**A D V I C E**

**Re: Benedict Maximov, Efwon Investments, Efwon Trading and Others**

**From: Rosalind Nicholson**

**Date: As at 1 January 2019[[1]](#footnote-1)**

1. Introduction
2. We are asked to advise Benedict Maximov concerning the interests of a group of companies of which he is the ultimate beneficial owner, and his personal interests in connection therewith.
3. The group consists of four limited companies: Efwon Investments ("**Efwon Delaware**"), incorporated in Delaware, Efwon Trading ("**Efwon UK**"), incorporated in England and Wales, and two wholly owned subsidiaries of Efwon UK, Efwon Romania ("**Efwon Romania**"), incorporated in Romania, and Efwon Hong Kong ("**Efwon HK**" and, together with Efwon Delaware, Efwon UK and Efwon Romania the "**Group**"), incorporated in Hong Kong.
4. The Group has served as the vehicle through which, since 2010, Mr Maximov has invested in the sport of Formula One ("**F1**") motor racing (the "**Sport**").
5. As a result of a freezing order, granted by the Romanian Court, which has frozen the assets and income of Efwon Romania, Efwon Romania is currently and will continue to be unable to meet the day to day expenses necessary to maintain its business and undertaking. In the absence of a resolution in the immediate term, Efwon Romania's business will certainly fail and, within a matter of weeks, it will default on certain loan repayments due to Efwon UK in early 2019. Efwon UK, in turn, will be unable to meet its own loan repayment obligations to both Efwon Delaware and a third party lender in Monaco, and Efwon Delaware will similarly default on its own obligations to a syndicate of banks.
6. The Group therefore finds itself in crisis and, as certain of Mr Maximov's assets are the subject of security granted to creditors of Efwon Delaware, he too is liable to be adversely affected personally as a result of Efwon Romania's failure.
7. Under those circumstances, we are asked to recommend a strategy which will allow the current issues to be dealt with and the business rescued.
8. Summary
9. In our view, the optimum route to effect a turnaround in this case requires proceedings to be opened in Romania, alongside proceedings in the US should it prove impossible to negotiate a consensual standstill and restructuring with Efwon Delaware's US creditors. We envisage that both Efwon UK and Efwon Romania, with Efwon HK if necessary, would be subject to Romanian insolvency proceedings for the purpose of effecting a restructuring. Within the protection of those proceedings, we propose that a financial and corporate restructuring be effected which will facilitate the sale of Efwon Romania's business and assets to a clean, newly incorporated vehicle in which the Efwon UK will retain a significant stake, to be funded by an injection of capital by a third party investor. That same investor will also be invited to provide short-term funding to the extent necessary from which day to day business expenses may be met over the next few months so as to ensure the team is ready to compete in the 2019 F1 season and to enable new drivers to be engaged. Group debt will also be restructured so as to improve profitability in the medium and longer term. We set out the specific recommendations and the steps which we envisage will be necessary to effect the turnaround in Sections E and F (paragraph 60ff) below.
10. Factual Background
11. The following facts, which emerge from our Instructions, appear to be those material to our advice. We highlight those areas where the facts are unclear and those where we would welcome further information.

*Mr Maximov*

1. Mr Maximov is a US citizen. We understand that he is a successful professional investor. Our understanding is that, although he has homes across the world, Mr Maximov is based in the United States. As this fact may be important to our analysis and recommendations, if this understanding is misplaced, we would welcome early correction.

*Efwon Delaware*

1. Efwon Delaware was incorporated in Delaware in 2010 as an investment vehicle through which Mr Maximov proposed to invest in the Sport. Our understanding is that all the shares in Efwon Investment are beneficially owned by Mr Maximov.
2. Mr Maximov invested USD100 million in Efwon Delaware although it is unclear whether this investment took the form of debt or equity.
3. We are not told, but would wish to know, who the current director(s) of Efwon Delaware are and, if they are third parties, where they are located, whether they charge fees or are retained under contracts for services and, if so, the relevant terms. For the purposes of this advice, we assume, as seems likely from what we are told about his involvement in the direction of that company's affairs, that any third party directors of Efwon Delaware act simply as nominees for Mr Maximov and on his instructions. We also assume that, if there are third party directors, they are also based in the United States. Again, if this is not the case, we would welcome early correction.
4. It would also be useful to know whether Efwon Delaware occupies premises in the United States, whether it employs personnel, and where its books and records are kept.

*The Syndicated Loan*

1. In addition to the sum of USD100 million which Mr Maximov himself invested in Efwon Delaware, USD250 million was borrowed from a syndicate of Banks (the "**Syndicated Loan**").
2. It is unclear from our instructions whether the borrower was Mr Maximov personally or Efwon Delaware. The nature of the assets over which security was granted would suggest that the borrower may have been Mr Maximov. However, since the onward loan to Efwon UK was, or was treated as, a loan from Efwon Delaware (see footnote 1 below), we propose to assume for the purposes of this Advice that the borrower was in fact Efwon Delaware. The identity of the borrower, the terms of the Syndicated Loan, and of the associated security documents, including the governing law and the rights conferred on the Banks thereunder, are clearly of critical importance to any proposed restructuring, and we would wish to see those documents at the first available opportunity. For the purposes of this advice, we assume that the governing law is that of the United States of America.
3. We are advised that –
4. The lender group ("**Banks**") consists of 2 senior banks (with an exposure of 100 million USD), 2 mezzanine financial creditors (60 million USD) and 5 junior financial creditors holding an exposure of 90 million USD.
5. The Syndicated Loan was for a term of 10 years, and carries an interest rate of LIBOR + 2%. At the date of this Advice, and subject to the occurrence of an event which would allow the Banks to accelerate repayment, the term has a little more than a year to run.
6. The Syndicated Loan is secured -

on certain real estate owned by Mr Maximov across the world which we are advised is collectively worth USD75 million;

by a pledge on the projected revenue to flow back from the resulting investment and participation in the Sport; and

by a pledge over the shares of Efwon Delaware,

It was also supported by a negative pledge for the entire value of the loan.

1. There is no suggestion in our Instructions that Efwon Delaware is currently in default of any of its obligations under the Syndicated Loan. However, in the circumstances set out below, there is a significant risk of default in early 2019.
2. We assume that Efwon Delaware has not undertaken any activities save for making the investment into Efwon UK and that it has no liabilities save for that under the Syndicated Loan and, possibly, to Mr Maximov himself.
3. Efwon Delaware would appear to have no assets save for the receivable from Efwon UK (the "Efwon Delaware Loan" as explained below) which, under present circumstances, is of doubtful value.

*Efwon UK*

1. Efwon UK was incorporated in England and Wales in 2010 by Mr Maximov as the vehicle for the acquisition and operation of an F1 team.
2. We assume, but would wish to confirm, that Mr Maximov is the sole shareholder in Efwon UK. As already noted, there is no suggestion in our Instructions that Efwon Delaware has an equity interest in Efwon UK. However, again, if our assumption is incorrect, please let us know.
3. We are not told, but would wish to know, who the current director(s) of Efwon UK are and, if they are third parties, where they are located, whether they charge fees or are retained under contracts for services and, if so, the relevant terms. However, it appears from our instructions that it is Mr Maximov who directs the affairs of Efwon UK, whether or not he is *de jure* a director of that company: it is Mr Maximov who is the decision maker in respect of the affairs of Efwon UK and, whatever his legal status, it is he who "directs" its affairs in practice.
4. It would be helpful to know whether Efwon UK occupies premises or retains staff, whether in the UK or elsewhere. We would also wish to have confirmation that Efwon UK has not traded or incurred any other liabilities save for those identified below. We assume that Efwon UK operates a bank account into which it has received monies which it has borrowed and from which it has disbursed sums of money which it has lent. It would be useful to know where that Bank account is held, whether in the United States, the UK, Romania or elsewhere and who the signatories on the account are.

*The Loans*

1. In 2010, Efwon UK borrowed USD350 million from Efwon Delaware (the "**Efwon Delaware Loan**")[[2]](#footnote-2). The Efwon Delaware Loan is secured on future revenue from Efwon UK's activities.
2. In addition to its liability under the Efwon Delaware Loan, in 2014 in order to provide funds to Efwon Romania during the 2014 F1 season, Efwon UK obtained a loan from a Monaco Lender (the "**Monaco Lender**") for a principal sum USD100 million (the "**Monaco Loan**") which we are instructed carries a high rate of interest. The Monaco Loan is also secured on Efwon UK's revenues. We have been given no information as to the identity of the Monaco Lender. However, we note that, in contrast to the description of the lenders at Efwon Delaware level, the Monaco Lender is not described as a "bank". Although the Monaco Loan is secured only against income and that security is of little or no value at present, Efwon UK would obviously wish to avoid a situation where the Monaco Lender were in a position to obtain a judgment against it and to enforce that judgment, whether by way of a charging order, winding up or otherwise, against Efwon UK's assets either ahead of or during the proposed restructuring. Accordingly, the Monaco Lender needs to be dealt with as part of the restructuring.
3. We have not seen, and would wish to see at an early stage, the loan agreements in respect of both the Efwon Delaware and the Monaco Loan together with the associated loan documents. Of particular importance is the governing law under which each loan was made. In particular, if either loan is governed by English law, this may have an effect on the strategy to be adopted[[3]](#footnote-3). We would also wish to scrutinise any terms prescribing the circumstances under which Efwon UK would be, or be deemed to be, in default of its obligations, particular those under the Monaco Loan, and the remedies afforded to the lenders under such circumstances.
4. There is no suggestion in our Instructions that Efwon UK is currently in default of any of its obligations under either the Efwon Delaware Loan or the Monaco Loan.
5. Our understanding is that Efwon UK has not otherwise traded or incurred liabilities. Again, if our understanding is incorrect, we would welcome correction.
6. Efwon UK's assets consist of its holding of shares in two wholly owned subsidiaries, Efwon Romania and Efwon HK.

*Efwon Romania*

1. The business activities of the Group have primarily been carried out through Efwon Romania.
2. Efwon Romania was incorporated in Romania in 2010 in order to facilitate the acquisition of an existing F1 team consisting of two drivers (the "**Drivers**") and the associated business and stock, including several machines ready for racing in Romania.
3. Critically, the team held, and Efwon Romania now holds, one of the limited number of licenses granted by the Fédération Internationale de l’Automobile (the "**FIA**") enabling it to compete in the international Grands Prix. That licence was included in the acquisition.
4. We are not told who the Directors or key managers or employees of Efwon Romania other than the Drivers are or which of those are key to Efwon Romania's operations or whether, in the period since 2010, Efwon Romania has retained any reserve drivers. We would wish to know the terms under any such persons are retained and to have sight of the relevant contracts.
5. We note that the team operated by Efwon Romania is strongly identified with Mr Maximov; in particular, that the cars in which the team races carry Mr Maximov's photograph alongside the company logo. It would be helpful to know if the logo used is also used by the other companies in the Group and what name the team competes under.

*The Efwon UK Loan*

1. In order to fund the acquisition and the first racing year, Efwon UK advanced the sum of USD150 million to Efwon Romania by way of loan (the **"Efwon UK Loan**"): of this sum, USD50 million represented the cost of the acquisition and the balance, the projected budget for the first racing year, 2011, of USD100million. We have not had sight of the loan documentation and are not informed of its terms or governing law. Our Instructions do not specify whether or not the Efwon UK Loan was interest bearing. However, we are advised that the Efwon UK Loan was secured on the team's share of the broadcasting revenue, derived from the sale of broadcasting rights to the races and distributed by the Formula One Group which holds the commercial rights to the televising of the Grands Prix.
2. Between 2012 and 2014, Efwon UK advanced further sums to Efwon Romania to fund its annual participation in the Sport totalling in aggregate 350million ("**Efwon UK further advances**"). It is unclear on what terms the Efwon UK further advances were made or whether they are secured in whole or in part. For the purpose of this advice we assume that they are simply informal, unsecured loans.
3. Although our instructions suggest that Efwon Romania has periodically made repayments to Efwon UK, it is unclear how much of the Efwon UK loan or the Efwon UK further advances remain outstanding. However, it is clear from those instructions that significant sums remain outstanding. Our instructions do not suggest that Efwon Romania is currently in default of its obligations to Efwon UK.
4. Further, importantly, there is no suggestion that Efwon Romania is currently in default in respect of any of its other liabilities or that, in the absence of the freezing order which we discuss below, it is unable to service those liabilities from current assets. We would expect Efwon Romania to have some cash reserves, generated during the 2018 F1 season, given that our instructions indicate that it is the freezing order, rather a lack of funds, which threatens to put in in the position of defaulting in its payments to Efwon UK.
5. So far as its assets are concerned, it is likely that Efwon Romania may also have assets beyond the FIA Licence and machines, including goodwill. We also assume that, in addition to the contingent liability to the Drivers discussed below, and its liabilities to Efwon UK, Efwon Romania will also have other liabilities to be met in the ordinary course of business including liabilities to managers, employees, suppliers, service providers, landlords and others.
6. In the short term, we would wish to see any recent management accounts, including a balance sheet and profit and loss account. We would also wish to have a list of Efwon Romania's assets, identifying which are owned outright, which leased or subject to hire or rental charges and a list of its liabilities, including liabilities under contracts of employment and contracts for services, hire purchase charges, rentals etc. with creditors listed and the sums owed identified. We would also wish to see all current contracts to which Efwon Romania is party.
7. If there is in existence no up to date independent valuation of Efwon Romania's business and assets, including, in particular, the FIA Licence and the machines, then we suggest that one be obtained as soon as possible as those value will be critical to the structuring of the investment into Newco.

*Efwon HK and the Sponsorship Agreement*

1. Efwon HK was incorporated in Hong Kong by Efwon UK in 2013 in order to deal with potential sponsors. Our understanding is that its sole purpose was to secure sponsorship and to fund the team by remitting sponsorship funds received by it to Efwon Romania. We are not told whether there was any formal agreement under which Efwon HK was obliged to remit funds to Efwon Romania. If there is, would wish to know the terms of that agreement and, if in writing, to see a copy of the terms. This is of particular importance if Efwon HK still holds funds not expended from the 2018 sponsorship as we would wish to know whether those funds might fall to be treated as assets of Efwon Romania or whether they might otherwise be available for business purposes.
2. Since 2015, sponsorship has been provided by an Indonesian sponsor, Kretek, under the terms of an agreement ("**Sponsorship Agreement**") under which Kretek would provide exclusive sponsorship for the period of 5 years, beginning in 2015 on an exclusive basis worth an estimated USD 100 million annually. We have not had sight of the Sponsorship Agreement and are not advised of its terms and conditions or of its governing law. In particular, we would wish to know whether Kretek's obligations to Efwon HK under the Sponsorship Agreement would survive a transfer of the team by Efwon Romania and whether there are any terms in the Sponsorship Agreement which would trigger a termination in the event of an insolvency event or similar occurring in relation to Efwon Romania.
3. Save for the benefit of the remaining term of the Sponsorship Agreement, and any sums not expended from the 2018 sponsorship, Efwon HK would appear to have no other assets and, so far as we are aware, has incurred no other liabilities. However, we would ask for confirmation that our understanding is correct in this regard.
4. We assume that Efwon HK operates a bank account into which it has received monies which under the Sponsorship Agreement and from which it has remitted sums of money to Efwon Romania and others. It would be useful to know where that Bank account is held, whether in Hong Kong, Romania, the United States, the UK, or elsewhere and who the signatories on the account are. We would also wish to know the current balance.

*Crash and crisis*

1. The Group now finds itself in crisis. In the last race of the 2018 season, on 25 November 2018 in Abu Dhabi, both Drivers were injured. Although our instructions do not go into any detail of the injuries, we assume for the purposes of this advice that they were serious and that neither of the Drivers is currently able or willing to continue to compete in the Sport. We understand that it is usual amongst F1 teams to have several "reserve" drivers who themselves hold licenses and are able to compete in the absence of one or more of the team's principal drivers. However, since our instructions do not mention that Efwon Romania employs any drivers other than the Drivers, this advice proceeds on the footing that the Drivers were the only drivers employed by Efwon Romania and that there are no reserve drivers currently under contract with the team.
2. The Drivers have brought proceedings before the Romanian Courts claiming what we are advised are "substantial" damages. Simultaneously, the drivers have filed for the insolvency of Efwon Romania and, pending an order being made, have obtained freezing injunctions over the company’s assets and income. Our understanding is that no insolvency order has yet been made by the Romanian Court.
3. Given that the Romanian Court has been prepared to grant a freezing order, we take it that the Court has been satisfied that the Drivers have at least an arguable case that Efwon Romania is liable to them in damages, and that there is a risk that Efwon Romania may dispose of its assets ahead of any judgment. However, our instructions do not include any information as to the value of the Drivers' claims, or refer to any advice received as to the likely outcome of the Claims or of any defences which Efwon Romania may have to the claims. Nor do our instructions indicate whether (as might be expected) Efwon Romania has insurance which would extend to the Drivers' claims and which would cover any liability, whether wholly or in part. We do not know what the anticipated timeframe for resolution of the claim is. However, for the purpose of this advice, we assume that the Drivers are likely to succeed in their claims and are therefore contingent creditors of Efwon Romania. We also assume that the value of the claim, and therefore of the freezing order, leaves Efwon Romania with no free reserves out of which it may service its day to day liabilities. We bear in mind, of course, that the freezing order does not represent security and, to the extent that the Drivers succeed in their claims, they remain unsecured creditors of the company ranking *pari passu* with other unsecured creditors of the same class.
4. The immediate difficulties which the Group faces are a result of the freezing Order. It is as a result of that Order, rather than from any immediate underlying solvency issues, that Efwon Romania is liable to default on the payments to Efwon UK due to be made in early 2019. This will, in turn, cause Efwon UK to default in its obligations to Efwon Delaware and under the Monaco Loan.
5. Other than the Drivers, whose claims are contingent on an award of damages at trial, and Efwon UK which is Efwon Romania's sole shareholder, it is unclear what other creditors Efwon Romania may have. However, as a result of the freezing order, Efwon Romania is unable to service its ordinary course of business liabilities, including those to employees, suppliers, contractors, landlords and others.
6. Summary – Current position
7. None of the four members of the Group is currently in default of any of its financial obligations. However, the existence of the freezing order means that Efwon Romania is currently unable to meet its debts as they fall due, including those day to day business expenses, including wages and essential services, necessary to keep its business going and its repayment obligations to Efwon UK due in early 2019. If Efwon Romania does not meets its repayment obligations in early 2019, Efwon UK will not meet its repayment obligations to Efwon Delaware when they fall due or, we assume, those to the Monaco Lender.
8. It seems to us that the immediate solution to the current crisis would be to have the freezing order lifted or varied, whether with the consent of the Applicants or by order of the Court. We assume that Mr Maximov and Efwon Romania have taken Romanian legal advice on this question and that they have been advised that this is not an option under current circumstances. We also assume that a payment into Court in the sum of the freezing order is not a possible or practical solution and in any event would cause similar cash-flow difficulties to those caused by the freezing order itself. However, unlocking the cash flow issue does seem to us to be key to a successful turnaround.
9. The first race of the 2019 F1 season is to take place on 17 March 2019 in Melbourne, Australia. If current conditions prevail, Efwon Romania will be unable to field a team to compete: even leaving aside the position with the Drivers, as a result of the freezing order, it is unable to pay the wages of the personnel required to maintain and prepare the machines ready for racing or to perform the other necessary work to enable the team to travel to Australia and compete in that race. Accordingly, in the absence of a solution, Efwon Romania can expect to generate no income from the Assets in the medium term and its failure to compete in the opening race of the season may well damage its goodwill. There is therefore a narrow window within which to find a rescue solution if it is to achieve the optimum result. The desire for speed therefore also informs the strategy.

*New money – possible investor*

1. At the end of the 2017 season, Kretek indicated that it had doubts about renewing its sponsorship of the team after the expiry of the Sponsorship Agreement in 2020. However, Efwon HK succeeded in identifying a possible interested party, KuasaNas, a Malaysian state-owned company which supplies alternative energy fuels. KuasaNas indicated its interest in providing sponsorship to the team, subject to certain conditions, including the condition that KuasaNas would be able to acquire a majority stake (51%) in the team, that the team move to Malaysia where, amongst other benefits, a deal could be secured to obtain the use of the Sepang GP racetrack for practice and training purposes and new drivers sufficiently qualified to be able to obtain Super Licences could be engaged.
2. The Malaysian General Election of mid-2018, resulted in the proposed deal being put on hold as the incoming government undertook a review of actual or intended contracts with state companies. At the date of this advice, that review is ongoing. However, we are advised that Mr Maximov remains interested in concluding a deal with KuasaNas. Our instructions do not suggest that there are any other interested parties but if the business is to be viable in the long term, not only must replacement sponsorship be secured, but further capital must be injected so as to put the Group on a stronger footing. Accordingly, we recommend that urgent efforts should be made to identify other potential investors who may be interested in investing in the Group.
3. If KuasaNas or another third party is prepared to invest in the Group, and to provide sponsorship and other support on terms similar to those which were under discussion before 2018, then the possibility of a turnaround does exist.
4. One of the conditions KuasaNas have now stated will form a pre-condition for any deal going ahead will be that the insolvency issues affecting the Group are dealt with promptly. We are therefore asked to advise Mr Maximov on how to facilitate the deal with KuasaNas, particularly as to how the insolvency issues affecting the Companies can be dealt with. It is likely that any other investor would prescribe similar conditions.
5. Suggested Restructuring
6. Any turnaround plan will be informed by the fact that, as we understand it, other than inter-company receivables, the value of which is doubtful at present, the principal assets of value ("**Assets**") within the Group are held by Efwon Romania, including (i) the FIA licence; (ii) the cars held by Efwon Romania together with (iii) any broadcasting revenue rights, goodwill and other assets associated with the team which survive the injury to the Drivers. Looking at the Group as a whole, therefore, Efwon Romania and its Assets would appear to be key. The Assets, particularly the FIA Licence, have significant value, and are marketable. There is likely to be significant goodwill associated with the team given its success in the years to 2017, when it finished 6th. We believe Efwon Romania, and, possibly Efwon HK, to have cash reserves and there is the potential for ongoing income which, but for the freezing order, would be sufficient to service its ongoing liabilities as they fall due and to make the payment due to Efwon UK in early 2019. On the face of it, therefore, Efwon Romania's business looks viable.
7. We set out below our suggestion as to what a restructuring might look like: it takes the form of both a financial and a corporate restructuring. These are our preliminary thoughts and we are open to discussion on individual elements or the proposal as a whole –
	* 1. Efwon UK will incorporate a new company as a wholly owned subsidiary ("**Newco**"). Newco will serve as the investment vehicle through which KuasaNas or another third party investor will invest and acquire a stake in the Group. Newco can be incorporated in any common law jurisdiction which recognises the concept of limited liability and separate corporate personality, including Malaysia.
		2. KuasaNas will subscribe for shares in Newco. Efwon UK will retain a significant stake in Newco, possibly as much as 49%.
		3. Efwon Romania will sell its business and assets to Newco at market value.
		4. We envisage that the consideration for the sale will be provided partly in cash, derived from part of the funds subscribed by KuasaNas, and partly by Efwon UK agreeing to write down the debt due to it from Efwon Romania, so that the cash proceeds of sale of the Assets may be applied exclusively against Efwon Romania's liability to the Drivers (if any) and its other creditors.
		5. After the realisation of the Assets, payment of costs and the distribution of the proceeds to creditors, Efwon Romania may be wound up and dissolved.
		6. KuasaNas, Efwon HK and Newco will enter into an agreement under which KuasaNas agrees to provide sponsorship to the team from 2020 in consideration for which Newco agrees amongst other things to operate its team out of Malaysia.
		7. The funds introduced by KuasaNas by way of subscription and, if necessary, by way of additional short-term funding, will also allow new drivers holding or sufficiently qualified to be able to obtain Super Licences in time for the 2019 F1 season to be engaged by Newco.
		8. Mr Maximov either waives any sums due to him from Delaware or converts them to equity.
		9. Efwon Delaware swaps the debt due from Efwon UK for equity in Efwon UK. This step is optional but, subject to any US tax or other advice which might render this an unattractive, it appears to us to make sense that the relationship be restructured this way. See also step (xiii) below.
		10. Efwon Delaware refinances facility, extends term, and increases borrowing by enough to cover Monaco Loan; Efwon UK grants new, additional, security over shares in Newco and income stream.
		11. Efwon Delaware lends Efwon UK sum sufficient to discharge Monaco Loan secured on Efwon UK shares in Newco and income stream;
		12. Efwon UK discharges Monaco Loan.
		13. It might be an option, at this stage, for Efwon UK and Efwon Delaware to merge, with Efwon Delaware as the survivor. Both substantive and tax advice should be sought as to whether this would be an efficient last step.
8. The objective of the restructuring is: (i) to realise value in respect of the Assets in the short term so as to allow Efwon Romania to settle its affairs; (ii) to present a clean vehicle into which new money, whether from KuasaNas or otherwise, may be invested; (iii) for the current owners to retain an interest in the business so that members of the Group and their creditors can recover against income generated by and in connection with the Assets the longer term; (iv) to provide fresh capital from which day to day business expenses may be paid so as to ensure the team is ready to complete in the 2019 F1 season and to enable new drivers to be engaged; and (v) to restructure Group debt so as to improve profitability in the medium and longer term.
9. Method
10. It is critical to the success of the restructuring process that it take place under the protection of a moratorium which safeguards Efwon UK, Efwon Romania and Newco (and, so far as necessary, Efwon HK) from any attempt by third party creditors to enforce their claims until such time as the restructuring is completed. In particular, before any steps are taken to introduce new capital to Newco, Efwon UK and its assets must be protected against any action against it or its assets on the part of Efwon Monaco. As already mentioned, time is of the essence and that, too, will drive the decision on the best method of achieving a successful outcome.
11. There are a number of routes through which, in theory, a restructuring might be achieved. The first, by way of a simple negotiation of standstill agreements, followed by contractual rescheduling or deferral agreements individually negotiated by Efwon Delaware, Efwon UK and Efwon Romania with their external creditors.
12. However, whilst a negotiation of this sort might be possible with institutional creditors (including, possibly, the Monaco Lender if, indeed, it is an institutional lender), it is unlikely to be a realistic option with respect to the numerous employee, service providers and trade creditors of Efwon Romania, much less with the Drivers given the litigious and aggressive approach which they have adopted to date. It is also likely to take time, which is at a premium here, and may hand the negotiating high ground to the creditors, in particular with respect to extended or replacement security and interest rates, which, given in particular the liability at Efwon UK level, may in turn impact on the ultimate returns to creditors at Efwon Delaware level.
13. There may also be advantages afforded by alternative routes (as discussed below) which would not be available in a purely consensual workout under current circumstances. Accordingly, although negotiation will play a part in the proposed restructuring, in particular we have in mind with the Banks, we do not advise that in this case the restructuring be attempted solely through negotiation
14. The second possibility, which might be combined with a negotiated standstill with the institutional lenders (including the Monaco Lender) or a hybrid process, in combination with Court action elsewhere, is by way of judicial reorganisation limited to Efwon Romania in Romania, initiated by Efwon Romania itself on the grounds that it is currently unable to meet its debts. Romanian law advice will be needed as to whether this is possible given the outstanding insolvency application by the Drivers. As we understand it, the current Romanian process allows a period of "observation" within which a restructuring may be proposed. The debtor remains in possession and able to continue to trade. A restructuring plan requires the approval of a majority by number and amount of creditors in each defined class and the approval of the Court. This process would be particularly useful if it allowed the freezing order to be discharged in the immediate term – as to which Romanian law advice will also be needed – which would allow Efwon Romania to continue to meet its debts as they fall due in the ordinary course of business and allow it to continue to prepare for the 2019 F1 competition.
15. We understand that, by January 2020, Romania will have fully implemented the European Directive 2019/1023 on preventive restructuring frameworks (the "**Preventive Directive**"). Given the urgency of the Group's current situation, and the anticipated timescale for the restructuring, it is not anticipated that the Preventive Directive will be of assistance in this case. Were it currently in force in Romania, the Preventive Directive would provide an ideal framework for a restructuring of the Group: it brings with it a number of the useful features of Chapter 11 including the possibility of a cross-class cram down. Once implemented in Romanian legislation, the Preventive Directive will allow debtors facing a likelihood of insolvency access to a preventative framework which will allow for a restructuring which will prevent insolvency. It will provide, amongst other things, for the debtor to remain in possession, and in control of its assets and the operation of its business either in whole or in part, and a stay of enforcement whilst a restructuring plan is under negotiation. The restructuring plan must be approved by a majority (to be set by the state and no exceeding 75%) of affected parties, divided into classes sharing common interests, or by the Court under certain circumstances notwithstanding that certain classes of creditor may not have approved the plan.
16. However, as we understand that any significant repayments to Efwon UK, as Efwon Romania's sole shareholder, during the observation period may be challengeable under Romanian law other means would have to be deployed to safeguard Efwon UK and its assets and to prevent any action on the part of the Banks during the restructuring of Efwon Romania. Notwithstanding that the Courts in England and Wales are currently bound to recognise the Romania insolvency process by virtue of [Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast)](http://uk.westlaw.com/1-616-3108?originationContext=document&vr=3.0&rs=PLUK1.0&transitionType=PLDocumentLink&contextData=(sc.Default)) (the "**Recast Insolvency Regulation**")[[4]](#footnote-4), without a parallel process which protects Efwon UK and its assets, Efwon UK remains vulnerable and its assets, specifically the shares in Efwon Romania, Efwon HK and, in due course, Newco, potentially open to enforcement action by the Monaco Lender. Any solution, therefore needs to incorporate protective action encompassing E–UK and its assets.
17. One possibility which we have considered is whether Efwon UK might also to be subject to an insolvency process in Romania alongside Efwon Romania. Efwon UK's assets appear to consist primarily, if not exclusively, of the shares which it holds in Efwon Romania and Efwon HK, and those assets may well be taken to be sited in Romania and Hong Kong respectively[[5]](#footnote-5). Since it is against those assets that any enforcement action might be taken, any protective measures need to be put in place in the jurisdictions where those assets are sited.
18. It is, in principle, possible for insolvency proceedings in respect of any foreign company to be opened and conducted before the Romanian Courts. Although there is a presumption that the place of a debtor's registered office represents its COMI, that presumption is rebuttable by other, objectively ascertainable, factors including the place where its central administration takes place, where the debtor conducts its economic activities and where it holds assets. It is in this context in which the questions which we ask in paragraph 23, 24 and 36 above are pertinent. If it were possible to persuade the Romanian Court that it has jurisdiction because Efwon UK has its COMI in Romania, and therefore to open such proceedings in Romania, we understand that, once an Order is made opening the insolvency proceedings, all enforcement actions against the debtor's assets in Romania would be stayed.
19. A possible alternative would be for Efwon UK to file for administration under the English Insolvency Act 1986. That would have the effect of imposing a moratorium on enforcement against Efwon UK's assets. However, any administration order would then need to be recognised in the jurisdictions where Efwon UK's assets are sited to ensure full protection.
20. So far as Efwon UK's assets in Hong Kong, in the form of its shares in Efwon HK, although the Hong Kong court will generally recognise foreign collective insolvency proceedings opened in the company's country of incorporation[[6]](#footnote-6), it will not recognise English administration proceedings commenced purely for the purposes of a restructuring. This is because Hong Kong does not itself have any equivalent to administration or any statutory provision which provides for a moratorium on the enforcement of a secured debt[[7]](#footnote-7). The way around this difficulty might be for provisional liquidators to be appointed to Efwon UK in England. The Hong Kong Court will, in principle, recognise and assist provisional liquidators appointed in respect of foreign companies for the purposes of a restructuring. However, recent case law in Hong Kong suggests that the Hong Court will scrutinise any application in order to satisfy itself that the provisional liquidation and restructuring proposal are proposed with the financial interests of the company's creditors as their priority and not merely to conserve shareholder value[[8]](#footnote-8). Of course, whether Efwon HK is an important piece in the puzzle will depend on whether it currently holds funds and the terms on which it holds them under its arrangement with Efwon Romania.
21. Both administration proceedings and a provisional liquidator appointed in England would be recognised in Romania under the Recast Insolvency Regulation provided that the proceedings are commenced prior to the end of the Brexit Transition Period (31 December 2020). After the end of the transition period, the UK will no longer be treated as an EU member state for the purposes of the Recast Insolvency Regulation and, consequently, amongst other things, the Recast Insolvency Regulation will no longer apply to a debtor whose COMI is in the UK in respect of insolvency proceedings with respect to that debtor in the EU. As a result, insolvency proceedings opened in respect of that debtor in the UK will no longer benefit from the automatic recognition provisions in the EU and English law as the governing law of the insolvency proceedings will not necessarily be recognised; and the domestic laws of the relevant EU member state will determine whether or not it is possible to open insolvency proceedings in respect of that debtor in that state. Where the EU state has adopted the Uncitral Model Law on cross-border insolvency (as Romania has) it will be those provisions, as implemented domestically, which will govern recognition of foreign insolvency proceedings.
22. If two sets of proceedings, in the UK and Romania, were to be instituted prior to the end of the transition period, given that Efwon Romania is a wholly owned subsidiary of Efwon UK, and that Efwon UK therefore controls Efwon Romania, both companies fall within the definition of a "*group of companies*" (and Efwon UK as a "*parent undertaking* ") within Article 2(13) of the Recast Insolvency Regulation. As such, the office holders appointed respectively in the UK and in Romania are obliged to consider and if possible coordinate (i) the administration and supervision of the affairs of the two companies; and the proposal and negotiation of a coordinated restructuring plan (Article 56 of the Recast Insolvency Regulation). The two Courts, in Romania and the UK, must similarly endeavour to cooperate, communicate and coordinate (Article 57) and either (or both) of the office holders in the UK and Romania may request the opening of group coordination proceedings with a view to recommending a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members’ insolvencies.
23. However, unlike the process which the Preventive Regulation will allow, group coordination proceedings do not provide for the administration of the separate insolvency proceedings in a single place under the supervision of a single court and, inevitably, the existence of separate proceedings, in separate countries, under the supervision of separate Courts with separate office holders necessarily brings with it a duplication of costs and, as a result, a diminished return to stakeholders, as well as the potential for conflicting decisions. The optimum route for a restructuring would be one where all members of the Group, their assets and liabilities, can be dealt with together, in a transparent and coordinated fashion, by a single supervisory Court. However, for reasons which we explain below, there are some difficulties in achieving this in the present case whilst ensuring that the Group's assets remain sufficiently protected where they are situated.
24. We have also considered whether a possible route is for all four members of the Group (and, potentially, Mr Maximov himself, if necessary) to participate in a restructuring within Chapter 11 proceedings in the United States. It is fair to say that, although as we discuss below, Chapter 11 proceedings afford a debtor a number of very useful restructuring tools, they are extremely expensive and can be long drawn out and so not necessarily the first choice where the objective is a speedy resolution, and alternatives are available. One of the principal advantages of the Chapter 11 process is that the company's management remains in possession and able to continue to run the business: save in exceptional circumstances, where the Court concludes that there is cause to displace management, including fraud, dishonesty, gross mismanagement incompetence so that the interests of creditors require the appointment of a trustee. In appropriate circumstances, it also allows for modification of the terms of secured debt over the objection of the lender, for the reduction of the principal amount that must be repaid where the current value of the debt exceeds the value of the security, for an extension of the repayment period and a reduction of the interest rate. All of those things might be very useful in the current case since the only asset of value, namely Mr Maximov's property portfolio which we are advised is worth USD75 million, is significantly less than the debt due under the Syndicated Loan. Since the balance of the security, both to the Banks and to the Monaco Lender is effectively worthless, in real terms the balance of the debt under the Syndicated Loan and the entirety of the Monaco Loan, secured over Efwon UK's income, is effectively unsecured. These are points which might usefully be made in a negotiation with the Banks which are, in reality, secured only as to a fraction of their debt.
25. The opening of a case under chapter 11 triggers an automatic stay of any enforcement proceedings against the debtor or its assets[[9]](#footnote-9). The debtor may also continue to obtain unsecured credit, unless the court otherwise orders, and that credit is afforded priority over all prepetition unsecured claims. The Court may also permit the debtor to obtain credit with super-priority ahead of administrative expenses, to grant security over unencumbered assets or a second charge over secured assets[[10]](#footnote-10). In an exceptional case, the Court may also grant a new lender security which ranks ahead of existing security where the debtor is otherwise unable to obtain credit provided that the interests of the existing secured creditor are adequately protected[[11]](#footnote-11). To the extent necessary, Chapter 11 also allows for payment of critical vendors in the ordinary course of business: in the present case, in principle, that would allow Efwon Romania to pay those key members of the team who are critical to the continued servicing and maintenance of the machines so as to ensure that they are ready for the start of the new F1 season in March. It may also prevent contractual counterparties from terminating or refusing to perform their contractual obligations: something which may be of importance here given that the Sponsorship Agreement still has a year to run.
26. Both Mr Maximov himself and Efwon Delaware are eligible to file a case under Chapter 11 as persons who "*reside[-] or has a domicile, a place of business or property in the United States*"[[12]](#footnote-12). In order for Efwon UK, Efwon Romania or Efwon HK to be eligible to file a case, they must each[[13]](#footnote-13) bring themselves within section 109(a) of the Bankruptcy Code as of the date the petition is filed[[14]](#footnote-14). We assume that none of Efwon UK, Efwon Romania and Efwon HK currently have any property in the United States. However, it should be possible to establish eligibility for all three companies by the route endorsed in *Global Ocean Carriers Limited[[15]](#footnote-15)*, that is, by the retention of Bankruptcy Counsel within the United States and by each of the companies and the payment to Bankruptcy Counsel of sums by way of retainer on behalf of each of the companies. A relatively small amount will suffice[[16]](#footnote-16). To the extent that the companies themselves are not able to make such payments, and the existence of the freezing order means that Efwon Romania is not in a position to do so, there would appear to be no reason why such a sum should not be paid on its behalf[[17]](#footnote-17), perhaps by Mr Maximov, though Romanian law advice would need to be taken so as to ensure that any such payment is structured in a way which does not breach the terms of the freezing Order.
27. In terms of recognition, although Efwon UK has its registered office in England and Wales, and its assets consists of shares in Efwon Romania and Efwon HK which are likely to be deemed to be sited in Romania and Hong Kong respectively, our instructions make clear that their operations are directed by Mr Maximov. Mr Maximov is closely identified with the affairs of the Group and, in particular, with the team. Mr Maximov is a US citizen and we assume that he is resident, at least for most of the year, in the United States and therefore directs his, and the Group's affairs from premises in the United States. On that footing, and based on facts which are objectively ascertainable, there is a reasonable argument that, notwithstanding their place of incorporation, the COMI of each member of the Group is in the United States as its affairs are directed from there[[18]](#footnote-18). It is fair to say that the argument is of a great deal less force with respect to Efwon Romania which appears to conduct its activities in Romania such that persons dealing with it would certainly assume its COMI to be there.
28. If we are right, and if there are no facts sufficient to place Efwon UK's COMI elsewhere, we think there are reasonable prospects that the English Court would recognise the US Proceedings as a foreign main proceeding under Article 17 of the model law and would grant discretionary relief under Article 21(1)(g) of the Model Law equivalent to the moratorium against actions by individual creditors that would be provided to a company in administration under paragraph 43 of Schedule B1 to the Insolvency Act 1986[[19]](#footnote-19). However, if the English Court is not satisfied that Efwon UK's COMI is in the United States, but considers that it has its COMI elsewhere, for example, in Romania, then there is a risk that the English Court would decline to recognise the Chapter 11 proceedings with respect to Efwon UK since it is difficult to see, on the facts as we understand them and as set out above, that Efwon UK could be taken to have an "establishment" in the United States. The same risk applies *a fortiori* with respect to recognition in Romania. Efwon Romania's COMI would appear to be clearly sited in Romania and there is no suggestion that Efwon Romania has an establishment in the United States. There is therefore a real risk that the Romania Court would decline to recognise the Chapter 11 proceedings[[20]](#footnote-20).
29. With respect to Efwon UK, the difficulty would be mitigated if it were possible to be confident that its sole external creditor, the Monaco Lender, would treat itself as bound by the Chapter 11 proceedings. On the facts which we have, it is not obviously the case that the Monaco Lender has a sufficient connection with the United States so as to be concerned about breaching the terms of an Order made by a US Court. We have sought to deal with this potential difficulty by suggesting that the Monaco Lender be paid in full, with interest, as part of a refinancing. If it is possible to secure replacement finance on terms which provide for interest at a normal commercial rate, then, going forward, the cash flow up through Efwon UK will necessarily be better than if it has first to be applied in meeting the high rate which the Monaco Loan carries.
30. Conclusion and recommendation
31. Given the risks which we have identified above, we have concluded that the optimum route to effect a turnaround in this case does require proceedings in Romania, alongside proceedings in the US if necessary if it proves impossible to negotiate a standstill and restructuring with the Banks. We envisage that both Efwon UK and Efwon Romania, with Efwon HK if necessary, would be subject to Romanian insolvency proceedings for the purpose of effecting a restructuring. We would expect that the appointment of a Judicial Administrator in the case of Efwon Romania would allow the freezing order to be discharged. The opening of insolvency proceedings in Romania triggers an automatic stay on proceedings against the debtor the subject of the procedure and its assets. We think there is a good case to make that the COMI of all three companies is in Romania. Assuming that to be the case, we are confident that the Romanian Proceedings would be recognised in the UK, (even if opened post-transition period[[21]](#footnote-21)), and the United States should that be necessary under, respectively, the Recast Regulation and Chapter 15, and in Hong Kong too at common law.
1. The scenario contemplate that the defaults threatened by the freezing order are in the future, hence this advice is dated "as at" 1 January 2019. This advice is in fact prepared for submission on 21 February 2022. [↑](#footnote-ref-1)
2. Although our instructions initially say that Mr Maximov *"remitted....the entire USD350million by way of loan to [Efwon UK]*". It appears that this sum was in fact advanced by Efwon Delaware since, later on in our instructions, reference is made to "repayments" to Efwon Delaware and, later still, to Efwon UK's defaulting in its obligations to Efwon Delaware. [↑](#footnote-ref-2)
3. Notably because of the application, in England and Wales, of the so-called *Gibbs Rule*(*Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux (1890) LR 25 QBD 399*) the effect of which is that the cancellation of a debtor's obligations in foreign proceedings will discharge only those liabilities governed by the law of the country in which that proceeding took place unless the relevant creditor submits to a foreign proceeding. So, under the Gibbs Rule, and English law governed debt may be discharged only in proceedings in England and Wales. [↑](#footnote-ref-3)
4. Pending the end of the Transitional Period following Brexit, noting that this Advice is dated 1 January 2019. See also paragraph 74 below [↑](#footnote-ref-4)
5. The question of the situs of shares generally being a question determined the laws of the Country in which the company is question is incorporated [↑](#footnote-ref-5)
6. Re Kaoru Takamatsu [2019] HKCFI 802 at [5] [↑](#footnote-ref-6)
7. Joint Administrators of African Minerals Ltd v Madison Pacific Trust Ltd [2015] HKEC 641 at [12]. [↑](#footnote-ref-7)
8. Cyberworks Audio Video Technology Limited v Remedy Asia Ltd and others [2020] HKCFI 398 at [66]. Cited with approval in Re China Bozza [2021] HKCFI 1235 at [14]. [↑](#footnote-ref-8)
9. Section 362(a) Bankruptcy Code. The automatic stay is subject to certain exceptions, including certain regulatory, criminal and matrimonial proceedings, not material here - Section 362(b) Bankruptcy Code [↑](#footnote-ref-9)
10. Section 364(c) [↑](#footnote-ref-10)
11. Section 364(d) [↑](#footnote-ref-11)
12. Section 109(a) Bankruptcy Code [↑](#footnote-ref-12)
13. Bank of America v World of English 23 B.R. 1015, 1019-20 N.D.Ga. 1982 cited for the proposition that the test much be applied to each debtor in Global Ocean Carriers Limited 251 B.R. 31 (Bankr. D. Del. 2000) [↑](#footnote-ref-13)
14. In Re Axona International Credit & Commerce, Ltd., 88 B.R. 597, 614-15 (Bankr. S.D.N.Y. 1988) cited for the proposition that the test for eligibility is at the date the petition is filed in Global Ocean Carriers Limited Ibid. Note 7 supra. 38-40 [↑](#footnote-ref-14)
15. Ibid. Note 7 supra [↑](#footnote-ref-15)
16. Global Ocean Carriers Limited Ibid. Note 3 supra. [↑](#footnote-ref-16)
17. Indeed, in Global Ocean Carriers Limited Ibid. Note 3 supra, the retainers appear to have been paid on behalf of the debtors rather than by them directly. [↑](#footnote-ref-17)
18. Cf. Morning Mist Holdings Ltd. v. Krys, No. 11-4376 (2d Cir. 2013) [↑](#footnote-ref-18)
19. Cf. Re Videology Ltd [2018] EWHC 2186 (Ch) [↑](#footnote-ref-19)
20. See and cf In re Bear Stearns 374 B.R. 122 (Bankr. S.D.N.Y. 2007) [↑](#footnote-ref-20)
21. Under the Cross-Border Insolvency Regulations 2006 (SI 2006/1030) [↑](#footnote-ref-21)