363 of the US Bankruptcy Code[[1]](#footnote-1), free of encumbrances and claims, to a newly incorporated company in Malaysia (“**NewCo**”);
23. the consideration from the sale of Efwon Romania’s assets be channelled by Efwon Romania up the corporate structure, and used to effect compromises with the creditors of Efwon Trading and Efwon Investments (pursuant to a US Chapter 11 reorganisation plan);
24. the US Chapter 11 reorganisation plan will entail part repayment of the debts owning to the creditors of Efwon Trading and Efwon Investments, with the remaining outstanding debt to be converted into equity in the NewCo;
25. the bank syndicate will waive all rights against you personally; and
26. the US Chapter 11 reorganisation plan is to be subject to the condition precedent that the KuasaNas funding passes review by the Malaysian government;
27. Upon commencement of the US Chapter 11 proceedings by way of voluntary petition, immediate steps be taken to recognise the US Chapter 11 proceedings in Romania, pursuant to the UNCITRAL Model Law. Subsequently, that the UNCITRAL Model Law also be used to recognise in Romania the effect of any US Court order approving the Section 363 sale;
28. The NewCo is to be funded by an initial equity injection by KuasaNas of at least USD 200 million, with a further commitment by KuasaNas to provide further funding on an annual basis. The further funding by KuasaNas in subsequent years will be by debt secured on the future revenues of the NewCo;
29. KuasaNas will be given 51% equity in the NewCo. The remainder of the 49% will be allotted to the existing creditors of Efwon Investments (*i.e.,* the bank syndicate, with a cascading structure to reflect the different debt seniority within the syndicate), the Monaco-based lender, and with a very small equity stake for you (i.e., Maximov) (assuming the creditors agree);
30. The bulk of the initial initial equity injection from KuasaNas (of at least USD 200 million) into the NewCo will be used to purchase Efwon Romania’s assets (primarily the F1 constructor licence, the commercial rights/licences and stock (including the relevant machines)) (the “**Consideration**”);
31. Part of the Consideration will be held in escrow by Efwon Romania (or the relevant liquidators/insolvency administrators of Efwon Romania) to satisfy any potential successful litigation claim by, or any possible settlement with, the Romanian drivers. The remainder of the Consideration will be used to reffect part repayment to the creditors of Efwon Trading and Efwon Investments as part of the US Chapter 11 reorganisation plan.
32. One of the key assumptions in the Restructuring Proposal is that the transfer of the F1 constructors licence and the other commercial rights and licences by Efwon Romania to NewCo is possible, and will not lead to the relevant licences and rights being lost[[2]](#footnote-2);
33. Upon successful implementation of the US Chapter 11 reorganisation plan, Efwon Investments and Efwon Trading are to be wound up. Efwon Hong Kong will enter into new contracts with the NewCo to deal with sponsorships.
34. It is envisaged that the corporate and financial structure will be as set out in **Appendix A** upon successful implementation of the Restructuring Proposal.
35. We explain further below.
36. **Detailed Restructuring Proposal**
37. **Applications for US Chapter 11 Relief**
38. **Jurisdiction of the US Court**
39. A voluntary petition for US Chapter 11 relief can be filed by each one of the Efwon corporate entities and constitutes the entry of an “order for relief” opening the case.[[3]](#footnote-3)
40. So long as the relevant entity has “property” in, or significant contacts with, the United States, this is sufficient to satisfy the eligibility requirement for the US Courts to take jurisdiction over the relevant Chapter 11 voluntary application.[[4]](#footnote-4)

*Efwon Investments*

1. Efwon Investments, being incorporated in the US (*i.e.,* in the State of Delaware), is eligible to apply for Chapter 11 relief.[[5]](#footnote-5)

Efwon Trading

1. As for Efwon Trading, a UK incorporated company, it must be shown that it either has property or significant contacts with the United States. While Efwon Trading does not presently appear to have any property in the United States, the property requirement may be satisfied by minimal or *de minimis* property in the US, including a small balance in a bank account or retainers paid to US professionals. Further, a case can be made that US Chapter 11 jurisdiction over Efwon Trading is necessary as it is an integral part of the group restructuring of the Efwon group, and the best interests of Efwon Trading and its creditors would be best served by the US Court taking jurisdiction.[[6]](#footnote-6)
2. As a caveat to the above, given that the only creditor of Efwon Trading (other than the intercompany debt owed to Efwon Investments) is the Monaco-based lender, it might not be necessary for Efwon Trading to commence any formal proceedings if the Monaco-based lender is amenable to a consensual restructuring. If so, then there is no need for a moratorium restraining legal or enforcement action by the Monaco-based lender, which would disrupt the group’s restructuring plan. Instead, a standstill agreement can be entered into between Efwon Trading and the Monaco-based lender. Nor would there be any point in effecting a reorganisation plan under US Chapter 11 as there is only one (3rd party) creditor.
3. For now, however, given that Efwon Trading sits between Efwon Romania and Efwon Investments in the corporate structure[[7]](#footnote-7), we have devised the Restructuring Proposal on the basis that Efwon Trading would be put into the US Chapter 11 process as well, to minimise the *risks* of enforcement action from the Monaco lender, as it would be disruptive to the restructuring plan.
4. Additionally, we have assumed that the relevant loan agreement with the Monaco lender is not governed by English law. Otherwise, there may be an issue with obtaining a valid discharge of the debt under English law in light of the rule in *Gibbs[[8]](#footnote-8)*, despite any US Court confirmation of the reorganisation plan. That said, as highlighted above, this concern is likely to be more theoretical than real, given that the Monaco lender is the only creditor of Efwon Trading, and any compromise with the Monaco lender is more likely than not to be consensual in nature, rather than via a compromise under the US Chapter 11 regime. Any such consensual restructuring agreement entered into between a debtor and its creditor will be recognised under English law.

Efwon Romania

1. As for Efwon Romania, it will likewise be possible for it to satisfy the property requirement by taking the same steps as Efwon Trading, *i.e.,* arrange for a small balance to be placed in a US bank account, or pay retainers to US professionals ahead of any Chapter 11 filing. Even more so than Efwon Trading, Chapter 11 relief for Efwon Romania is critical to the group restructuring, and it can be argued that the interests of its main creditor (i.e., Efwon Trading) would be best served if the US Court takes jurisdiction.
2. **Recognition of US Chapter 11 Proceedings in Romania**
3. Given that there is a pending insolvency application in the Romanian Court (commenced by the Romanian drivers), we will need to consider 2 possible scenarios at the time the petition to the US Court for Chapter 11 relief is filed by Efwon Romania.

Insolvency Order not yet made by the Romanian Court

1. Assuming the Romanian Court has not granted the winding up order sought by the Romanian drivers, an urgent petition for US Chapter 11 relief should be made by Efwon Romania. As mentioned above, upon the filing of the petition an order for relief is deemed to have been entered, and an estate is immediately deemed to arise, consisting of all of the assets of the company as of the commencement of the case.[[9]](#footnote-9)In the supporting papers for the petition, Efwon Romania should make full and frank disclosure of the fact of the pending insolvency application in Romania.
2. One of the immediate effects of Efwon Romania’s voluntary petition for Chapter 11 relief is that an automatic stay will arise.[[10]](#footnote-10) The automatic stay prohibits all creditors of the company (actual or contingent) from commencing or continuing litigation against the company and, theoretically speaking at least, apples to all entities, whenever domiciled, and all property of the debtor, whereover located. In other words, the automatic stay, in theory, will prohibit the Romanian drivers from continuing the insolvency application in the Romanian Courts, unless leave is first obtained from the US Court. If they fail to comply with the automatic stay, the Romanian drivers will be in contempt of the US Court.
3. That said, there are both *legal* and *practical* limitations to the effects of the US automatic stay. From a legal perspective and due to considerations of judicial comity, the US Court may have concerns about the worldwide effect of the automatic stay, in circumstances where there is already a pending insolvency application before the Romanian Court *at the time* the voluntary petition for US Chapter 11 relief is made.
4. Further, from *a* practical perspective, given that the Romanian drivers appear to have little or no contact with the US, even if they are technically subject to the automatic stay, the Romanian drivers might nevertheless decide to not comply if they come to the view that the US Courts have no personal jurisdiction over them.[[11]](#footnote-11)
5. However, the strategic value to Efwon Romania of the voluntary petition for US Chapter 11 relief goes beyond the automatic stay. Importantly, Efwon Romania should also make clear in its supporting court papers that it intends to take urgent and immediate steps to recognise the US Chapter 11 proceedings[[12]](#footnote-12) in Romania under the Romanian Insolvency Law – which implements the UNCITRAL Model Law on Cross Border Insolvency 1997 (“**Model Law**”). Romania adopted the Model Law in 2002 and the Model Law (as enacted in Romania) (the “**Romania Model Law**”) governs cross border insolvency matters involving non-EU member states.
6. Pursuant to the Romania Model Law, non-EU insolvency officeholders have the standing to apply for the relevant foreign proceedings to be recognised by the Romanian Court. The party making the application to the Romanian Court for recognition has to be Efwon Romania’s “*foreign representative*”[[13]](#footnote-13), *i.e.,* a person, including one appointed on an interim basis, authorised in a foreign proceeding (i.e., the US Chapter 11 proceedings) to administer Efwon’s Romania’s reorganisation or to act as a representative of the foreign proceeding. An interim order can be sought from the US Court appointing either an insolvency practitioner or international counsel as Efwon’s Romania’s “*foreign representative*” for this purpose.
7. Under the Romanian Model Law, recognition is a formal process and the Romanian Court is obliged to recognise the US Chapter 11 proceedings, subject to the requirement of reciprocity and Romanian public policy[[14]](#footnote-14). There does not appear to be any issues with the reciprocity requirement, as the US Courts appears to have recognised Romanian insolvency proceedings in the past.[[15]](#footnote-15) Further, to our understanding, there is nothing under Romanian public policy that would prevent the Romania Court from recognising US Chapter 11 proceedings.
8. In seeking recognition by the Romanian Court, Efwon Romania will argue that the US is its centre of main interests (“**COMI**”), and therefore its US Chapter 11 proceedings should be recognised as a foreign main proceeding. Although Efwon Romania is incorporated in Romania, and therefore cannot rely on the presumption contained in Article 16(3) of the Model Law, the place of incorporation is just a starting point and the presumption can be displaced by the presence of other factors pointing towards the US as Efwon Romania’s COMI. Some of the key factors the Court will likely look at include:
9. Whether the US is the place from which control and direction over Efwon Romania’s administration was exercised, and/or whether it is the “nerve centre” of Efwon Romania’s administration (for e.g., if the Efwon Group’s head office is in the US and all of the administrative functions of the Group, including Efwon Romania’s, is located there);

1. There is room to argue that this is the case given that you (and your team) are the persons directing the activities of each of the entities in the Efwon Group, and as an American you are based in the US. Further, while Efwon Romania’s main creditor[[16]](#footnote-16), Efwon Trading, is an UK company, it in turns obtains the bulk of its funding from Efwon Investments, a US company. In other words, it was Efwon Investments that raised the bulk of the financing for the group. Therefore, while the strict legal position under the Model Law still appears to be that each company in the Efwon group has its own COMI which is to be derived from its own individual circumstances, if the administrative seat of all of the Efwon Group companies is the US, then the US will be deemed to be the COMI of each of the companies.
2. If necessary, and subject to the issue of timing[[17]](#footnote-17), we should consider whether additional steps ought to be taken to shift more of the key administrative functions of Efwon Romania to the US ahead of the commencement of formal proceedings, in order to effect a COMI shift to the US. Any such COMI shift can be explained to the Romanian Court as constituting “*good forum shopping*”, to enable the group to take advantage of key features of the US Chapter 11 regime (such as a Section 363 sale), which will benefit all creditors by facilitating the injection of new monies (by KuasaNas) as part of the overall restructuring.
3. Alternatively, Efwon Romania can argue that its US Chapter 11 proceedings should at least be recognised as a foreign non-main proceeding, relying on many of the same factors discussed above as constituting an “*establishment*” in the US.
4. Ultimately, assuming that Efwon Romania is able to successfully obtain recognition of the US Chapter 11 proceedings, the relevant “*foreign representative*” will be able to avail himself/herself of the following important reliefs[[18]](#footnote-18):
5. obtain a stay of the pending insolvency proceedings in Romania[[19]](#footnote-19);
6. intervene in any proceedings in which Efwon Romania is party to, including the existing litigation claim brought by the Romanian drivers[[20]](#footnote-20); and
7. the assets of Efwon Romania may be entrusted to the foreign representative.
8. Article 22 of the Model Law stipulates that in granting relief, the Court must be satisfied that the interests of Efwon Romania’s creditors (including local creditors) are adequately protected before the assets of Efwon Romania will be entrusted to the foreign representative.
9. Therefore, we propose that Efwon Romania explains in its recognition application to the Romanian Court that it is seeking the release of the freezing injunction, and the right to transfer Efwon Romania’s assets to KuasaNas, only upon the successful implementation of the Restructuring Proposal (including after obtaining the necessary approvals from the US Courts for the reorganisation plan and Section 363 asset sale). The terms of the Restructuring Proposal ensure the rights of the Romanian drivers are protected as (i) Efwon Romania will be receiving the Consideration in exchange for the transfer of its assets to KuasaNas; and (ii) part of the Consideration will be held in escrow to satisfy any potential successful litigation claim by the Romanian drivers, or any possible settlement.
10. **Alternatively, Implement an Insolvency Protocol Between the Romanian and US Courts**

Insolvency Order has already been made by the Romanian Court / No time to petition for and obtain recognition of US proceedings in Romania

1. If, however, there is no time to petition for and obtain recognition of the US Chapter 11 proceedings before the making of a winding order by the Romanian Court against Efwon Romania, then Efwon Trading (as the main creditor of Efwon Romania) should take one of the following two (2) steps:
2. appear and participate in the insolvency application before the Romanian Court, and to propose its own nominee as liquidator – strategically this is to ensure that any eventual liquidator of Efwon Romania is not someone nominated by the Romanian drivers. Even if the risk may be more perceived than real, we want to ensure that any liquidator appointed over Efwon Romania will not seek to stifle the restructuring plan. We consider that the Romanian Courts ought to have stronger regard to Efwon Trading’s proposed nominee, given that it is a very significant creditor (USSD 350m), as opposed to the drivers (who are not only contingent creditors, but are opposing parties in the ongoing litigation against Efwon Romania); or
3. if Romania has fully implemented the European Directive 2019/1023 on preventive restructuring frameworks by the relevant time[[21]](#footnote-21), then Efwon Trading (qua creditor) or Efwon Romania itself (qua debtor) might wish to seek recourse under the applicable Romanian restructuring laws, including to obtain a moratorium to stay the pending insolvency proceedings on the basis that the Efwon Group is working on implementing a restructuring plan[[22]](#footnote-22).
4. Either way, given that there will be concurrent and parallel insolvency proceedings in the US and Romania involving different entities in the Efwon Group, we propose that the appropriate applications be made to the US and Romanian Courts for a Court order implementing an insolvency protocol, which can help facilitate communication and coordination between the US and Romanian Courts[[23]](#footnote-23), and the implementation of the Restructuring Proposal. This will also assure the Romanian Court, in particular, that it will be kept apprised of the progress of the US Chapter 11 proceedings.
5. At the appropriate time, with the leave of the Romanian Court, Efwon Romania can apply for the US Court to approve and confirm the sale of its assets to NewCo pursuant to Section 363 of the US Bankruptcy Code.[[24]](#footnote-24) As explained below, this is required in order to give certainty to the NewCo that it will take Efwon Romania’s assets free of claims and encumbrances.
6. **Seeking individual relief under US Chapter 11 (if necessary)**
7. Given that the bank syndicate loan to Efwon Investments is secured by, among other things, a number of personal properties you own around the world, there may a need for you to personally file for US Chapter 11 relief as well, if there is a risk that the bank syndicate might seek to enforce on their security and foreclose on your properties. Further, given that the bank syndicate has a pledge over the shares of Efwon Investments, if they enforce on the pledge and replace the management of that company it might also disrupt the restructuring.
8. Natural persons can petition for US Chapter 11 relief. Given that you are an American citizen the US Bankruptcy Court will have jurisdiction over any such application. From your personal perspective, the main relief you will be seeking will be a stay of all action, including any enforcement action by the banks against your personal properties and shares, with the Restructuring Proposal is being implemented.
9. **Key Aspects of the US Chapter 11 Plan and Proceedings**
10. You should note that Chapter 11 of the US Bankruptcy Code supports a debtor-in-possession restructuring. In other words, you and the existing management team will remain in control of the various Efwon entities (save for Efwon Romania which, depending on the progress of the Romanian Court proceedings, might be in liquidation and under the control of a liquidator). This is important as you can continue on the companies’ business in the meantime.
11. If necessary, you can choose to appoint a chief restructuring officer (CRO) to the boards of directors of the Efwon entities, who can lead the restructuring efforts, working together with the existing management team. The CRO can also act as the relevant ‘*foreign representative*’ for the purposes of any recognition application, including in Romania. The CRO will usually be an experienced insolvency practitioner.

Section 363 Asset Sale

1. The key reason for using US Chapter 11 proceedings is that it enables the Efwon Group to effect a sale of Efwon Romania’s key assets free of liens, claims, or other encumbrances.
2. The Section 363 asset sale process will broadly take place in the following manner:
3. While the plan here is to effect a sale of Efwon Romania’s assets to NewCo at the Consideration, there will have to be an open auction process where competing bids for the assets will have to be entertained.
4. An application will first have to be made by Efwon Romania to the US Bankruptcy Court for court approval for the sale of the assets via the auction process, including approval of the procedures and rules to be used during the auction.
5. Assuming that there are no bids for Efwon Romania’s assets at a price higher than the Consideration, then NewCo will win the auction and approval will be sought from the US Bankruptcy Code of the sale of Efwon Romania’s assets to NewCo.
6. Assuming that the US Bankruptcy Code approves the Section 363 sale as being at ‘*fair consideration*’[[25]](#footnote-25), the assets will be transferred to NewCo free of liens, claims, or other encumbrances. Further, given that the sale would have been approved by the US Court, this also greatly reduces the risk of any subsequent transaction avoidance action. This will allow NewCo to obtain Efwon Romania’s assets without being saddled with the debt load / insolvency issues facing the Efwon Group, which is one of its key objectives.
7. Steps should also be taken to ensure that the Romanian Court is kept closely updated on the Section 363 sale process, either pursuant to the relevant insolvency protocol in place, and/or by the relevant foreign representative of Efwon Romania filing affidavits in the Romanian Court.
8. Once the Consideration is transferred to Efwon Romania, part of it will be kept in escrow by Efwon Romania (or the relevant liquidators/insolvency administrators of Efwon Romania) to satisfy any potential successful litigation claim by the Romanian drivers, or any possible settlement with them. A good faith attempt at settling the Romanian drivers claims should be made, if possible, but any eventual settlement should involve the Romanian drivers waiving all present and future claims against Efwon Romania and the other Efwon entities.
9. The rest of the Consideration should be used to repay Efwon Trading, who will in turn pay off its Monaco-based lender as well as Efwon Investments. The monies received by Efwon Investments will be used to pay the bank syndicate pursuant to the terms of the US Chapter 11 Plan.

US Chapter 11 Plan

1. The US Chapter 11 Plan should provide for, among other things, the following:
2. part repayment of the debts owning to the creditors of Efwon Trading and Efwon Investments, with the remaining outstanding debt to be converted into equity in the NewCo;
3. in consideration for the above, the bank syndicate (and its individual members) and the Monaco-based lender will waive all present and future rights and claims against Efwon Investments and Efwon Trading respectively. The bank syndicate (and its individual members) will also waive all present and future rights and claims against you personally; and
4. The Plan will be subject to the condition precedent that the KuasaNas funding is approved by the Malaysian government.
5. One of the important features of US Chapter 11 proceedings is that it enables the US Bankruptcy Code to confirm a restructuring plan over the objections of dissenting (minority) creditors within a class, or despite a dissenting class of creditors.
6. This may be particularly important to Efwon Investments given that the bank syndicate is made up of various creditors. While technically it might be argued that there is only one creditor, *i.e.,* the trustee or security agent with the instructions and authority to act under the terms of the syndicated loan, the different constituent creditors who are part of the syndicate have slightly different orders of priorities and might take differing positions on the Restructuring Plan.
7. If necessary, if the bank syndicate does not do so itself, we should encourage them to form a creditors’ committee and engage lawyers to advise them – with the relevant professional fees being funded by Efwon Investments. The formation of a creditors’ committee and the engaging of legal advisors will help to streamline the negotiations with the bank syndicate and raise the chances of a successful restructuring.
8. We will also have to review the relevant intercreditor deed governing the position as among the creditors within the syndicate, including the relevant threshold percentages for the creditors to instruct the trustee or security agent to act on behalf of the syndicate. If the relevant threshold percentage to instruct and authorise the trustee to enter into any reorganisation plan is higher than 67% and there are holdout creditors, then it might make sense to either use the US Chapter 11 Plan and/or cram-down mechanism to bind any dissenting creditor / class of creditors.
9. Assuming that all of the bank syndicate creditors of Efwon Investments are placed in a single class, so long as 67% in value and the majority in number of the voting creditors vote in favour of the US Chapter 11 Plan, the Plan will pass and can be placed before the US Bankruptcy Code for confirmation. The US Court will confirm the Plan if, among other things, there has been proper disclosure[[26]](#footnote-26)the Plan does not discriminate unfairly among the creditors and it is fair and equitable[[27]](#footnote-27).
10. Once the Plan is confirmed by the US Court, it will take effect (subject to the fulfilment of any condition precedent(s)).
11. **Liquidation of Efwon Investments and Efwon Trading**
12. Assuming that the Restructuring Proposal is successful, then the final step will be to put both Efwon Investments and Efwon Trading into liquidation. By then, all of their existing debts would have been fully compromised, and the main assets of the group would have been transferred to the NewCo.
13. **The Possibility of Using English Proceedings and/or the Impact of Brexit**
14. For completeness, we had also considered the use of the scheme of arrangement proceedings in the UK as an alternative to US Chapter 11.
15. One of the potential advantages of using the UK scheme of arrangement proceedings is that if the European Insolvency (Recast) Regulation is applicable, then if the COMI of a debtor is located in an EU Member State[[28]](#footnote-28), and insolvency proceedings are opened in that Member State, the proceedings will be automatically recognised as a “m*ain proceeding*” throughout the EU. The laws of the Member State opening such Main Proceedings (in general terms) will also govern the nature and effect of insolvency proceedings throughout the EU. This will make recognition in Romania more straightforward.
16. However, we considered that the European Insolvency (Recast) Regulation is of more limited utility in the present case, given that the COMI of Efwon Romania is unlikely to be the UK. Further, there is no equivalent of Section 363 of the US Bankruptcy Code in the UK restructuring laws.[[29]](#footnote-29)
17. It therefore follows that Brexit will not have any impact on the Restructuring Proposal. In any event, pursuant to the “*Withdrawal Agreement*”, the EU Insolvency Regulation and the Recast Insolvency Regulation will continue to apply as regards insolvency proceedings within the UK and EU Member States (save for Denmark), even after UK officially ceases to be a member of the EU on 31 January 2020. The Withdrawal Agreement specifically confirms that at the end of the Transition Period, the Recast Insolvency Regulation shall apply to insolvency proceedings, provided that the Main Proceedings were opened before the end of the Transition Period (envisaged to conclude on 31 December 2020).[[30]](#footnote-30)
18. **Conclusion**
19. We hope you found our advice helpful. Please do not hesitate to contact us if you have any queries.

 **Appendix A**

**KuasaNas**

**(51%)**

B.M

Bank Creditors

Monaco Lender

**NewCo Sdn Bhd**

**Assets**

1. 11 USC § 363 [↑](#footnote-ref-1)
2. We will need to review the relevant licence agreements, and also consider seeking pre-approval from F1. Pre-approval from F1 will be a condition precedent to the implementation of the Restructuring Proposal. [↑](#footnote-ref-2)
3. See 11 USC § 301 [↑](#footnote-ref-3)
4. See *In re Global Ocean Carriers Limited* 251 BR 39 [↑](#footnote-ref-4)
5. See 11 USC § 109(a) [↑](#footnote-ref-5)
6. See *In re* *Northshore Mainland Services, Inc.*, et al., Debtors, 537 B.R. 192, 208 (Bankr. Del. September 15, 2015) (the “**Baha Mar**” case). [↑](#footnote-ref-6)
7. Efwon Trading is thus in a position of *structural priority* over Efwon Investments – any fund flow from Efwon Romania would have to pass through Efwon Trading before going to Efwon Investments [↑](#footnote-ref-7)
8. See *Anthony Gibbs & Sons v La Société Industrielle et Commerciale des Metaux* 91890) 25 QBD 399 [↑](#footnote-ref-8)
9. See 11 USC § 301 [↑](#footnote-ref-9)
10. See 11 USC § 362 [↑](#footnote-ref-10)
11. That being said, given the pervasiveness of the US financial and banking systems, there is a fair chance that the Romanian drivers might have some contact with the US, for example through US bank accounts or business interests in the US etc [↑](#footnote-ref-11)
12. Which would have commenced by virtue of the filing of the voluntary petition itself [↑](#footnote-ref-12)
13. See Article 2(d) read with Article 15 of the Model Law [↑](#footnote-ref-13)
14. See Dana Radulescu and Diana Neagu, Restructuring & Insolvency Romania, Thomson Reuters Practical Law [↑](#footnote-ref-14)
15. See https://www.nortonrosefulbright.com/en/knowledge/publications/a3a86442/review-of-chapter-15-cases-in-2017-comi-shifting-is-still-possible [↑](#footnote-ref-15)
16. Excluding the drivers, who are in any event contingent creditors [↑](#footnote-ref-16)
17. There is some urgency given the pending insolvency proceedings in Romania [↑](#footnote-ref-17)
18. See Article 19 or 21 of the Model Law. Whether these reliefs, particular the stay, is automatic will depend on whether the US proceedings are recognised as foreign main or non-main proceedings [↑](#footnote-ref-18)
19. The stay will be automatic if the US proceedings are recognised as foreign main proceedings, and discretionary if it is a foreign non-main proceeding [↑](#footnote-ref-19)
20. See Article 24 of the Model Law – subject to the requirements of Romanian Law being met [↑](#footnote-ref-20)
21. Timing-wise, the new Romanian preventive restructuring framework will only be implemented in January 2020. Given that the timing of this advice is early January 2019 and the insolvency proceedings in Romania are already pending, it is relatively unlikely that we will be able to avail ourself of the procedures under the new Romanian out of court/ hybrid procedure [↑](#footnote-ref-21)
22. Article 6(1) of the European Directive provides that Member States shall ensure debtors can benefit from a stay of individual enforcement action to support the negotiations of a restructuring plan in a preventing restructuring framework [↑](#footnote-ref-22)
23. The European Communication and Cooperation Guidelines for Cross Border Insolvency (the “CoCo Guidelines”), the EU Cross-Border Insolvency Court-to-Court Communications Principles and Guidelines (“JudgeCo Principles”), or the Judicial Insolvency Network Guidelines (the “JIN Guidelines”), set out the principles and framework that would typically apply to such a protocol [↑](#footnote-ref-23)
24. While this might also be possible under the new Romanian preventive restructuring framework, the relevant provisions are likely to be untested, given these laws would only have been newly implemented. There will be more precedents and also greater certainty that an order by the US Bankruptcy Court sanctioning an asset sale under Section 363 will be recognised in other jurisdictions. [↑](#footnote-ref-24)
25. See for e.g., *Kemos, Inc v Bader* 545 F.2d 913, 915 (5th Cir. 1977) [↑](#footnote-ref-25)
26. See 11 USC § 1129(a)(5) [↑](#footnote-ref-26)
27. See 11 USC § 1129(b)(1) [↑](#footnote-ref-27)
28. Save for Denmark [↑](#footnote-ref-28)
29. At the material time [↑](#footnote-ref-29)
30. See https://kennedyslaw.com/thought-leadership/article/brexit-and-eu-cross-border-insolvency-what-comes-next/ [↑](#footnote-ref-30)