Dear Mr Maximov,

I have been instructed to give advice on how to facilitate a deal in relation to the sponsorship and the acquisition of the majority stake by KuasaNas, a Malaysian state company, particularly in how the insolvency issues affecting the companies in the Efwon Group (defined below) can be dealt with (the **Scope**).

**Executive Summary**[[1]](#footnote-1)

Based on the information available, it is recommended that certain entities in the Efwon Group to commence insolvency proceedings in order to address the insolvency issues so that the sponsorship agreement with KuasaNas can be secured. The advice given below is subject to a number of assumptions and the provision of further information discussed throughout the letter of advice. It is recommended that:

1. Efwon Romania requests the Romanian court for the opening of insolvency procedure pursuant to Title II of the Romania IA in order to protect its business and assets from the threatening actions by the Drivers;
2. Efwon Romania submits a declaration in accordance with Article 67(1)(g) of the Romanian IA of its intention to enter judicial reorganisation;
3. Efwon Trading invites the Monaco Lender to negotiate and seek to restructure the loan;
4. the director(s) of Efwon Trading initiates the CVA to confirm the debt restructuring plan in accordance with Part I of the UK IA, as required;
5. Efwon Investments commences reorganisation procedure pursuant to Chapter 11 of the Code to address the loan payable to the Banks;
6. Efwon Investments seeks recognition of its Chapter 11 in other jurisdictions under the Model Law, particularly the UK, as required;
7. alternative to Efwon Trading commencing the CVA, Efwon Trading commences reorganisation procedure pursuant to Chapter 11 of the Code;
8. Efwon Trading seeks recognition of its Chapter 11 in other jurisdictions under the Model Law, particularly the UK, as required;

By taking the above actions, the companies in the Efwon Group will retain control of the operation of their business even when insolvency proceedings are commenced. The companies can also obtain recognition of their insolvency proceedings in other jurisdictions as and when required, particularly when there is a need to protect the assets in other jurisdictions and/or to avoid separate insolvency proceedings being commenced. This is of even greater benefits for Efwon Romania and Efwon Trading as their insolvency proceedings commenced in Romania and the UK respectively will be benefited from the automatic recognition by the Member States. There will be automatic moratorium in most of the above insolvency proceedings (with the exception of the CVA) to allow the Efwon Group a breathing space when their debts are reconstructed and/or additional capital are sought. Subject to the insolvency proceedings being recognised as foreign main insolvency proceedings, automatic relief for stay of enforcement actions are available in other jurisdictions. Otherwise, discretionary relief can be sought if the insolvency proceedings are recognised as foreign non-main proceedings. Despite the fact that, usually, the automatic stay does not affect the right of the secured creditors to enforce their security interests, the mechanism of adequate undertaking and/or adequate protection are available under the above insolvency proceedings in most of the jurisdictions to prevent the secured creditors from enforcing their security interests.

The financial and/or debt restructuring proposed and approved in accordance with the above insolvency proceedings also allow the sale of assets and/or introduction of new debt and/or capital to facilitate the transfer of the shareholding and/or issuance of new shares to KuasaNas.

Therefore, the above recommendations will resolve the insolvency issues affecting the companies in the Efwon Group so as to satisfy the pre-condition required by KuasaNas to execute the sponsorship agreement and to sell the stake of the Efwon Group to KuasaNas.

**background**

I have been informed with the background as follows.

The **Efwon Group** comprises of Efwon Investments incorporated under the law of Delaware, and Efwon Trading incorporated under the law of England and Wales, which are both directly and wholly owned by yourself. Efwon Trading is the 100% shareholder of Efwon Romanian and Efwon Hong Kong. The Efwon Group was formed for the participation in the Formula 1 competition sanctioned by the Fédération Internationale de l’Automobile (**FIA**).

Every entity in the Efwon Group serves different functions. Efwon Investments acts as the investment entity which holds the source of capital and invests in the trading entity, Efwon Trading. Efwon Trading holds all trading subsidiaries with different functions. While Efwon Romania holds the FIA Super Licence, the racing machines, and the contracts with the drivers, Efwon Hong Kong deals with the sponsorship and holds the sponsorship agreement.

The current sponsorship agreement with Kretek, an Indonesian company, will come to an end in 2020 and will unlikely be renewed. Efwon Hong Kong is in negotiation with the new sponsor, KuasaNas, in which one of the conditions is that KuasaNas will acquire a 51% majority stake in the racing team. The new sponsorship agreement has not been finalised as the newly elected Malaysian Governments is required to review the sponsorship agreement given that KuasaNas is a state-owned company. The new sponsorship agreement is still under review.

In the fall of 2018, during the last race of the season, the drivers of the racing team (the **Drivers**) were injured. Subsequently, the Drivers have brought claims before the Romanian courts whereas substantial compensations may be awarded in favour of the Drivers. Further, the Drivers have filed for the insolvency of Efwon Romania and obtained freezing injunctions over Efwon Romania’s assets and income.

In this regard, Efwon Romania risks defaulting on its payments to Efwon Trading which may lead to a knock-on effect to other entities in the Efwon Group. Furthermore, given this circumstance, KuasaNas has requested an additional pre-condition for the sponsorship agreement to be executed, subject to the Malaysian Government’s approval, that the insolvency issues affecting the companies in the Efwon Group are to be dealt with promptly.

Given the current situation, it appears that the Efwon Group is in need for additional source of funds given the withdrawal of sponsorship by Kretek and the potential adverse costs in the Romanian litigation. While the new sponsorship agreement with KuasaNas may resolve the issue of funding, the insolvency issues within the Efwon Group are required to be dealt with as a pre-condition to secure the sponsorship from KuasaNas.

**Romanian insolvency proceedings**

Facts

The claims brought by the Drivers against Efwon Romania have given rise to threats to Efwon Romania’s ability to pay the debt owed to Efwon Trading unless appropriate measures are taken now. I have also been informed that if the Drivers succeed in their claims, substantial compensations awarded against Efwon Romania are likely. In addition, Efwon Trading has lent a total of USD450 million as operating capital to Efwon Romania which is secured by the racing team’s share of the broadcasting revenue.

Procedures and outcomes

In accordance with Article 5(29) of the Romania Law No 85/2014 on insolvency prevention and insolvency proceedings *(privind procedurile de prevenire a insolvenței și de insolvență)* (the **Romanian IA**), insolvency is imminent when it is proven that the debtor will not be able to pay the due debts committed at maturity with the funds available at the maturity date. Given the insolvency of Efwon Romania, it is entitled to commence the insolvency procedure under Title II of the Romanian IA.[[2]](#footnote-2) While Efwon Romania is obliged to address a request of the commencement of the insolvency procedure within a maximum of 30 days from the appearance of the state of insolvency, it should be caution that the premature introduction of such request attracts liability of Efwon Romania for the damages caused.[[3]](#footnote-3) Therefore, Efwon Romania must make immediate assessment as to whether it is insolvent within the meaning of Article 5(29) of the Romanian IA, particularly if it will fail or has failed to satisfy its current or future debt that exceeds the threshold of RON50,000 (approximately USD12,500 as at the end of 2018).

Assuming Efwon Romania is insolvent, it can request the court for the opening of insolvency procedure accompanied by a set of documents listed in Article 67 of the Romania IA. Among these documents is a list of creditors regardless of the certainty of their claims. Therefore, the list of creditors should include the Drivers. In addition, Efwon Romania is entitled to submit a declaration of its intention to enter judicial reorganisation.[[4]](#footnote-4) Subject to the satisfaction of the requirements under the Romanian IA, the syndic judge will pronounce a decision opening the insolvency procedure and order the appointment of the provisional judicial administrator while subsequent to which, the creditors can decide to appoint a judicial administrator at the first meeting of creditors. In the meantime, Efwon Trading, as the sole shareholder of Efwon Romania, can appoint a special administrator who will administer the activity of Efwon Romania under the supervision of the judicial administrator. After the syndic judge pronounce the opening of the insolvency procedure, Efwon Romania will immediately enter the observation period which will end when the reorganisation plan is confirmed or when it enters bankruptcy procedure.

In accordance with Section 6, Chapter I of Title II of the Romanian IA, Efwon Romania can enter judicial reorganisation and propose a reorganisation plan within 30 days from the publication of the definitive table of claims.[[5]](#footnote-5) The purpose of a reorganisation plan is to restructure and continue debtor’s (i.e. Efwon Romania’s) activity, or liquidate some of its assets, or a combination of both. The reorganisation plan that Efwon Romania may propose must include a debt payment schedule which may contain reductions, deferrals of payments and/or payment in instalments of the registered receivables and must not exceed three years from the date of the confirmation of the reorganisation plan. The reorganisation plan will also be evaluated by the judicial administrator who will publish same in the insolvency proceedings bulletin.[[6]](#footnote-6)

The meeting of creditors to vote on the reorganisation plan will be held within 20 to 30 days from its publication. The creditors are divided into five categories.[[7]](#footnote-7) The reorganisation plan is considered to be accepted by a category if the absolute majority (i.e. more than 50%) of the value of the claims accepted it. The reorganisation plan will then be confirmed by the syndic judge within 15 days of the submission of the minutes of the meeting of creditors by the judicial administrator. In order for the syndic judge to confirm a reorganisation plan, more than half of the categories have to accept the reorganisation plan, provided that at least one of the disadvantaged categories and at least 30% of the total value of the claims have also accepted.

Benefits and disadvantages

Subject to its confirmation, the claims and rights of creditors will be modified in accordance with the reorganisation plan. Efwon Romania can continue to conduct its activity under the supervision of the judicial administrator. Should no events under Article 145(1)C to E of the Romanian IA occur, and after the judicial administrator has submitted a report confirming the fulfillment of the reorganisation plan, the reorganisation procedure will come to an end. Efwon Romanian will be relieved from any comprised debt pursuant to the reorganisation plan.

Given the threats arose from the claims brought by the Drivers and the potential defaults on its payments to Efwon Trading, entering insolvency proceedings of Efwon Romania affords certain benefits including that all enforcement measures against Efwon Romania are automatically suspended from the date of the opening of the insolvency proceedings.[[8]](#footnote-8) Further, no interest or penalty may be added to the claims arose before the date of the opening of the insolvency proceeding.[[9]](#footnote-9) During the observation period and the reorganisation period, Efwon Romania will be able to continue to carry out current activities under the supervision of the judicial administrator assuming that the right of administration has not been revoked. [[10]](#footnote-10) Efwon Romania will also benefit from the access of financing obtained during the observation period. Such financing enjoys priority with the guarantee of assets or rights which are not subject to preferential claims.[[11]](#footnote-11) The last but not least, the reorganisation plan allows restructuring of debt in which payments can be deferred or reduced.

Commencing of the insolvency proceeding by Efwon Romania with the view to propose a reorganisation plan provides moratorium on enforcement actions against Efwon Romania. Should the reorganisation plan be approved by the creditors, Efwon Romania will have the opportunity to resolve its liquidity issues with a duration of three years while the Efwon Group seeks to obtain new debt and/or capital. Furthermore, the management of Efwon Romania continues to operate and manage the business and affairs via the special administrator with the supervision of the judicial administrator.

Further information required

As can be seen from the above, the commencement of the insolvency procedure and the confirmation of the reorganisation plan rely heavily on the state of insolvency of Efwon Romania and the acceptance of the reorganisation plan by the creditors. Efwon Romania must determine whether it is insolvent so as to be entitled to commence insolvency proceedings. Apart from the contingent claim by the Drivers, it is also unclear as to the terms and maturity of the loan payable to Efwon Trading which both affect the assessment on Efwon Romania’s solvency. Efwon Romania also needs to consider the composition of its creditors’ claims which will be divided into five categories.[[12]](#footnote-12) In order for the reorganisation plan to be confirmed by the syndic judge, Efwon Romania is required to consider what and how a reorganisation plan should be proposed so as to secure sufficient voting from creditors under different categories of claims in favour of the reorganisation plan. The above advice has only been given, despite that they have filed for the insolvency of Efwon Romania, assuming that the Drivers actually have jurisdiction to file for insolvency proceedings against Efwon Romania. Should the Drivers not have jurisdiction to file same as their debts are contingent, further consideration is required as to whether aggressive protection strategy on Efwon Romania’s business and assets should be taken.

**UK insolvency PROCEEDINGs**

Facts

The liquidity issue of Efwon Romania may lead to the default of payment to Efwon Trading and may in turn result in the default of payment to the Monaco based lender (the **Monaco Lender**) which has lent USD100 million to Efwon Trading to further advance to Efwon Romania as budget for the 2014 season. The loan from the Monaco Lender is secured by Efwon Trading’s revenue. Another lender of Efwon Trading is Efwon Investments which has lent USD350 million with security on future revenue of Efwon Trading’s trading activities. Based on the information available, the role of Efwon Trading appears to be the provision of financing facilities for other companies within the Efwon Group.

In the event that Efwon Trading is at risk of insolvency and/or winding up proceeding by creditor(s) is anticipated, the United Kingdom Insolvency Act 1986 (the **UK IA**) affords two regimes for the protection of a company’s business and assets and to potentially facilitate a debt restructuring which are:

1. the company voluntary arrangements under Part I of the UK IA (the **CVA**); and
2. the administration under Schedule B1 of the UK IA (the **Administration**).

Both procedures can be initiated by the director of Efwon Trading.

Procedures and outcomes

*Company voluntary arrangements*

The CVA can be initiated by the director. [[13]](#footnote-13) The purpose of the CVA is that the director can propose a proposal to the satisfaction of the company and of its creditors to restructure its affairs and debts.[[14]](#footnote-14) Under the CVA, the director of a company makes a proposal and nominates a nominee, a qualified insolvency practitioner, who will evaluate the proposal and, by submitting a report to the court, recommend to the company and the creditors whether the proposal should be considered.[[15]](#footnote-15) If it is of the opinion that the proposal should be considered, the nominee will summon a meeting of the company to consider the proposal and to seek decision from the creditors as to whether they approve the proposal. [[16]](#footnote-16) If the proposal is so approved by more than 75% in value of the creditors, the voluntary arrangement will take effect and bind all creditors.[[17]](#footnote-17)

However, the CVA may not offer sufficient protection to Efwon Trading in its current circumstances. A proposal which affects the right of a secure creditor to enforce its security cannot be approved except that the secured creditor concerned concurs.[[18]](#footnote-18) Therefore, unless the Monaco Lender consents, it can still enforce its security even if Efwon Trading has entered the CVA procedure. In addition, automatic moratorium is not available under the CVA unless the company satisfies two or more of the requirements for being a small company pursuant to section 382(3) of the UK Companies Act 2006 (the **UK CA**). [[19]](#footnote-19) Based on the information available, Efwon Trading is not qualified as a small company. Furthermore, the 75% threshold to secure creditors’ approval is not low and the creditors have the right to challenge the decision in the court.[[20]](#footnote-20)

*Administration*

The objectives of the Administration are to rescue the company as a going concern, achieve a better result for the company’s creditors as a whole than in liquidation, or realise property in order to make a distribution to creditors.[[21]](#footnote-21) A company or its directors may appoint an administrator to initiate the Administration process by filing a notice of appointment with the court.[[22]](#footnote-22) The administrator will make a statement setting out proposals for achieving the objectives of the Administration which may include a proposal for a CVA or a compromise or arrangement under Part 26 of the UK CA.[[23]](#footnote-23) The proposal will be sent to every creditor who will decide whether the proposal is approved within 10 weeks from the commencement of the Administration.[[24]](#footnote-24) If the creditors so approve, the administrator will administer the terms of the proposal which, when its purpose has been sufficiently achieved, will come to an end with a notice filed with the court by the administrator.[[25]](#footnote-25)

During the process of the Administration, the administrator shall management the affairs, business and property of the company and, if the proposal is approved, in accordance with the proposal.[[26]](#footnote-26) The administrator shall also take custody or control of all the property of the company.[[27]](#footnote-27) In other words, the company and its director cease to have power to exercise management functions without the consent of the administrator.[[28]](#footnote-28) Furthermore, the administrator may remove directors and/or appoint others (whether or not to fill a vacancy).[[29]](#footnote-29) Automatic moratorium is available in the Administration regime. Any petition for the winding up of the company shall be suspended or dismissed.[[30]](#footnote-30) Any administrative receiver shall also vacate office. [[31]](#footnote-31)[[32]](#footnote-32) The administrator may also request any receiver appointed over part of the company’s property to vacate office.[[33]](#footnote-33) No winding up resolution shall be passed or legal process should be executed, including enforcement of security, repossession of goods, exercising right of forfeiture or irritancy.[[34]](#footnote-34) The administrator may also apply to the court for order to dispose of property which is subject to non-floating charge, provided that the proceeds will be utilised to discharge the security.[[35]](#footnote-35)

The commencement of the Administration requires notice of intention to appoint to be given at least five business days prior to the appointment of an administrator to any person who can appoint an administrative receiver or who holds qualifying floating charge.[[36]](#footnote-36) In this regard, I have been informed that the security that the Monaco Lender holds is a fixed charge security only on Efwon Trading’s income. In addition, an administration cannot be commenced under certain restrictions, including if the company was in administration in the preceding 12 months.[[37]](#footnote-37) Based on the information available, it does not appear that the restriction and the additional step apply to Efwon Trading. However, if this is the case, a different approach may be considered.

Benefits and disadvantages

As can be seen from the above, both the CVA and the Administration have their own advantages and disadvantages. In essence, the CVA allows the company and its directors to retain control of the company during the process but does not offer moratorium unless it is a small company. Further, it does not prevent security interest holder from enforcing its security or cannot alter the right of security interest holder. In contrast, the Administration offers protection under automatic moratorium but takes control away from the company and its directors.

In order for the management of Efwon Trading to retain control of the company and its business so as to maintain flexibility when negotiating a debt restructuring, commencing the CVA is a better option than the Administration. However, given the circumstances and the lack of moratorium in the CVA, it does not appear that it would be of great benefits for Efwon Trading to immediately commence the procedure. The Monaco Lender is the only known creditor in which the loan is secured by Efwon Trading’s revenue. Based on the information available, the revenue of Efwon Trading includes dividend income from its investments in Efwon Romania and Efwon Hong Kong, and interest income from its loan to Efwon Romania. In the event that Efwon Romania enters judicial reorganisation under the Romania IA, it is uncertain if there will still be dividend and interest incomes flow from it. In addition, as the role of Efwon Hong Kong is to seek sponsorship and hold sponsorship agreement, it is unlikely that there will be substantial dividend income. In this regard, even if the Monaco Lender enforces its security in the event of a default, its ability to recover material interest from its security is doubtful without the cooperation from the Efwon Group. Therefore, it should be of the interest of the Monaco Lender to work with the Efwon Group to recover its outstanding loan. Instead of immediately initiating insolvency proceedings, the more appropriate approach for Efwon Trading to deal with the Monaco Lender is to invite it to negotiate and seek to restructure the loan, and to manage the liquidity of Efwon Trading before commencing insolvency proceedings to seek to confirm any restructure plan. In this regard, the potential risk arose from the lack of moratorium in the CVA can be mitigated.

Further information required

The above advice in relation to Efwon Trading has been given under the assumption that related creditor, Efwon Investments, will not take vigorous action in the event of default of its loan. In addition, the willingness of the Monaco Lender to negotiate is uncertain. In the event that it is not willing to negotiate, immediate commencement of the Administration may otherwise be a better option to protect the business and assets even though the management will lose control of the operation of Efwon Trading. In addition, it is unclear if there are other creditors of Efwon Trading which may complicate the negotiation with the Monaco Lender. Therefore, immediate action is required to review the loan terms with the Monaco Lender to forecast the cash flow required to negotiate the financial or debt restructuring with it (and/or any other creditors). In the event that these assumptions are not valid or further information unfolds, the advice may need to be reconsidered.

**EU Regulation on Insolvency Proceedings**

While it may not be in the great interest of Efwon Trading to immediately commence insolvency proceedings, it is not completely without benefits for doing so. In the event that Efwon Trading commences insolvency proceedings in the United Kingdom (the **UK**), Efwon Trading will enjoy the protection in the other member states (the **Member States**) of the European Union (the **EU**).[[38]](#footnote-38) This also applies to the insolvency proceedings commenced by Efwon Romania in Romania.

COMI

Provided that the centre of main interests (**COMI**) requirement is satisfied, according to the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (**EIR Recast**), any judgement opening insolvency proceedings by a court of a Member State shall be recognised in all other Member States.[[39]](#footnote-39) The judicial reorganisation (reorganizarea judiciară) under the Romanian IA, and the CVA and the Administration under the UK IA, are all public collective proceedings listed in Annex A.[[40]](#footnote-40) Accordingly, these proceedings, if being properly opened at the company’s COMI, shall be recognised as the main insolvency proceedings in other Member States.

Article 3 of the EIR Recast governs that if an insolvency proceeding is opened of which the company’s COMI is situated, it is the main insolvency proceeding. The COMI shall be the place where the company conducts the administration of its interests on a regular basis, and which is ascertainable by third parties. The place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary.

Efwon Trading and Efwon Romania are incorporated in England and Wales and Romania respectively. The rebuttable presumption is that the COMI of Efwon Trading and Efwon Romania are in England and Wales and Romania respectively. Accordingly, the insolvency proceedings opened in the UK and Romania against Efwon Trading and Efwon Romania respectively are the main insolvency proceedings. This presumption is rebuttable if it is demonstrated that Efwon Trading or Efwon Romania has conducted its administration of its interests ascertainable by third parties on a regular basis in a place other than its registered office.

One of the contrary arguments is that whether a COMI is located where the managerial decisions are taken (i.e. the “head function” argument). In *Re Eurofood IFSC Ltd (Case C-341/04) [2006] Ch 508*, the principal activity of Eurofood IFSC Ltd (**Eurofood**) was the provision of financing facilities for other companies within the group, similar to that of Efwon Trading. It was a wholly owned subsidiary of Parmalat SpA (**Parmalat**), a company incorporated in Italy, and was registered in Ireland with its registered office in the International Financial Services Centre in Dublin, Ireland.[[41]](#footnote-41) Eurofood conducted its activity with no offices in Italy. Parmalat, by virtue of its shareholding and power to appoint directors, controlled the policy of Eurofood. The Court of Justic of the European Union (the **CJEU**) held that Recital 13 of the Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (**EIR 2000**), the predecessor of the EIR Recast, describes that the COMI must be identified by reference to criteria that are both objective and ascertainable by third parties.[[42]](#footnote-42) The simple presumption in favour of the registered office can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established differently.[[43]](#footnote-43) In other words, where a company carries on its business in the territory of the Member State where is registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not sufficient to rebut the presumption.[[44]](#footnote-44)

In *Interedil Srl v Fallimento Interedil Srl (Case C-396/09) [2012] Bus LR 1582*, the interpretation for the purposes of determining the COMI was ruled on. Interedil Srl (**Interedil**) was constituted under Italian law and had its registered office in Monopoli, Italy which was subsequently transferred to London, United Kingdom and at around the same time, Interedil was registered with the UK register of companies as a foreign company. The CJEU ruled that the requirement for the objectivity and the ascertainment by third parties, as laid down in *Re Eurofood* may be considered to be met where the material factors have been made public or, at the very least, made sufficiently accessible to enable third parties, particularly the company’s creditors, to be aware of them.[[45]](#footnote-45) Where the bodies responsible for the management and supervision of a company are in the same place as its registered office where the management decisions are taken, it is not possible that the company’s COMI is located elsewhere.[[46]](#footnote-46) The presumption under Article 3(1) of the EIR 2000 may be rebutted where, from the viewpoint of third parties, the place in which a company’s central administration is located is not the same as that of its registered office.[[47]](#footnote-47) The location of immovable property, where the company has concluded lease agreements and where a contract was concluded with a financial institution, being in the same place as the company’s registered office may be regarded as objective factors and, as these are likely to be matters in the public domain, factors that are ascertainable by third parties.[[48]](#footnote-48)

Why is COMI important?

The purpose of the EIR Recast is to provide a single set of insolvency proceedings across the EU. The opening of an insolvency proceeding in one Member State of the European Union prevents same in all other Member States. As mentioned above, the *lex concursus* (i.e. the law of the state of the insolvency proceedings) determines the effects of the proceedings.[[49]](#footnote-49) However, the EIR Recast applies only to insolvency proceedings in respect of a company whose COMI is located in the EU.[[50]](#footnote-50) Further, the competent court will examine whether a COMI is actually located within its jurisdiction before opening the insolvency proceedings.[[51]](#footnote-51) In this regard, the determination of the COMI of Efwon Trading and Efwon Romania is of importance. Based on the information available, it does not appear that the presumption of the COMI of Efwon Trading and Efwon Romania being in the UK and Romania respectively can be rebutted. Should factors that are objective and ascertainable by third parties exist which may rebut the presumption of the COMI of Efwon Trading and Efwon Romania, the above advice should be reconsidered.

That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated.[[52]](#footnote-52) Should factors exist that, for example, the presence of company’s assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated, a comprehensive assessment of all the relevant factors are required to determine whether these factors make it possible to establish that the company’s actual centre of management and supervision is located in that other Member State.[[53]](#footnote-53)

Lastly, should the registered offices of Efwon Trading and Efwon Romania be moved within a 3-month period prior to the opening of the insolvency proceedings, the presumption shall not apply.

Establishment

The opening of a main insolvency proceeding does not prevent the courts of another Member State from opening insolvency proceeding against the same company if the company has an establishment in that other Member State. The effects of such insolvency proceeding shall be restricted to the assets of the company situated in that other Member State only. Such insolvency proceeding shall be referred as the secondary insolvency proceeding.[[54]](#footnote-54) An establishment means any place of operations where a debtor carries out, or has carried out in the 3-month period prior to the opening of the main insolvency proceeding, a non-transitory economic activity with human means and assets.[[55]](#footnote-55) In *Interedil*, it was determined that the wordings of *“an economic activity of human resources”* suggest that a minimum level of organisation and a degree of stability are required.[[56]](#footnote-56) It was also held that the existence of an establishment must be determined, in the same way as the location of the COMI, on the basis of objective factors which are ascertainable by third parties.[[57]](#footnote-57)

*Efwon Trading*

Efwon Trading’s assets are its investment holding in Efwon Hong Kong and Efwon Romania, and the loan receivable from Efwon Romania. It is common theme that the situs of the shares issued by a company incorporated under the law of a jurisdiction shall be regarded as in that jurisdiction.[[58]](#footnote-58)[[59]](#footnote-59) However, the mere presence of a property without an organisation with people does not constitute an establishment.[[60]](#footnote-60)[[61]](#footnote-61) In other words, the shareholding in Efwon Romania does not constitute an establishment of Efwon Trading in Romania. Therefore, in order for a secondary insolvency proceeding to be capable of being opened in Romania, there must be at least the presence of a structure with pursuit of economic activity to the presence of human resources, and which are ascertainable by third parties.

In addition, it is uncertain as to the governing law of the loan advanced from Efwon Trading to Efwon Romania. At this stage, it does not appear that Efwon Trading has an establishment in Romania. If this is not the case, further assessment will be required.

Efwon Hong Kong was incorporated in Hong Kong where EIR Recast does not apply. In addition, Hong Kong has not adopted the UNCITRAL Model Law on Cross-Border Insolvency (1997) (the **Model Law**). Any recognition of a foreign insolvency proceeding sought in Hong Kong is made based on common law. Nevertheless, as the role of Efwon Hong Kong is to seek sponsorship and hold sponsorship agreement, it is not apparent that Efwon Hong Kong would have any realisable assets and accordingly, the chance that any creditors would take actions against Efwon Hong Kong to realise Efwon Trading’s investment interest in Efwon Hong Kong would be minimal. Therefore, a detailed assessment has not been made in this regard. However, should Efwon Hong Kong have any material assets so that the protection of Efwon Trading’s equity interest is required, further assessment will be necessary.

*Efwon Romania*

Efwon Romania was established to acquire the racing team and to hold the FIA licences, together with the racing machines. It serves as the operating subsidiary in the Efwon Group and holds the contracts with the Drivers. While the racing team participates in series of races all over the world, it is not apparent whether Efwon Romania has an establishment outside Romania where economic activity is conducted which is objective and ascertainable by third parties on a regular basis. Furthermore, based on the information available, it appears that all assets of Efwon Romania are situated in Romania. Therefore, even if a secondary insolvency proceeding is commenced in other Member States by successfully demonstrating an establishment, it would have minimal benefits as it would have restricted to the assets in that Member State only. In the event that Efwon Romania has assets in somewhere else to Romania, the above advice should be reconsidered.

Undertaking

Even if the opening of secondary insolvency proceedings is made in other Member States than the COMI, it can be avoided by giving a unilateral undertaking. Should the insolvency practitioner in the main insolvency proceedings request, the court shall not open the secondary proceeding if it is satisfied that the undertaking adequately protects the general interests of local creditors.[[62]](#footnote-62) According to Article 36 of the EIR Recast, the unilateral undertaking may be given by the insolvency practitioner, in respect of the assets located in the Member State where secondary insolvency proceedings could be opened, that when distributing those assets or the proceeds from their realisation, it will comply with the distribution and the priority rights under the national law of that Member State. The undertaking shall be made in the official language of the secondary Member State specifying factual assumption particularly to the value of the assets located in the secondary Member State and the options available to realise such assets. In addition, the undertaking must be approved by known local creditors.

The undertaking is a more complicated and costly process than a request to the court for a temporary stay of individual enforcement proceedings which does not require creditors’ approval. However, it offers better protection as the court shall not open secondary insolvency proceedings as long as there is adequate undertaking, as opposed to a temporary stay of the opening of secondary insolvency proceeding for a period of not exceeding three months.[[63]](#footnote-63) The temporary stay of the opening of the secondary insolvency proceeding is discretionary whereas the discretion is very limited if there is adequate undertaking.[[64]](#footnote-64) Nonetheless, based on the information currently available, it is unlikely that a secondary insolvency proceeding of Efwon Trading or Efwon Romania will be requested as it does not appear that Efwon Trading or Efwon Romania has an establishment in other Member States. In the event that Efwon Trading or Efwon Romania has an establishment with assets in another Member State, further detailed assessment must be undertaken.

**US insolvency proceedings**

Facts

Regardless of the approach to be taken by Efwon Trading, there is potential risk that it may default on its payment obligations which include those to Efwon Investments, and in turn impact the payment obligations of Efwon Investments on its syndicated loan to the nine banks (the **Banks**) in the amount of USD250 million. The syndicated loan is pledged on the projected revenue from resulting investment and participation in the sport and over shares of Efwon Investments. It is also secured by a number of homes of yours across the world. Based on the information available, Efwon Investments does not have any assets apart from its loan to Efwon Trading.

Procedures and outcomes

Efwon Investments may elect to commence the reorganisation procedure under Chapter 11 of the United States Bankruptcy Code (**Chapter 11** of the **Code**) to protect its position. The purpose of Chapter 11 is for a company to preserve and protect its business by encouraging a financial restructuring. It provides a breathing space for the company and the management to reassess its business plan and negotiate a restructuring with creditors and shareholders. If the process is so commenced, Efwon Investments will have the chance to negotiate and restructure its debts with the Banks.

Efwon Investments can commence the process by the filing with the bankruptcy court of a petition, and the commencement of which will constitute an order for relief.[[65]](#footnote-65) An estate comprising all property of Efwon Investments at the time of filing of the petition will be created which can be utilised under going concern or sold separately and will serve as the basis for recovery for creditors under the financial restructuring plan (the **Plan**).[[66]](#footnote-66) Within the first 120 days, Efwon Investments has the exclusive right to propose and file the Plan which can be extended by the court for cause but in any event not exceeding 18 months.[[67]](#footnote-67) The Plan may provide intensive modifications of Efwon Investments’ debts and secured debts, including changes in security, amount, interest rate and maturity, etc. and even their cancellation. Additionally, the Plan may also introduce new debt or equity.

The Plan will then be voted by all creditors (and shareholders) who are adversely affected by its terms. The claims of the creditors are grouped into classes, which will separately vote upon the Plan, according to their nature and similarity in which the Plan must provide the same treatment for each claim or equity interest within a particular class.[[68]](#footnote-68) A class of claims accepts the Plan if at least two-thirds in amount and more than one-half in number of the claims within the class accept the Plan.[[69]](#footnote-69) The bankruptcy court will confirm the Plan which will then be binding on all parties provided that the requirements under 11 U.S. Code § 1129 are satisfied, particularly the “Best Interest of Creditors Test” under 11 U.S. Code § 1129(a)(7) and the “Fair and Equitable Test” under 11 U.S. Code § 1129(b)(1).[[70]](#footnote-70) Accordingly, it also means that the mechanism allows cramdown of objecting classes.

Benefits and disadvantages

The greatest benefit for Efwon Investments to commence Chapter 11 is that the existing management will continue to operate the business which commonly known as debtor in possession.[[71]](#footnote-71) Only in rare circumstances such as fraud, dishonesty, incompetence, or gross mismanagement of the company’s affairs a trustee would be appointed to operate the company’s business.[[72]](#footnote-72) Efwon Investments may continue to sell, lease and use its property in the ordinary course of business without notice or hearing by the bankruptcy court.[[73]](#footnote-73) In contrast, the sale of property outside of the ordinary course of business will require the approval from the bankruptcy court. Even if the property is subject to security interest, it can be sold free and clear of such interest provided that the secured creditor consents or the sale proceed is greater than the value of the security interest.[[74]](#footnote-74) However, the cash received from Efwon Trading as revenue resulting from investment and participation in the sport may constitute cash collateral.[[75]](#footnote-75) If that is the case, Efwon Investments cannot use such cash collateral unless the Banks consent. Alternatively, Efwon Investments may elect to provide adequate protection for the use of the cash collateral. The Code provides mechanisms to protect the secured interest of secured creditors. While there is an automatic stay pursuant to 11 U.S. Code § 362(a) that holder of security interest in the company’s property may not commence actions to repossess or foreclose, they may apply for relief from automatic stay unless adequate protection is provided by the company which carries the burden to show that protection is adequate.[[76]](#footnote-76) 11 U.S. Code § 361 sets out how adequate protection may be provided. Therefore, while there is automatic stay in Chapter 11, the Banks can apply for relief from the stay and proceed with enforcement action. In such event, Efwon Investments will need to demonstrate that adequate protection is provided to oppose such relief sought. If the protection ultimately proves to be inadequate, the loss in the value of the Banks’ security interests will have priority over all administrative expenses under 11 U.S. Code § 507(a)(2).[[77]](#footnote-77)

Other benefits of Chapter 11 include the suspension of the commencement of litigation outside the bankruptcy court, and the temporary relief from paying pre-petition debts which will relief Efwon Investments from cashflow issue while preparing the Plan. In the event of severe cash shortage, the Code allows obtaining new unsecured credit and incurring unsecured debt in the ordinary course of business as an administrative expense which will provide priority of this debt over all pre-petition claims to strengthen the chance for a company to continue to operate.[[78]](#footnote-78) In the event that the inability to obtain unsecured credit is proven, the bankruptcy court may authorise the obtaining of credit or the incurring of debt with priority over all administrative expenses, by granting lien on unencumbered property, or by granting junior lien on encumbered property.[[79]](#footnote-79) In special circumstances, the bankruptcy court may even grant lien more senior or equal to the existing lien provided that there is adequate protection of the interests of the existing lien holder.[[80]](#footnote-80)

It must be noted that the automatic stay does not extend to guarantors. In other words, the Banks may continue to enforce its security held over your homes and your investment holding in Efwon Investments regardless of adequate protection has been provided by Efwon Investments. Notwithstanding, injunction relief may be available for stay of enforcement actions against yourself. However, the assessment of which is out of the Scope. Such assessment may include the possibility of utilising the Chapter 11 procedure or other applicable laws in other jurisdictions, and the jurisdiction of your habitual residence or domicile. In the event that separate assessment is required in relation to the protection of your personal interests, a further advice will be prepared.

Further information required

I have been informed that Efwon Trading is solely and directly owned by yourself, and the above advice has been given on this basis. In addition, it is unclear as to the terms of the syndicate loan, in particular whether the borrower is Efwon Investments or yourself. The above advice has been given under the assumption that Efwon Investments is the borrower. If these bases and assumptions are not valid, the above advice may need to be reconsidered. Furthermore, the payment terms of the syndicate loan may affect the assessment. Should further information unfold with the detailed terms of the syndicate loan, reassessment may be required.

**recognition in the uk**

Based on the information available, it does not appear that Efwon Investments has any assets apart from its loan to Efwon Trading. Should Efwon Investments have assets in other jurisdictions and/or wish to avoid separate insolvency proceedings being opened against Efwon Investments in other jurisdictions, a recognition of the Chapter 11 of Efwon Investments in other jurisdictions as a foreign proceeding may be required which can be achieved utilising the Model Law.

The UK adopted the Model Law in Schedule 1 to its Cross Border Insolvency Rules 2006 (the **UK** **Model Law**) which provides foreign representative access to local insolvency proceedings, recognition of the foreign insolvency proceeding and the foreign representative to represent estate’s interests, and relief from separate enforcement actions. Should Efwon Investments require such provisions to be obtained in the UK, application can be made for recognition of its Chapter 11 proceeding as foreign main proceedings and for other discretionary reliefs.[[81]](#footnote-81)

The foreign representative of Efwon Investments will need to make an application to the court for the recognition of the Chapter 11 procedure.[[82]](#footnote-82) The foreign representative means a person authorised in the Chapter 11 procedure to administer the reorganisation of Efwon Investments’ assets or affairs.[[83]](#footnote-83) Given that Chapter 11 is a procedure where the management continues to operate the business, the director of Efwon Investments can be the foreign representative. It has been established in common law that Chapter 11 is within the meaning of foreign proceeding under Article 2(i) of the UK Model Law and that the debtor and its management in Chapter 11 can be the foreign representative under Article 2(j) of the UK Model Law.[[84]](#footnote-84) This leaves the question on whether the Chapter 11 procedure of Efwon Investments should be recognised as foreign main proceeding or foreign non-main proceeding.

COMI

A foreign main proceeding is recognised to be a foreign proceeding that is taking place in a jurisdiction where the company has the COMI.[[85]](#footnote-85) In *Re Stanford International Bank Ltd [2011] Ch 33*, it was held that the court in England should apply the test applied by the CJEU to determine the COMI.[[86]](#footnote-86) As mentioned above, the COMI of a company established by the EIR Recast and applied by the CJEU is presumed to be at its registered office unless the presumption is rebutted in which factors to be relied on to rebut the presumption must be objective and ascertainable by third parties. In the absence of other information to demonstrate that Efwon Investments has administered its business and affairs in another jurisdiction other than the place of its registered office (i.e. Delaware), the presumption is that the COMI of Efwon Investments is in the US. Therefore, the Chapter 11 procedure of Efwon Investments will be recognised in the UK, and similarly in other jurisdictions where the Model Law is adopted, as foreign main proceeding.

Relief

Accordingly, Efwon Investments is entitled to the automatic stay under Article 20 of the UK Model Law, including the stay of commencement of actions concerning its assets or liabilities and execution against its assets, and the suspension of the right to transfer, encumber or dispose of its assets. However, the automatic stay does not prevent the commencement of an insolvency proceeding.[[87]](#footnote-87) As such, discretionary relief under Articles 20(6) and 21(1)(g) may be required. The effect, if the discretionary relief is successfully granted, is that the stay and suspension will extend to the actions, proceedings and execution against Efwon Investments. Efwon Investments is required to demonstrate that its Chapter 11 procedure is aiming to restructure its business and affairs and that a separate proceeding will give rise to unnecessary costs and burden to deal with any of the business and assets in the UK.[[88]](#footnote-88) Furthermore, should there be a need for urgent relief for stay after the filing of the application for recognition and before the application is decided upon, Efwon Investments may apply for interim relief.[[89]](#footnote-89)

Further information required

The above advice has been given under the assumption that Efwon Investments has assets in other jurisdictions that require protection or that there are creditors of Efwon Investments which may commence insolvency proceedings in other jurisdictions. Based on information available, the only asset of Efwon Investments is the loan receivable from Efwon Trading. Further assessment will be required if Efwon Investments has other assets. For example, if Efwon Trading is owned by Efwon Investments instead of yourself. In addition, I have not been informed with the governing law of the syndicated loan which may affect the above advice.

**Efwon Trading to commence Chapter 11 and seek recognition in the uk**

As mentioned above, it does not appear that it would be of great benefits for Efwon Trading to immediately commence insolvency proceedings either in accordance with the CVA or the Administration in the UK. However, Efwon Trading may elect to commence Chapter 11 together with Efwon Investments and seek to have it recognised in other jurisdictions as a foreign proceeding under the Model Law. The benefits and disadvantages of commencing the Chapter 11 process and recognition in other jurisdictions as a foreign proceeding have been discussed above, similar to that of Efwon Investments, though as Efwon Trading was incorporated in England & Wales, further consideration on taking such approach is required.

Eligibility to commence Chapter 11

The first question is whether Efwon Trading is eligible to commence Chapter 11. In *Re Global Ocean Carriers Ltd., 251 B.R. 31 (Bankr. D. Del. 2000)*, it has been established that the test for eligibility should be taken with regards to the date the petition is filed. Even where Efwon Investments is eligible to file, the eligibility of Efwon Trading must be tested separately, and the burden of establishing which is on Efwon Trading. Therefore, in order for Efwon Trading to be eligible to commence Chapter 11, it needs to establish that it resides or has a domicile, a place of business, or property in the US.[[90]](#footnote-90) Based on the current information available, it does not appear that Efwon Trading resides or has a domicile or a place of business in the US. However, the test may still be satisfied if Efwon Trading has property in the US. As it has been established in *Re Global Ocean*, such property in the US may include:

1. shareholding in a company incorporated under the laws of the US;[[91]](#footnote-91)
2. original books and records of Efwon Trading;
3. bank accounts maintained by Efwon Trading regardless of how much money is actually maintained;
4. any claims by Efwon Trading against the funds in the bank accounts maintained by Efwon Investments in the US; and
5. retainers held in the escrow funds by US counsel which Efwon Trading has an interest in regardless of who paid the retainer.

It is unclear if Efwon Trading has such property in the US. If it does, it is eligible to commence Chapter 11. Assuming Efwon Trading is eligible to commence Chapter 11, it may then elect to seek recognition in other jurisdictions as a foreign proceeding.

Recognition in the UK

*COMI*

The second question is whether the Chapter 11 of Efwon Trading can be recognised as a foreign main proceeding or foreign non-main proceeding. A foreign proceeding is a foreign main proceeding if it is commenced in the jurisdiction where the company has the COMI or is a foreign non-main proceeding if it is commenced in the jurisdiction where the company has an establishment.[[92]](#footnote-92) The determination of the COMI by the UK courts has been discussed above where it should be noted that the determination of the COMI by the UK courts is different to the eligibility of commencing Chapter 11 in the US. Being eligible to commence Chapter 11 does not necessarily mean that the COMI is in the US when seeking recognition as a foreign main proceeding in the UK courts. In order for Efwon Trading to establish that its COMI is in the US, it will need to demonstrate factors that are objective and ascertainable by third parties that it administers its business and affairs at a place (i.e. the US) other than its registered office (i.e. England & Wales) to rebut the presumption that its COMI is in the UK. Based on the information available, it is uncertain whether such factors exist. As established in *Videology Ltd, Re Cross-Border Insolvency Regulations 2006 [2018] EWHC 2186 (Ch), s*uch factors, which should be visible and immediately ascertainable by Efwon Trading’s customer, and in particular by the trade creditors, may include:

1. the location of Efwon Trading’s trading premises and staff;
2. where Efwon Trading’s customer and creditor relationships are established;
3. where Efwon Trading administers its relations with its trade creditors on a day-to-day basis using such trading premises and local staff; and
4. where Efwon Trading’s main assets are located.[[93]](#footnote-93)

Failing to demonstrate such factors, Efwon Trading may still seek to have the Chapter 11 recognised as a foreign non-main proceeding if it has an establishment in the US.[[94]](#footnote-94)

*Establishment*

Establishment means any place of operations where the debtor carries out a non-transitory economic activity with human means and assets or services.[[95]](#footnote-95) It should be noted that the definition of establishment under the UK Model Law is slightly different to that under the EIR Recast, as described above when discussing whether Efwon Trading has an establishment in other Member States. The differences between the two definitions are the *“human means and assets or services”* under the UK Model Law and the *“human means and assets”* under the EIR Recast, and that the EIR Recast gives a time extension to cover the 3-month period prior to the opening of the insolvency proceedings. In *Videology*, reference was made to the Guide to Enactment and Interpretation of the Model Law (2013) and *In Trustees of the Olympic Airlines SA Pension & Life Assurance Scheme v Olympic Airlines SA [2015] 1 WLR 2399* to determine whether the company had an establishment in the US. [[96]](#footnote-96) In essence, Efwon Trading will need to demonstrate that it has a fixed, as opposed to occasional, place of business or operations in the US with external, as opposed to internal, activities carried on with its assets and human agents. Such activities should consist of dealings with third parties but not pure acts of internal administration and should appear externally but not pure intention of Efwon Trading. Based on information available, it is uncertain whether such place of business or operations and activities exist in the US. In order for the Chapter 11 of Efwon Trading to be recognised as a foreign non-main proceeding in other jurisdictions, it will need to consider if its business relationships with customers and creditors have been regularly managed, and external activities have been carried on, at a place of business or operations by its assets and human agency in the US as being seen by external third parties.

The above analysis on establishment also applies to Efwon Investments, should it fail to demonstrate that its COMI is in the US, when seeking recognition as a foreign non-main proceeding under the Model Law.

*Relief*

Should the Chapter 11 of Efwon Trading be recognised as a foreign non-main proceeding, the relief available is different to that of Efwon Investments in which its Chapter 11 can be recognised as a foreign main proceeding. As a foreign proceeding being recognised as a foreign main proceeding, automatic stay of commencement of actions concerning its assets or liabilities and execution against its assets, and the suspension of the right to transfer, encumber or dispose of its assets are available under Article 20 of the UK Model Law. Recognition of the Chapter 11 of Efwon Trading as a foreign non-main proceeding does not bring such automatic stay. Efwon Trading will need to apply for discretionary relief under Article 21 of the UK Model Law. The general assumption is that the main insolvency proceedings of a company should be in the UK where the COMI of that company is in the UK.[[97]](#footnote-97) In essence, even if Efwon Trading commences Chapter 11 in the US, local insolvency proceedings against Efwon Trading can still be commenced in the UK. There must be obvious benefits to creditors as a whole, coupled with appropriate protections for the creditors, for the UK courts to restrict or prohibit creditors from seeking to commence main insolvency proceedings in the UK but to entrust the restructuring of the company and its business to the Chapter 11.[[98]](#footnote-98) Efwon Trading will need to demonstrate synergy and value creation for the insolvency proceedings being managed under Chapter 11, that unnecessary additional costs will be incurred and delay will be created at the detriment of the creditors should separate insolvency proceeding be commenced in the UK, and that it is guaranteed that creditors as a whole have an active and influential voice for the protection of their interests under the Chapter 11 process, in order for the UK courts to exercise its power to grant discretionary relief under Article 21 of the UK Model Law.

Rule in Gibbs

Consideration is also required to be given to the “rule in Gibbs” for Efwon Trading to participate in the reorganisation procedure under Chapter 11. The rule in Gibbs is a long-established ruling in *Gibbs & Sons v Sociětě Industrielle et Commerciale des Mětaux (1890) 25 QBD 399* that a debt governed by English law may only be discharged under English law. In essence, restructuring plan under non-English law will not extinguish English law debt unless the English law creditors voluntarily submitted in it. The UK Court of Appeal upheld the High Court’s decision on the operation of the rule in Gibbs in *Re OJSC International Bank of Azerbaijan [2018] EWCA Civ 2802* and refused to grant relief for indefinite stay under Article 21(1)(a) and (b) of the UK Model Law to prevent English law creditors from enforcing their English law rights that may have been discharged by a non-English law restructuring plan.[[99]](#footnote-99) Therefore, the effectiveness for Efwon Trading to commence Chapter 11 depends on if the rule in Gibbs applies. Based on the information available, it is unclear whether the debt of the Monaco Lender is governed by English law. The approach suggested in the advice given above may need to be reconsidered should further information come to light.

**Efwon Romania and Efwon Trading to seek recognition in the US**

With Efwon Romania commencing insolvency proceeding in Romania, and if Efwon Trading commencing insolvency proceeding in the UK, question as to whether there is jurisdiction for recognition of them to be sought as foreign proceedings in the US may arise. The US adopted the Model Law in its Chapter 15 of the US Code (the **US Model Law**) which is intended to promote cooperation between the US courts and the foreign courts for a fair and efficient administration of cross-border insolvency to protect the interests of all creditors and other interested entities. The process and grounds for granting the recognition as a foreign proceeding is similar to that of Article 17(1) of the UK Model Law whereas the foreign representative under the US Model Law would be the judicial administrator of Efwon Romania, and the board of directors of Efwon Trading under the CVA or the administrator under the Administration.[[100]](#footnote-100) Similarly, the distinguishment between a foreign main proceeding and a foreign non-main proceeding is governed by 11 U.S. Code § 1517(b) compared to Article 17(2) of the UK Model Law. Therefore, the rebuttable assumption that the COMI of Efwon Romania and Efwon Trading are at their respective registered offices applies. However, the US courts consider the *“factors that indicate regularity and ascertainability”* to rebut the presumption differently to that of the UK courts and the CJEU and make reference to the principle of *“nerve centre”* and *“headquarters”* to consider where the debtor’s activities are directed and controlled when determining the debtor’s COMI.

COMI

In *In re OAS S.A., 533 B.R. 83 (Bankr. S.D.N.Y. 2015)*, OAS Investments GmbH (**OAS Investments**) is an entity incorporated in Austria with its registered office in Vienna, Austria, and its principal corporate purpose is the financing of the operations of the OAS group, particularly by the issuance of senior notes guaranteed by related entities. In this regard, the function of OAS Investments is substantially similar to that of Efwon Trading. It was established in *Re OAS* that the COMI analysis permits consideration of any relevant activities, including liquidation activities and administrative functions. The court found that OAS Investments’ nerve centre and headquarters was in Brazil where the OAS group operated its business, all of OAS Investments’ directors and OAS group’s officers resided, and the foreign insolvency proceedings of the OAS group were administered. The sole shareholder, a Brazilian entity, of OAS Investments had the power to elect OAS Investments’ executive officers and determine the outcome of any action and transactions requiring shareholder’s approval according to the Brazilian Corporation Law. In this regard, it was concluded that Brazil being the nerve centre and headquarters of OAS Investments was consistent with the expectation of the creditors. In addition, the risk factors that the senior note purchasers considered before deciding to purchase the notes described the risk associated with the business of the OAS group but not OAS Investments alone. Furthermore, the senior note purchasers understood that they were investing in the Brazilian-based business and expected to receive repayment from the cash generated by the operations of the OAS group. Therefore, the OAS Investments’ place of incorporation, or for that matter its very existence, was immaterial to the senior note purchasers’ decision to purchase the notes.

Further information required

Based on the information available, it was unclear how the Monaco Lender considered the risks and rewards on its lending to Efwon Trading. In addition, it was unclear how Efwon Trading administers its business, and how and where it conducts other activities than the pure provision of finance to other entities in the Efwon Group given the unknow identity of its board of directors and that you are the sole shareholder. In the absence of other factors, it would even appear that the US courts may consider, as has been established in *Re OAS*, the COMI of Efwon Trading is in Romania based on the mere view in relation to the purpose of the loans from the Monaco Lender and Efwon Investments that they were utilised as capital to finance the operations of Efwon Romania. Nonetheless, it is uncertain at this stage whether Efwon Romania and/or Efwon Trading, should they commence local insolvency proceedings, are required to seek recognition under Chapter 15 of the Code. Should they be required, further detailed assessment is necessary to consider the COMI under the US Model Law, the approach of recognition and accordingly, the relief available from the recognition and to be sought from the US courts.

**Brexit**

At present, the UK is a Member State. By 31 January 2020, the UK will withdraw from the EU and stop being a Member State (**Brexit**). The withdrawal agreement between the UK and the EU (the **Withdrawal Agreement**) provides a transition period until 31 December 2020 (the **Transition Period**).[[101]](#footnote-101) Prior to 1 January 2021 (i.e. before the end of the Transition Period), in accordance with the Withdrawal Agreement, the EIR Recast will continue to apply on the UK and other Member States in relation to the recognition and enforcement of insolvency proceedings, particularly the automatic recognition. In addition, the EIR Recast will continue to apply to insolvency proceedings provided that the main insolvency proceedings have been opened before the end of the Transition Period. Should Efwon Romania and Efwon Trading commence the insolvency proceedings in Romania and the UK respectively now (i.e. before the end of the Transition Period), the EIR Recast will continue to apply on both insolvency proceedings even after the end of the Transition Period, given that, as mentioned above, both Efwon Romania and Efwon Trading are likely to have the COMI in Romania and the UK respectively and hence, their respective insolvency proceedings are both main insolvency proceedings. In the event that Efwon Romania or Efwon Trading does not commence insolvency proceedings respectively in Romania and the UK before the end of the Transition Period, further considerations are required.

*Efwon Romania*

If Efwon Romania commences insolvency proceedings in Romania after the end of the Transition Period, the insolvency proceedings remain to be recognised as a main insolvency proceeding in the Member States.[[102]](#footnote-102) For the insolvency proceeding of Efwon Romania to be recognised in the UK as a foreign proceeding, the UK Model Law is to be utilised to achieve same as the EIR Recast will not be applicable. The mechanism, benefits, disadvantages and whether the foreign proceeding is to be recognised as a foreign main proceeding or foreign non-main proceeding for Efwon Romania to seek recognition in the UK under the UK Model Law are similar to those in relation to the Chapter 11 of Efwon Investments seeking recognition in the UK under the UK Model Law, as described above.

*Efwon Trading*

If Efwon Trading commences insolvency proceedings in the UK after the end of the Transition Period, the insolvency proceedings will not be automatically recognised in the Member States as it will not be recognised as the main insolvency proceedings by the Member States even if the COMI of Efwon Trading is in the UK. In order to seek recognition of its insolvency proceedings as foreign proceedings in the Member States, Efwon Trading will need to apply to each relevant court of the Member States on the bases of the international treaties and/or national laws of the relevant jurisdiction of the Member States. This may create disparity between different jurisdictions and uncertainty subject to the context of each international treaty and/or national law.

Nonetheless, as mentioned above, it does not appear that it would be of great benefits for Efwon Trading to immediately commence either the CVA or the Administration in the UK. The considerable benefit for Efwon Trading to commence insolvency proceedings in the UK prior to the end of the Transition Period is the automatic recognition of the insolvency proceedings in the Member States. If the automatic recognition is not available after the end of the Transition Period, it will be of even little benefits for Efwon Trading to commence insolvency proceedings in the UK. In this regard, based on the information available, it appears to be more desirable for Efwon Trading to commence only the Chapter 11 if it has not commenced insolvency proceedings in the UK before the end of the Transition Period. Further consideration and detailed reassessment will be required on whether Efwon Trading should commence insolvency proceedings in the UK after the end of the Transition Period.

Notwithstanding the above, the commencement of the insolvency proceedings by Efwon Trading in the UK after the end of the Transition Period may not affect it to seek recognition as foreign proceedings in Romania. Romania has adopted the Model Law in its Romania Law No 637/2002 (as amended) regarding the regulation of private international law relations in the field of insolvency (the **Romanian Model Law**). The mechanism, benefits, disadvantages and whether the foreign proceeding is to be recognised as a foreign main proceeding or foreign non-main proceeding for Efwon Trading to seek recognition in Romania under the Romanian Model Law are similar to those in relation to those other insolvency proceedings seeking recognition in other jurisdictions under the Model Law, as described above.

Brexit does not affect other insolvency proceedings described above in which EIR Recast does not originally apply.

**The deal with KuasaNas**

The above insolvency proceedings provide the mechanism for financial and/or debt restructuring that may facilitate the sale of the respective company’s shareholding in its subsidiary or the introduction of new debt and/or capital by issuing new shares pursuant to respective appliable law. Subject to further information provided, the deal to transfer of or sell the 51% stake of the racing team can be achieved from the financial and/or debt restructuring proposal under the respective insolvency proceeding by any company in the Efwon Group.

As mentioned above, I have been informed that Efwon Trading is solely and directly owned by yourself. As an example, to facilitate the transfer of or sell the 51% stake of the racing team, one of the options that may be adopted is for you to transfer your entire ownership in Efwon Trading to Efwon Investments then for KuasaNas to acquire 51% of your shareholding in Efwon Investments by terms in the financial and/or debt restructuring plan of Efwon Investments and Efwon Trading respectively. Alternative options may be available to facilitate the deal with KuasaNas subject to the provision of further information to confirm the most appropriate approach to resolve the insolvency issues affecting the companies in the Efwon Group. Once the most appropriate approach is confirmed, further assessment and analysis can be undertaken to outline the appropriate strategy to facilitate the deal in relation to the sponsorship and the acquisition of the 51% stake by KuasaNas.

**Conclusion**

There are different options and approaches in order to resolve the insolvency issues by commencing different insolvency proceedings and seeking recognition as and when required for each of the company in the Efwon Group. The above advice is the most suitable strategy to achieve the goal of selling the majority stake in the Efwon Group to KuasaNas based on the information currently available. In order to complete the assessment and achieve the goal, further information is required to determine and assess:

1. the governing law of the various loans;
2. the situs of any other assets and property;
3. the COMI of each company and whether factors that are objective and ascertainable by third parties exist that may rebut the rebuttable presumption that the COMI of each company is at its registered office. In essence, this analysis may result in different COMI of the same company when seeking recognition in different jurisdiction;
4. whether there is place of business or operations that non-transitory economic activity is carried out with or without human means to demonstrate establishment;
5. whether automatic relief and/or discretionary relief exist and/or can be sought;
6. the most appropriate financial and/or debt restructuring plan.

Further information required includes but not limited to:

Efwon Investments

* The governing law, repayment terms and maturity of the syndicate loan.
* Details of the negative pledge in accordance with the syndicate loan.
* Confirmation as to the borrower of the syndicate loan.
* Confirmation as to the shareholder of Efwon Trading.
* Details of any unencumbered property to secure debtor in possession financing.
* Details of any assets situated in jurisdictions outside the US.
* Confirmation as to whether there is place of business or operations outside the US.
* Whether factors which are both objective and ascertainable by third parties exist that can be relied on to rebut the presumption that the COMI is in the US, and which may potentially obstruct the recognition of its Chapter 11 as foreign main proceeding by the UK courts.

Efwon Trading

* The governing law, repayment terms and maturity of the loan payable to the Monaco Lender.
* Attitude and willingness of the Monaco Lender to engage in negotiation to restructure the debt.
* Details of any other creditors other than the Monaco Lender for the purpose of determining the complexity of any negotiation process.
* Whether creditors’ approval of 75% threshold can be achieved if a plan is proposed under the CVA.
* Whether factors, as described in *Eurofood*, which are both objective and ascertainable by third parties on a regular basis exist that can be relied on to rebut the presumption that the COMI is in the UK, and which may potentially obstruct the automatic recognition of its insolvency proceedings as main insolvency proceedings by the Member States. In essence, the mere fact that its economic choices are or can be controlled by yourself (or Efwon Investments if it is the sole shareholder) in another jurisdiction outside the UK is not sufficient to rebut the presumption.
* Whether non-transitory economic activity with human means and assets is carried out or has been carried out at a place of operations, outside the UK, so that establishment can be demonstrated for the purpose of determining the possibility that assets, if any, in other Member States may be enforced.
* Whether undertaking can be provided to avoid the opening of secondary insolvency proceedings in other Member States outside the UK
* Whether there is property, as described in *Re Global Ocean*, in the US for the purpose of establishing jurisdiction to commence Chapter 11.
* Whether factors, as described in *Videology*, which are visible and both objective and ascertainable by the customers and trade creditors, exist that can be relied on to rebut the presumption that the COMI is in the UK, for the purpose of demonstrating that Efwon Trading has COMI in the US for its Chapter 11 to be recognised in the UK as foreign main proceeding.
* Whether a fixed place of business or operations in the US exists with external activities carried on with its human means and assets or services, as described in *Videology*, and consisted of dealing with third parties for the purpose of demonstrating establishment in the US for its Chapter 11 to be recognised in the UK as foreign non-main proceeding, should the argument over the COMI fail.
* Details of nerve centre and headquarters, as described in *Re OAS*, for the purpose of determining the COMI should recognition of insolvency proceedings be required in the US.
* Details of how the loan advanced from the Monaco Lender is administered and whether the Monaco Lender understood that the loan was to finance the working capital of Efwon Romania for the purpose of determining the COMI should recognition of insolvency proceedings be required in the US.

Efwon Romania

* The governing law, repayment terms and maturity of the loan payable to Efwon Trading.
* Whether the Drivers have jurisdiction to file for insolvency proceedings and whether that would be admitted by the court, despite that their claims may be contingent.
* Probability that the Romanian courts will grant compensation order against Efwon Romania in favour the Drivers.
* Detail assessment to its solvency taken into account the repayment terms on the loan payable to Efwon Trading and the contingent claim of the Drivers, in particular to any current or future debt that exceeds the threshold of RON50,000 which has been or will be due for over 60 days.
* Details of the composition of its creditors’ claims and their attitudes towards a reorganisation plan.
* Whether non-transitory economic activity with human means and assets is carried out or has been carried out at a place of operations, outside Romania, so that establishment can be demonstrated for the purpose of determining the possibility that assets, if any, in other Member States may be enforced.
* Whether undertaking can be provided to avoid the opening of secondary insolvency proceedings in other Member States outside Romania
* Details of nerve centre and headquarters, as described in *Re OAS*, for the purpose of determining the COMI should recognition of insolvency proceedings be required in the US.
* Details of how the loan advanced from Efwon Trading is administered for the purpose of determining the COMI should recognition of insolvency proceedings be required in the US.

Efwon Hong Kong

* Details of any assets and their location

Yours sincerely

Johnny Law

1. Abbreviations used in the executive summary are defined throughout the context of this letter of advice. [↑](#footnote-ref-1)
2. Although under certain circumstances, simplified procedure under Article 38 of the Romanian IA may apply, based on the information available, it does not appear that Efwon Romania is qualified for the simplified procedure. [↑](#footnote-ref-2)
3. *Law No 85/2014 on insolvency prevention and insolvency proceedings*,art 66(1) and (9). [↑](#footnote-ref-3)
4. *Ibid*, art 67(1)(g). [↑](#footnote-ref-4)
5. *Ibid*, art 5(67). Definitive table of claims is the table that includes all the claims on the debtor’s assets at the date of the opening of the procedure. [↑](#footnote-ref-5)
6. *Ibid*, art 58(1)(d). [↑](#footnote-ref-6)
7. *Ibid*, art 138. [↑](#footnote-ref-7)
8. *Ibid*, art 75. [↑](#footnote-ref-8)
9. *Ibid*, art 80. [↑](#footnote-ref-9)
10. *Ibid*, arts 87 and 141. [↑](#footnote-ref-10)
11. *Ibid*, art 87(4). [↑](#footnote-ref-11)
12. *Ibid*, art 138. [↑](#footnote-ref-12)
13. *Insolvency Act 1986 (UK)*, s 1(1). [↑](#footnote-ref-13)
14. *Ibid*. [↑](#footnote-ref-14)
15. *Ibid*, s 2(2). [↑](#footnote-ref-15)
16. *Ibid*, s (3). [↑](#footnote-ref-16)
17. *Ibid*, s (5). [↑](#footnote-ref-17)
18. *Ibid*, s 4(3). [↑](#footnote-ref-18)
19. A small company is one which, in a year, satisfies two or more of the requirements, being:

    turnover not more than GBP10.2 million;

    balance sheet total not more than GBP5.1 million; or

    number of employees not more than 50. [↑](#footnote-ref-19)
20. *Supra*, note 18, s 6. [↑](#footnote-ref-20)
21. *Ibid*, sch B1, para 3(1). [↑](#footnote-ref-21)
22. *Ibid*, paras 22 and 29. [↑](#footnote-ref-22)
23. *Ibid*, para 49. [↑](#footnote-ref-23)
24. *Ibid*, para 51. [↑](#footnote-ref-24)
25. *Ibid*, para 80. [↑](#footnote-ref-25)
26. *Ibid*, paras 59 and 68. [↑](#footnote-ref-26)
27. *Ibid*, para 67. [↑](#footnote-ref-27)
28. *Ibid*, para 64. [↑](#footnote-ref-28)
29. *Ibid*, para 61. [↑](#footnote-ref-29)
30. *Ibid*, para 40. [↑](#footnote-ref-30)
31. *Supra*, note 20, s 29. An administrative receiver is the receiver or manager appointed over the whole or substantially the whole of a company’s property which was created as a floating charge. [↑](#footnote-ref-31)
32. *Supra*, note 30, para 41(1). [↑](#footnote-ref-32)
33. *Ibid*, para 41(2). [↑](#footnote-ref-33)
34. *Ibid*, paras 42 and 43. [↑](#footnote-ref-34)
35. *Ibid*, para 71. [↑](#footnote-ref-35)
36. *Ibid*, paras 14 and 26. [↑](#footnote-ref-36)
37. *Ibid*, paras 23 to 25, 39. [↑](#footnote-ref-37)
38. Reference to the Member States shall exclude Denmark for the purpose of this letter of advice. [↑](#footnote-ref-38)
39. *Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast)*,art 19. [↑](#footnote-ref-39)
40. *Ibid*, art 1. [↑](#footnote-ref-40)
41. *Re Eurofood IFSC Ltd (Case C-341/04) [2006] Ch 508*, para 17. [↑](#footnote-ref-41)
42. *Ibid*, paras 32 and 33. [↑](#footnote-ref-42)
43. *Ibid*, para 34. [↑](#footnote-ref-43)
44. *Ibid*, para 37. [↑](#footnote-ref-44)
45. *Interedil Srl v Fallimento Interedil Srl (Case C-396/09) [2012] Bus LR 1582*, para 49. [↑](#footnote-ref-45)
46. *Ibid*, para 50. [↑](#footnote-ref-46)
47. *Ibid*, para 51. [↑](#footnote-ref-47)
48. *Ibid*, para 53. [↑](#footnote-ref-48)
49. *Supra*, note 40, art 7. [↑](#footnote-ref-49)
50. *Ibid*, recital 25. [↑](#footnote-ref-50)
51. *Ibid*, recital 27. [↑](#footnote-ref-51)
52. *Supra*, note 44, para 37. [↑](#footnote-ref-52)
53. *Supra*, note 48, para 59. [↑](#footnote-ref-53)
54. *Supra*, note 51, art 3(2) and (3). [↑](#footnote-ref-54)
55. *Ibid*, art 2(10). [↑](#footnote-ref-55)
56. *Supra*, note 53, para 62. [↑](#footnote-ref-56)
57. *Ibid*, para 63. [↑](#footnote-ref-57)
58. HMRC internal manual Capital Gains Manual, *CG12440 - Location of assets: types of asset (2): shares and securities etc.*, at << https://www.gov.uk/hmrc-internal-manuals/capital-gains-manual/cg12440>>, accessed on 6 August 2023. [↑](#footnote-ref-58)
59. *8 Del. C. 1953*, § 169. [↑](#footnote-ref-59)
60. M Virgós and F Garcimartín, *The European Insolvency Regulation: Law and Practice*, Kluwer Law International, 2004, p 300. [↑](#footnote-ref-60)
61. B Wessels, *International Insolvency Law Part II*, European Insolvency Law Series, Wessels Insolvency Law Volume X, Deventer: Wolters Kluwer, 4th ed., 2017, p 10533-10537. [↑](#footnote-ref-61)
62. *Supra*, note 55, art 38(2). [↑](#footnote-ref-62)
63. *Ibid*, art 38(3). [↑](#footnote-ref-63)
64. *Ibid*, recital 45 and arts 38(2) and 38(3). The wordings for a temporary stay in Article 38(3) are that “*…the court…may stay the opening of insolvency proceedings…*” where it is within the court’s discretion to do so. As opposed to those in Article 38(2) that “*…the court shall…not open secondary insolvency proceedings…if it is satisfied that the undertaking adequately protects…*” where discretion is limited. [↑](#footnote-ref-64)
65. *11 U.S. Code § 301*. [↑](#footnote-ref-65)
66. *Ibid § 541*. [↑](#footnote-ref-66)
67. *Ibid § 1121*. [↑](#footnote-ref-67)
68. *Ibid § 1122(a), 1123(a)(1) and 1123(a)(4)*. [↑](#footnote-ref-68)
69. *Ibid § 1126(c)*. In addition, claims or equity interests which are not impaired by the Plan are not entitled to vote while claims or equity interests which will recover no distribution under the Plan are deemed to have rejected the Plan. [↑](#footnote-ref-69)
70. The “Best Interests of Creditors Test” provides that no claims or interests will receive under the Plan less that they would receive in liquidation under Chapter 7 of the Code. The “Fair and Equitable Test” provides that if at least one impaired class accepts the Plan and the bankruptcy court finds that the treatment under the Plan does not discriminate unfairly and is fair and equitable, the bankruptcy court shall confirm the Plan. [↑](#footnote-ref-70)
71. *Supra*, note 69, *§ 1107*. [↑](#footnote-ref-71)
72. *Ibid § 1104 and 1108*. [↑](#footnote-ref-72)
73. *Ibid § 363(c)(1)*. [↑](#footnote-ref-73)
74. *Ibid § 363(f)*. [↑](#footnote-ref-74)
75. *Ibid § 363(a)*. [↑](#footnote-ref-75)
76. *Ibid § 362(d)(1) and 362(g)*. [↑](#footnote-ref-76)
77. *Ibid § 507(b)*. [↑](#footnote-ref-77)
78. *Ibid § 364(a)*. [↑](#footnote-ref-78)
79. *Ibid § 364(c)*. [↑](#footnote-ref-79)
80. *Ibid § 364(d)*. [↑](#footnote-ref-80)
81. *Cross Border Insolvency Regulations 2006 (UK)*, sch 1, arts 17 and 21. [↑](#footnote-ref-81)
82. *Ibid*, art 15. [↑](#footnote-ref-82)
83. *Ibid*, art 2(j). [↑](#footnote-ref-83)
84. *Videology Ltd, Re Cross-Border Insolvency Regulations 2006 [2018] EWHC 2186 (Ch)*, paras 17 and 25. [↑](#footnote-ref-84)
85. *Supra*, note 83, arts 2(g) and 17(2)(a). [↑](#footnote-ref-85)
86. *Re Stanford International Bank Ltd [2011] Ch 33,* paras 53 to 54*.* [↑](#footnote-ref-86)
87. *Supra*, note 85, art 20(5). [↑](#footnote-ref-87)
88. *Supra*, note 84, paras 82 to 83. As it has been established in *Videology*, while the extension of the moratorium to the prohibition of collective insolvency proceedings in the UK is not automatic, the English courts have been willing to use their powers under Article 21(1) of the UK Model Law to replicate the moratorium against individual actions under paragraph 43(6) of Schedule B1 of the UK IA where recognition is accorded to a foreign main proceeding which has as its purpose the restructuring of the debtor rather than its winding-up. [↑](#footnote-ref-88)
89. *Supra*, note 87, art 19. [↑](#footnote-ref-89)
90. *Supra*, note 80, § 109. [↑](#footnote-ref-90)
91. *Supra*, notes 58 and 59. [↑](#footnote-ref-91)
92. *Supra*, note 89, art 17. [↑](#footnote-ref-92)
93. *Supra*, note 88, para 72. [↑](#footnote-ref-93)
94. *Supra*, note 92, art 17(2)(b). [↑](#footnote-ref-94)
95. *Ibid*, art 2(e). [↑](#footnote-ref-95)
96. *Supra*, note 93, paras 78 and 79. [↑](#footnote-ref-96)
97. *Ibid*, para 85. [↑](#footnote-ref-97)
98. *Ibid*. [↑](#footnote-ref-98)
99. *Re OJSC International Bank of Azerbaijan [2018] EWCA Civ 2802*, para 95. [↑](#footnote-ref-99)
100. *Supra*, note 90, *§ 1517(a)*. [↑](#footnote-ref-100)
101. The Withdrawal Agreement was endorsed by the EU leaders in its original form on 25 November 2018 and in its revised form on 17 October 2019. [↑](#footnote-ref-101)
102. Reference to the Member States exclude Denmark and the UK for the period after the end of the Transition Period. See also note 38. [↑](#footnote-ref-102)