Case Study II — Efwon Group

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Below you will find the draft legal memorandum prepared in connection with the case study of Efwon group's debt restructuring.

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[PRIVILEGED AND CONFIDENTIAL]

M E M O R A N D U M

February 21, 2019

To: Mr. Benedict Maximov
Efwon Investments

Re: Insolvency Efwon Group—KuasaNas Financing

The following is to provide you with our considerations regarding the available alternatives to restructure and reorganize the business of the Formula 1 team (the "F-1 Team") owned by Mr. Benedict Maximov ("Mr. M"), through a multi-layered corporate structure (the "Efwon Group"), for the closing of a financing transaction KuasNas Group based in Malaysia ("KuasNas").

In particular, we will address the following questions and issues submitted to our consideration:

(a) proposed strategy for dealing with Efwon Group's insolvency;

(b) whether one or more insolvency proceedings are required to achieve the goal of selling a stake in the group to KuasaNas (should the intended contract receive Government clearance);

(c) where these proceedings will take place;

(d) what impediments may exist to proceedings taking place;

(e) what advantages/disadvantages may exist in relation to proceedings being organised in the way you propose;

(f) the factors that will allow you to determine the above;

(g) any further facts or information that may be needed to answer the question;

(h) where you envisage the application of the European Insolvency Regulation and/or UNCITRAL Model Law in achieving this?

(i) in particular, how the provisions of these texts may assist or impede the strategy you propose to implement?

(j) possible effects, if any, of Brexit on the analysis.

For ease of reference, we have included an appendix to this memorandum with the defined terms herein (Appendix "A").

ASSUMPTIONS

This memorandum relies upon the following assumptions:

1. Efwon Investments, LLC ("Efwon US") is wholly owned by Mr. M, and is both the parent company to Efwon Trading ("Efwon UK") and the holding company to the Efwon Group. Efwon UK, in turn, is parent company to Efwon Romania ("Efwon Romania") and Efwon Hong Kong ("Efwon HK").

2. The effects of the freezing injunction (the "Romanian Injunction") issued by the Romanian court (the "Romanian Court") in the unvoluntary insolvency proceedings (the "Romanian Proceedings") filed by two F-1 Team's drivers (the "Team Drivers") affect—but may not absolutely preclude—Efwon Group's ability to enter into new licensing agreements (and other necessary contracts) with the *Fédération Internationale de l'Automobile* ("FIA") to collect the bulk of the operating income of the F-1 Team, relocated to a newly formed OpCo or investment vehicle located in Malaysia or elsewhere.

3. The secured loan agreement entered into by Efwon US and a group of nine banks (collectively, the "Bank Syndicate Lenders") is governed by U.S. law.

4. The secured loan agreement entered into by Efwon UK and a financing institution based in Monaco (the "Monaco Lender;" and jointly with the Bank Syndicate Lenders the "Financial Creditors") is governed by UK law.

5. Mr. M and the KuasNas Group based in Malaysia ("KuasNas") have entered into a financing transaction for the F-1 Team (the "Financing Transaction"), documented through a definitive Share Purchase Agreement ("SPA") for the transfer of 51% of Efwon US' stock to KuasNas (the "Proposed Merger"), conditioned upon prior solving the financial distressed situations affecting the Efwon Group at the different levels of its corporate structure (the "Condition Precedent").

6. The liquidation value of the aggregate assets of Efwon Group, in general, is lower than its going concern value as an operating F-1 Team.

7. No circumstances suggesting abuse of process, improper purpose, bad faith or fraud by the Team Drivers in the Romanian Proceedings exists or has been stablished.

CONCLUSIONS AND RECOMMENDATIONS

Based upon the considerations and analysis set forth below, we believe that:

8. The Romanian Injunction has affected both sources of revenues of Efwon Group: (i) the TV license distributions, received through Efwon Romania; and (ii) the sponsorship revenues, which are expected to be received as result of the Financing transaction with KuasNas. This makes lifting the Romanian Injunction a key point of action.

9. Notwithstanding the above, Efwon Group should validate with both Romanian counsel and FIA-specialized counsel, as to the extent of effects of the Romanian Injunction over operating property and assets (including TV licensing fee receivables), and the possibility of moving or transferring such assets out of Efwon Romania (and the jurisdiction of the Romanian Court). This possibility may have substantial implications in terms of the negotiation dynamics with the Team Drivers (and leverage in such negotiations).

10. If Mr. M and KuasNas have yet to enter into definitive closing documents for the Financing Transaction (as was assumed in ¶ 5), they should move to immediate do so, by negotiating the final terms of the SPA (including clearly setting out the scope of the Condition Precedent) and executing the final contract.

11. The main obstacle to close the Financing Transaction is the Romanian Proceedings, which warrants immediate attention from Efwon Group. Ideally, the Team Drivers' claims should be addressed: first, by trying to arrive to a negotiated settlement lifting the Romanian Injunction; and second, should that fail (or move slowly toward resolution) then Efwon Group should try to limit the effects of the Romanian Injunction over the F-1 Team cash flows (*e.g.*, by having a newly set up entity to that effect—Efwon Malaysia or "Efwon Mal," moving to take over Efwon Romania rights *vis-à-vis* FIA, as licensed F-1 Team). This second alternative would also ideally clear the threshold set by the Condition Precedent.

12. Settlement negotiations with the Team Drivers may be undertaken through a mediator. It is important, in the context of such negotiations, to account for factors that may incentive a prompt negotiated solution by the Team Drivers (*e.g.*, the spillover effects that the Romanian Proceedings—and blocking the economic financial of the F-1 team—may have over their own careers).

13. The Financial Creditors may have little incentives to be substantially impaired by a plan of reorganization, which means that securing smooth and timely approval of any such plan will likely require leaving the Financial Creditors' credits mostly unimpaired (discussions should

instead focus in rollovers and the partial or complete release of the security interest over Mr. M property by the Bank Syndicate Lenders). General unsecured creditors (such as vendors, suppliers and commercial counterparties) should be left unimpaired under any plan.

14. A plan of reorganization may also segregate the stream of revenues of the F-1 Team's operations through Efwon Mal and Efwon UK; leaving the latter as conduit for TV revenues (not overly affecting the lien held by the Monaco Lender).

15. The final terms and conditions of the agreement between Efwon Group and the Financial Creditors, and the plan of reorganization, should ultimately be included into a Restructuring Support Agreement.

16. In general, under our suggested multi-layered approach, a reorganized business of Efown Group should follow the outline in Fig. 1, below (Efwon Romania and Efwon HK would be subject to liquidation under the Plan):

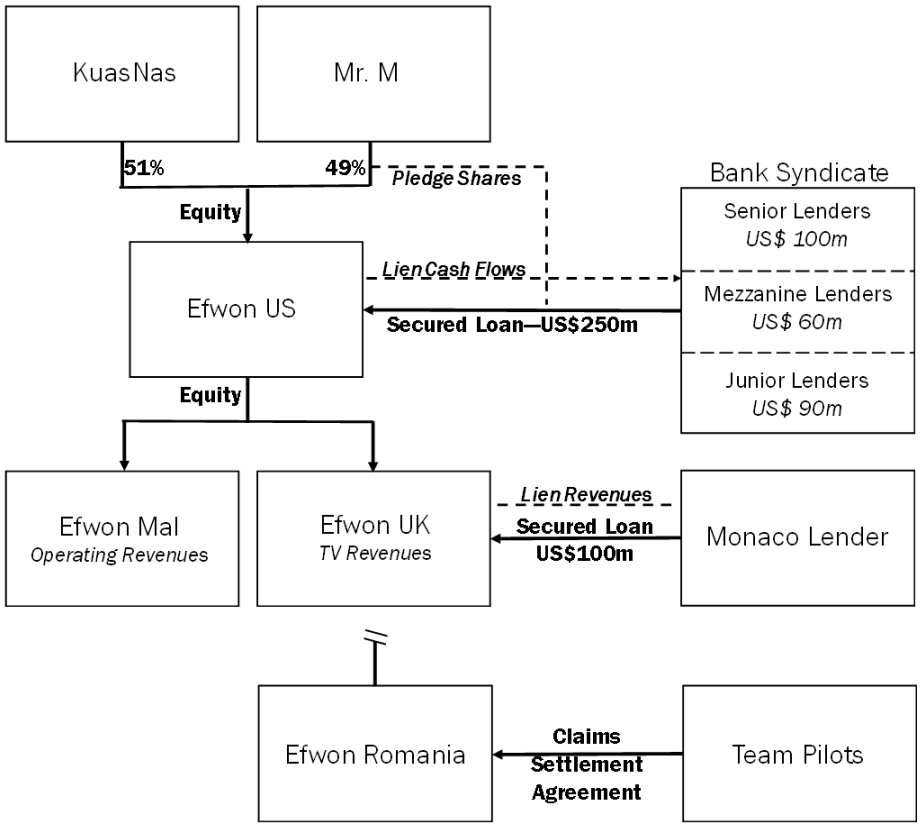

Fig. 1

17. Regarding the venue for confirmation of a plan of reorganization of Efwon group, there are strong arguments suggesting that its center of main interest lies in the U.S., making a bankruptcy court in Delaware as the proper venue for such proceedings to take place.

18. Efwon Group could pursue a consolidated reorganization of its business through a pre-packaged or pre-negotiated transaction under Chapter 11 of U.S. Bankruptcy Code, by submitting either a previously creditor-approved plan for confirmation (in case of a pre-pack), or a previously negotiated plan with key constituencies (*e.g.*, the Financial Creditors).

19. Under a chapter 11, the plan of reorganization may be crammed down upon the Team Drivers; as an additional alternative to deal with the Romanian Proceedings.

20. However, pursuant to UNCITRAL Model Law, the Romanian Court would have discretionary power to consider otherwise, and instead determine the Romanian Proceedings as main, relegating a Chapter 11 to a foreign non-main proceeding status. Indeed, certain elements of the F-1 Team's operations in Romania may be invoked by the Romanian Court in upholding Romania to be the actual center of main interest of Efwon Group (through Efwon Romania). Thus, it is uncertain whether a plan of reorganization confirmed by a Delaware bankruptcy court would be granted instant recognition by the Romanian Court for settling the Romanian Proceedings.

21. Note that Efwon Group may hold sufficient venue connection to the UK, which makes additional reorganization alternatives available, such as the combined use of an English scheme in conjunction with a U.S. chapter 15 and the Romanian iteration of UNCITRAL Model Law (for recognition in the jurisdictions of Efwon US and Efwon Romania, respectively). However, we consider that certain aspects may deter pursuing a restructuring of the Efwon Group in the UK (instead of the U.S.), such as: (a) the high degree of uncertainty regarding the legal treatment warranted for cross-border insolvencies of group of companies in the EU and UK, moving forward beyond Brexit's transitional period (which is set to end on December 31, 2020); and that (b) it may not be simple to ascertain that UK is the center of main interest of Efwon Group, as opposed to U.S. or Romania, where there may exist stronger connection factors.

DISCUSSION AND ANALYSIS

EU Legal Framework Applicable to the Romanian Proceedings

22. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (the "REIR") governs insolvency proceedings in member states, filed after 26 June 2017. The REIR is applicable to reorganization proceedings in Romania (in addition to relevant Romanian domestic laws—mainly Law 85/2014); including the Romanian Proceedings filed by the two Team Drivers.

23. The REIR contains enforceable legal provisions binding upon EU member states, such as Romania, which regulate—under a flexible approach, adaptable to each member state's legal system—cross-border insolvency proceedings of group of companies (*i.e.*, parent

undertaking and all its directly or indirectly-controlled subsidiary undertakings).[1] The REIR introduces procedural rules providing for the cooperation and coordination between proceedings opened in more than one member state, in connection with a group of companies.

24. A core idea under the REIR is that each of the members to a group of companies warrants a separate legal treatment as a stand-alone entity.

25. The REIR does not provide for the possibility of substantive consolidation (as in the U.S. Bankruptcy Law) of the separate proceedings nor for a main-secondary (parent-subsidiary) proceedings approach, since the subsidiaries cannot be perceived as "establishments," even in cases they have a similar function.

Restructuring Through a U.S. Proceeding

a) General Features of Chapter 11

26. A chapter 11 case is a judicial proceeding governed by the U.S. Bankruptcy Code that is designed to assist businesses in restructuring as going concerns ("Chapter 11"). Chapter 11 embodies a policy that it is generally preferable to enable a debtor to continue to operate (or be sold as a going concern) rather than to be subject to liquidation.[2] Continued operation may enable the stakeholder to maximize value, in cases where the going concern value of a business is greater than the piecemeal liquidation value of its assets. In Chapter 11, there is no required appointment of a trustee, administrator or receiver, and the debtor's board of directors and management is allowed to continue business operations.

27. Regarding jurisdiction of U.S. courts to oversee a reorganization, Chapter 11 has a relatively low jurisdictional threshold under which for a foreign debtor to qualify, pursuant to the U.S. Bankruptcy Code, minimal connection factors need to be established. This translates into easy accessibility to U.S. bankruptcy courts in cross-border cases by debtors operating in multiple jurisdictions and groups of companies.

b) The Restructuring Plan:

28. A plan of restructuring or reorganization (hereinafter, a "Plan") is a comprehensive, detailed and thorough draft agreement setting out the roadmap through which a debtor entity is expected to come out of an insolvency proceeding, either through outright liquidation or business reorganization. Pursuant §1129(a)(11), U.S. Bankruptcy Code the court may not confirm the Plan unless it finds that its confirmation is not likely to be followed by liquidation or additional reorganizations (unless such liquidation or reorganization is foreseen as scenarios under the Plan). This is the so-called *feasibility rule*, which requires a Plan to have a reasonable

[1] Article 2(13), (14), REIR.
[2] *Collier on Bankruptcy*, ¶ 1100.01, 16th ed (2018).

assurance of success,[3] based upon reasonable projections—which are not speculative, conjectural or unrealistic—that there will be sufficient cash flows to fund the plan and maintain business operations.[4]

29. A Plan's approval under Chapter 11 is subject to intercreditor *cramdown*, which is a device whereby the proponent imposes the Plan on other class or classes of claimholders without its or their consent. By getting at least one impaired accepting class, then it becomes possible to cram down a dissenting class by satisfying the requirements of § 1129(b), U.S. Bankruptcy Code, which provides that the court shall confirm a Plan if the Plan *does not discriminate unfairly, and is fair and equitable* with respect to each class of dissenting, impaired creditors. The notion of the absolute priority rule is embedded within the fair-and-equitable requirement and basically consists in the inability of a class to receive value under a Plan unless all senior classes holding higher payment priority are previously satisfied in full.[5]

30. In a standard Chapter 11, filing is followed by a negotiation process over the terms of the Plan, the approval of a disclosure statement, vote solicitation and ultimately Plan confirmation by the bankruptcy court overseeing the proceedings.

c) Substantive Consolidation of Group of Companies:

31. Another notable feature of Chapter 11 is the possibility of substantive consolidation of different debtors—usually part of a company group—under the umbrella of a single reorganization proceeding, thus allowing the bankruptcy court to consolidate different estates. Substantive consolidation can be carried as part of a Plan.

32. If substantive consolidation is granted, for purposes of Plan confirmation, then all of the debtor's assets must be accounted for purposes of distributions and creditor repayment, which means that a corporate group structure by itself cannot adversely affect any specific creditors.[6]

d) Pre-Packaged and Pre-Negotiated Transactions:

33. Pre-packaged and pre-negotiated Chapter 11 are alternative hybrids mechanisms through which a company may restructure its business, minimizing the costs and lengthy time frames typically associated with bankruptcy proceedings, by having the relevant parties negotiating a Plan prior to entering into bankruptcy, with vote solicitation occurring either (a)

[3] *In re Johns-Manville Corp*., 843 F.2d 636, 649 (2d Cir. 1988).
[4] *In re Quigley Co.*, 437 B.R. 102, 142 (Bankr. S.D.N.Y. 2010).
[5] Bernstein, M. and Kuney, G. *Bankruptcy in Practice*, American Bankruptcy Institute (ABI), 5th Edition (2015), pp. 518, 522.
[6] *In re Global Ocean Carriers Limited*, No. 00-955(MFW) to 00-969(MFW) (Bankr. D. Del. Jul. 5, 2000).

also before filing, in the case of a Pre-packaged (or pre-pack) Plan; or (b) after the commencement of proceedings, in pre-negotiated transactions.

34. In a pre-pack Plan the debtor submits simultaneously a Plan, the votes solicited in advance and the bankruptcy petition (to a committee of creditors established in advance), and seeks outright confirmation of such previously approved Plan by the bankruptcy court, on the basis of votes tallied before filing. Although this alternative requires significant work done in advance, in general, it reduces direct and indirect costs and expenses associated with Chapter 11, and shortens the proceedings, making it a fitting alternative in scenarios where time is of the essence (such as when an strategic merger, sale or acquisition is conditioned upon quickly dispensing with a Plan, making a business viable moving forward).

35. Solicitations of votes for a Plan in advance to a bankruptcy filing must either comply with applicable law or meet the requirements for disclosure statements that typically are included in a Plan,[7] in addition to additionally requiring that the materials used to solicit votes be submitted to substantially all members of a class and that a reasonable time period[8] is provided for submitting the vote.[9]

36. A similar alternative may be the use of a pre-negotiated restructuring, in which a preliminary Plan is negotiated and agreed upon between key creditors and constituencies but is then submitted through Chapter 11 for confirmation (meaning that the voting process will be conducted before a bankruptcy judge). This alternative mitigates risks associated with potential issues affecting the validity of the voting process conducted without the acquiescence of a bankruptcy judge. The trade-off is that pre-negotiated transactions are not as quick as a pre-pack.

37. For pre-negotiated transactions to be effective it is usually required to have certain creditor coordination mechanisms and lock-ups in place, prior to commencement of bankruptcy proceedings, in the form of a plan or restructuring support agreement ("RSA"). Incidentally, RSAs are a useful tool to structure a sale of the distressed business as a going concern.

38. When compared to an out-of-court workout, the main benefit of either a pre-packaged or pre-negotiated plan is the ability to use the U.S. Bankruptcy Code to bind dissenting classes of creditors (without compromising too much on terms of time and costs).

General Aspects of a Restructuring Plan for Efwon Group

39. Efwon Group could pursue a consolidated restructuring of its business through a pre-packaged or pre-negotiated Plan with either (a) its Financial Creditors, or (b) its Financial

[7] § 1126(b), U.S. Bankruptcy Code.
[8] Usually no less than a month.
[9] Rule 3018(b), Federal Rules of Bankruptcy Procedure.

Creditors and the Team Drivers; to be entered into a Delaware bankruptcy court (which is the applicable venue for Efwon US) for prompt confirmation. Vote solicitation to the applicable creditors and claimholders would be conducted either prior to filing or afterwards (depending on the final determination), subject to the approval and cramdown rules of the U.S. Bankruptcy Court.

40. Efwon Group is not a financially insolvent business and has been put on a relatively distressed due only to the blocking effects of the Romanian Injunction over financing of its operations through the Proposed Merger. Thus, the Financial Creditors may have little incentives to be substantially impaired by a Plan.

41. The acceptance of a Plan by the Bank Syndicate Lenders and the Monaco Lender is key for a Plan to (a) be crammed down upon the Team Drivers in the Romanian Proceedings (should they fail to vote affirmatively or their votes never been solicited in the first place); (b) ringfence the exposure and potential spillover of liabilities from Efwon Romania to Efwon UK and the Efwon Group, in general; and (c) effectively resolve the relative distress situation of Efwon Group's business in general, for purposes of clearing the Condition Precedent for closing of the SPA with KuasNas.

42. Thus, for securing smooth and timely approval of the Plan through a pre-pack or pre-negotiated Chapter 11, it may be advisable to leave the Financial Creditors' credits mostly unimpaired (at least regarding the principal outstanding balance), focusing instead mainly in possible debt rollovers in terms that are consistent with cash flows projections for the next 2-5 years. Other aspects that could be addressed in such renegotiations are (i) the partial or complete release of the security interest over Mr. M property by the Bank Syndicate Lenders (which may be warranted by having KuasNas stepping in as new majority owner of Efwon Group); and (ii) segregating the stream of revenues of the F-1 Team's operations through two streams—the newly created Malaysian vehicle, Efwon Mal, and Efwon UK—the latter of which will be the conduit only of TV revenues, which will in turn indirectly affect the lien held by the Monaco Lender.

43. For purposes of votes' solicitation, a viable way of breaking down creditors' groups may be: (i) the Monaco Lender; (ii) the two senior Bank Syndicate Lenders; (iii) the two mezzanine Bank Syndicate Lenders; (iv) the five junior Bank Syndicate Lenders; (v) general unsecured creditors (which may include any vendor, supplier, etc.);[10] and (vi) the Team Drivers (if their vote if finally solicited—which may be unnecessary if, for instance, a Settlement Agreement[11] is previously reached).

[10] Such creditors should be left unimpaired under a Plan.
[11] As defined below.

44. The final terms and conditions of the agreement between Efwon Group and the Financial Creditors should be included into an RSA. Such RSA will set out the basis for the Plan, to be confirmed by the Delaware bankruptcy court.

45. The Plan may be conditioned upon the terms of the RSA—and the Plan itself—clearing the threshold of the Condition Precedent under the SPA with KuasNas (and the Financing Transaction effectively closing).

46. Under the RSA the Team Drivers may be dealt with, either by (a) being submitted the Plan for their vote and approval; (b) being subject to cramdown of the Plan; (c) entering into a separate settlement agreement with them (which may be the result of a prior mediation effort) to dislodge and terminate the Romanian Proceedings; or (d) carving out Efwon Romania from the Efwon Group (to the extent that such possibility is operationally feasible and no strategic assets or property—needed for the continued business of the F-1 Team—is affected by the Romanian Injunction).

47. Efwon Romania (and Efwon HK) would be subject to liquidation under the Plan.

Recognition of a Chapter 11 Plan in Romania

48. Considerations pertaining the jurisdiction of a U.S. court over an Efwon Group restructuring through a Chapter 11 should be analyzed in conjunction with its interactions with other jurisdictions over which such proceedings will need to be recognized—such as Romania, where the non-voluntary Romanian Proceedings were brought forward by the Team Drivers.

49. Recognition by the Romanian Court of a Plan confirmed *via* Chapter 11 in the U.S. will be assessed pursuant to domestic Romanian law, which has adopted the UNCITRAL Model Law on Cross-Border Insolvency (the "UNCITRAL Model Law"). This may facilitate recognition in Romania of the Chapter 11 Plan, provided that the Romanian Court can establish that the U.S. proceedings are in fact a *foreign main proceeding*, carried out in the jurisdiction where Efwon Group has effectively its center of main interest.[12]

50. In cross-border insolvencies, the concept of center of main interest ("COMI") is of utmost significance, as it determines the jurisdiction where main insolvency proceedings need to be conducted. Various factors are relevant to such determination, including: the location of the debtor's headquarters; the location of headquarters and management; the location of the "*nerve centre*" of a business; the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes. However, when considering group of

[12] See article 17(2)(a), UNCITRAL Model Law.

companies entangled through the use of special purpose vehicles, the determination is anything but straightforward.[13]

51. Determination of COMI under the UNCITRAL Model Law is deemed to be an holistic endeavor, where different factual elements are considered on a case-by-case basis, to determine that the location of the foreign proceeding in fact corresponds to the actual location of the debtor's COMI, readily ascertainable by creditors.[14]

52. The recognition of a concurrent Chapter 11 as foreign main proceeding in Romania, would entail a coordinated approach by the Romanian Court, warranting cooperation with the U.S. proceedings.

53. In the case of Efwon Group we consider different concurrent elements exist to establish U.S. as COMI for the group of companies' business, as: the holding company of the group is located in Delaware; the ultimate owner—Mr. M—is an U.S. citizen; the "nerve centre" and place where decision-making is actually carried out is the U.S., where Mr. M resides; the organizational structure downstream (Efwon UK and Efwon Romania) were only established by virtue of practicality considerations of the business (*e.g*., the location of most others F-1 teams, or the fact that a FIA License to operate a F-1 team had already been granted to a Romanian entity), as opposed to key operational or strategic considerations of the business; most creditors (both in term of the number and aggregate sum of outstanding credits or claims) are actually located in the U.S.—*i.e*., the Bank Syndicate Lenders; the security interests serving as collateral to the benefit of the Bank Syndicate Lenders are property located in the U.S.

54. Notwithstanding the above, the discretionary nature of the determination of COMI, means that a high degree of uncertainty exists in regards as to the recognition by the Romanian Court of a Chapter 11 Plan as either main or non-main proceedings.

Settlement Negotiations with the Team Drivers

55. From a first look it may seem that the Team Drivers hold the upper hand in terms of leverage over Efwon Group, in terms of a prospective settlement, as their preemptive gambit to bring forward the Romanian Proceedings and secure the Romanian Injunction has (a) put significant strain on the situation of Efwon Group (at different levels of the corporate structure) *vis-à-vis* the Financial Creditors; and, perhaps more importantly, (b) it has jeopardized the Financing Transaction by putting the Condition Precedent in front of it. However, a proper assessment of situational leverage should also take into account the position of the Team Drivers, as counterparty in a negotiation table

[13] *In re OAS S.A.* 533 BR 83, (Bankr. S.D.N.Y. 2015), CLOUT 1629
[14] *Guide to Enactment and Interpretation*, UNCITRAL Model Law (2014), § 146, p. 71.

56. Leverage, which can be defined as one's ability to reach a bargain in one's own terms, is a dynamic rather than static factor in negotiations, potentially shifting at any moment. It has close relationships with control over the *status quo* and appearance of comfort with a present course of action.[15] Typically leverage derives from an ability to persuade the counterparty of concrete loses which would derive from a situation in which no deal is achieved. It is a situational concept, in the sense that it depends on specific sets of circumstances at specific times.

57. Thus, it becomes imperative to assess the situation faced by the Team Drivers in the context of settlement agreement negotiations under a Plan being extended their way. The Team Drivers may generally assumed to be young, competitive and focused on their professional careers. Their main drive in life may likely be their achievement in motorsports, instead of simply procuring economic gains for themselves. Thus, their main motivation in filing for the Romanian Proceedings may have been the perception of their racing seats being put on jeopardy by the relocation of the F-1 Team from Romania to Malaysia, under a new majority owner and sponsor. It is from this point of view that the Romanian Proceedings seem to have been a tactical move. However, pushing forward with any such recalcitrant tactics to the extent that the prospective Financial Transaction falls through may in fact affect their status as F-1 drivers not only as their current employer, the F-1 Team, may cease to exist, but also it may severely impact the prospects for them joining other F-1 teams in the future (as they will likely be perceived to be troublesome employees by other F-1 team owners). From this point of view, the Romanian Proceedings may actually be strategically disadvantageous for the Team Drivers.

58. For purposes of such circumstances becoming apparent to the Team Drivers, it may be advisable to engage into settlement negotiations with them, through the assistance of an experienced mediator, with background in sport's agents-principals conflicts.

59. Furthermore, in terms of situational leverage, the different scenarios available examined under ¶ 46 (and provided that the assumption stated in ¶ 2 holds), may in fact translate into enhanced leverage for Efwon Group when entering into negotiations with the Team Drivers.

60. A thorough profile of each of the Team Drivers should be constructed in advance to undertaking any definitive negotiation tactical roadmap.

61. The aim of undertaking negotiations with the Team Drivers would be to settle their claims against Efwon Romania (and the Efwon Group, under any piercing of corporate veil or alter ego notion), in a timely and private manner, by which (a) any potential impediment to the Condition Precedent is dispensed with, and (b) the status and prospects of the Team Drivers to remain as candidates for a racing seat in any F-1 team is maximized. For this purpose, Efwon

[15] Shell, G. Richard. *Bargaining for Advantage*, Penguin Books, 2nd edition (2006), pp. 90, 94, 98.

Group may consider entering into cash indemnifications to be made in installments, in terms consistent with the F-1 Team's business plan and projected cash flows for the following 2-5 years.

62. The final terms and conditions of an agreement between Efwon Group and the Team Drivers would be included in a settlement (the "Settlement Agreement"), through which the Romanian Proceedings would be terminated. The Settlement Agreement may have enhanced binding effects by concluding and executing it in a signatory country to the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention").[16]

Disincentives to an UK Restructuring

63. Although (a) the Efwon Group undeniably holds sufficient connection to the UK, through its presence in the country with Efwon UK—parent company to Efwon Romania—with business dealings and operation within the borders of UK, and (b) the UK insolvency legal framework provides with efficient restructuring mechanisms for dealing with groups of companies (*e.g.*, through the combined use of a scheme plus a U.S. chapter 15 and the Romanian iteration of UNCITRAL Model Law);[17] we consider that certain aspects may deter pursuing a restructuring of the Efwon Group in the UK, instead of the U.S.

a) Uncertainty from Brexit:

64. As mentioned in ¶ 22, the REIR governs insolvency proceedings in member states, commenced after 26 June 2017, including the Romanian Proceedings (in addition to relevant Romanian domestic law).

65. The REIR also applies in the UK, and will continue to do so until either (a) a deal addressing the treatment of cross-border insolvencies between the UK and the EU is reached during the Brexit transitional period, which is set to expire on December 31, 2020 (the "Transitional Period"); or (b) the deadline set for the Transitional Period elapses, without any deal being reached.

66. In case a deal between the EU and the UK is achieved during the Transitional Period (*e.g.*, extending of the applicability of REIR in the UK upon completion of Brexit) then the legal treatment warranted to the interplay between the Romanian Proceedings and an eventual insolvency proceeding of Efwon UK commenced in UK jurisdiction, would need to be addressed under pursuant to the applicable framework resulting from such agreement (most likely, the REIR).

[16] Having ratified the Singapore Convention.
[17] Adopted and adapted in Romania under Title I of Law 637/2002.

67. If, on the other hand, no deal between the EU and the UK is achieved during the Transitional Period, then the REIR will continue to temporarily apply for proceedings brought forward before the expiry date of the Transitional Period, and after which the Insolvency (Amendment) (EU Exit) Regulations 2019 (the "Brexit Regulations"). This means, that a narrowing time window will still be available for Efwon UK to initiate insolvency proceedings in the UK, under the REIR.

68. Thus, a high degree of uncertainty regarding the legal treatment warranted for cross-border insolvencies of group of companies in the EU and UK, moving forward beyond the Transitional Period exists.

69. If Efwon UK commenced insolvency proceedings in the UK during the Transitional Period (or afterwards, if an agreement extending applicability of the REIR is achieved), then the proceedings would be conducted pursuant to the provisions of the REIR.

70. If Efwon UK failed to commence insolvency proceedings in the UK during the Transitional Period and instead did so afterwards, then those proceedings would be conducted in adherence to the Brexit Regulations, which substantially modified the framework on recognition of insolvency proceedings, court-to-court communication, treatment of group insolvencies and information disclosure rules to creditors.

b) Issues on Establishing COMI:

71. As mentioned in ¶ 50, in the context of cross-border insolvencies, the concept of COMI is of absolute relevance, as it determines the jurisdiction where main insolvency proceedings need to be conducted. The insolvency practitioner or administrator appointed under such main proceeding has full and universal authority over the whole of the debtor's assets, while ancillary proceedings opened in other jurisdictions have a scope restricted to assets located within each of those jurisdictions. Determination of the COMI—and by consequence, of the country with jurisdiction over main insolvency proceedings—is generally understood to be eminently a factual undertaking, to be determined on a case-by-case basis.[18]

72. In the European context, pursuant to the REIR there is a presumption that a company's COMI lies in the EU member state where it has its registered office.[19]

73. Under leading EU case law, this presumption can only be rebutted if there are objective factors signaling otherwise, ascertainable by arm's length creditors.[20] The European Court of Justice ("ECJ") gave as an example the relatively straightforward case where a

[18] Wessels, Bob. *International Jurisdiction to open Insolvency Proceedings in Europe, in particular against (groups of) Companies*, Institute for Law and Finance, Working Paper No. 17 (2003).
[19] See article 3(1), REIR.
[20] *Eurofood IFSC Ltd* (Re) [2006] Ch 508 (ECJ) [para. 36, 37].

company has a registered office in one member state but that office is no more than a letterbox address and the company does not carry on any activity in that state. In such a case the fact that there was no trading activity and/or administration conducted in that state would be a factor readily discoverable by those dealing with the company potentially leading to the rebuttal of the presumption set in article 3(1), REIR. The European Court of Justice believed the presumption as to the situation of the COMI in the state where the registered office is located is not rebutted simply by producing evidence that the headquarters of the parent company that has the ability to make or influence economic choices for its subsidiary was elsewhere.

74. It seems clear that the *onus* to prove circumstances clearing the threshold set by the presumption of COMI is a high one.

75. Furthermore, the ECJ has also held that the presumption of registered office as COMI, will not be rebutted merely by the fact that a company operating in the member state where its registered office is located, is controlled by a parent company sitting in another member state. Thus, where a company carries on its business in a member state in which its registered office is situated, the fact that its economic choices are (or can be) controlled by a parent company in another member state is not enough to rebut the presumption.[21]

76. The factors to be taken into account in order to establish COMI—and rebut the registered office presumption—include multiple aspects such as, other places in which: the debtor company may carry out economic activities, holds assets, owns immovable property, enters into financing agreements, etc., in so far as those places are ascertainable by third parties; further provided that those factors must be assessed in a comprehensive manner. The existence of a financing agreement in another member state may be considered an objective factor ascertainable by third parties. However, the existence of such contracts outside the country where the registered office is situated by itself cannot be regarded as sufficient to rebut the presumption laid down by the REIR, unless a comprehensive assessment of all other relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other member state.[22]

LIMITATIONS AND QUALIFICATIONS

77. We make no recommendation as to the tax, regulatory and FIA-related considerations, relevant in connection with subject matter of this memorandum, and the advise herein provided. Legal advise from experienced practitioners in such matters (in the relevant jurisdictions) should be sought.

[21] *Eurofood* [para. 37].
[22] *Interedil, Srl.* [2011] EUECJ C-396/09 [para. 52, 53].

78. The advise given in this memorandum is made as of its stated date. Any regulatory changes occurring after such date, may materially affect or impact the substance of the analysis.

79. We intend not to supplement nor replace in any form the legal counsel made by professionals admitted for practicing law at any other relevant jurisdiction(s), other than in connection with subject matter of this memorandum. In particular, we make no analysis with regards to Romanian insolvency law, other than in connection with the applicability of REIR and an adapted version of UNCITRAL Model Law in such jurisdiction.

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RPS

Appendix "A"
Defined Terms

The terms below will have the following definitions, for purposes of the memorandum dated February 21, 2019:

"Bank Syndicate Lenders" means collectively a group of nine banks who entered into the secured loan agreement with Efwon US.

"Brexit" means the United Kingdom ceasing to be a member state of the European Union regardless of which countries comprise the United Kingdom at such date.

"Brexit Regulations" means the Insolvency (Amendment) (EU Exit) Regulations 2019.

"Chapter 11" means chapter 11 of the U.S. Bankruptcy Code.

"COMI" means center of main interest.

"Condition Precedent" means the prior solving of the financial distressed situations affecting the Efwon Group at the different levels of its corporate structure, upon which closing of the Financing Transaction is conditioned pursuant to the SPA.

"ECJ" means the European Court of Justice.

"Efwon Group" means the group pf companies comprised of Efwon US, Efwon UK, Efwon Romania and Efwon HK.

"Efwon HK" means Efwon Hong Kong, based in Hong Kong.

"Efwon Mal" means Efwon Malaysia, based in Malaysia.

"Efwon Romania" means Efwon Romania, based in Romania.

"Efwon UK" means Efwon Trading, incorporated under the laws of England and Wales.

"Efwon US" means Efwon Investments, LLC, based in Delaware.

"EU" means the European Union.

"F-1 Team" means the Formula 1 team owned by Mr. M, and operated through Efwon Group.

"FIA" means *Fédération Internationale de l'Automobile*.

"Financial Creditors" means, jointly, the Bank Syndicate Lenders and Monaco Lender.

"Financing Transaction" means the deal through which KuasNas agrees to finance the operations of the F-1 Team, through the acquisition of a 51% stake in Efwon US.

"KuasNas" means the KuasNas Group based in Malaysia.

"Monaco Lender" means a financing institution based in Monaco which entered into a secured loan agreement with Efwon UK.

"Mr. M" means Mr. Benedict Maximov.

"Plan" means plan of reorganization or similar.

"Proposed Merger" means the transfer of 51% of Efwon US' stock to KuasNas under the SPA.

"REIR" means Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast).

"Romanian Court" means the Romanian insolvency court which issued the Romanian Injunction in the Romanian Proceedings.

"Romanian Injunction" means the freezing injunction issued by the Romanian Court in the Romanian Proceedings.

"Romanian Proceedings" mean the unvoluntary insolvency proceedings filed by the Team Drivers before the Romanian Court.

"RSA" means a restructuring support agreement or similar.

"Settlement Agreement" means an agreement between Efwon Group and the Team Drivers for settling and dislodging the Romanian Proceedings.

"Singapore Convention" means the United Nations Convention on International Settlement Agreements Resulting from Mediation.

"SPA" means a share purchase agreement entered into by Mr. M and KuasNas, to carry out the Financing Transaction.

"Team Drivers" mean the two F-1 Team's drivers who filed for the Romanian Proceedings.

"UK" means the United Kingdom.

"UNCITRAL Model Law" means UNCITRAL Model Law on Cross-Border Insolvency.