**INSOL Case Study II Assignment – Tim Prudhoe**

Benedict Maximov

[Address]

*Via email only*

Dear Mr. Maximov,

**Efwon Group of Companies / viable insolvency solutions**

We have had sight of helpful document dated [ ], as supplied on your behalf and with us understanding the relevant factual background (“the Briefing Document”). For brevity, in this Advice Letter we refer to the various Efwon corporate entities collectively as “the Efwon Group”.

For ease of reference both within this document and in subsequent discussions arising, we number the remaining paragraphs below, and refer to them as “Para. 1” etc. Finally, and reflecting your busy schedule, we have provided a high-level summary of the position (“Executive summary”) at the outset, with more detailed analysis following that. For similar reasons, we have provided endnotes instead of footnotes. Because, as you will see, we do not advise that a US (Chapter 11 Bankruptcy Code) strategy is pursued, we have not focused on that. At the end of this Advice Letter, we have dealt with those which we see as the most significant reasons what the Chapter 11 route is not the best solution for the Efwon Group.

When you are had the chance to digest this document, we would be happy to discuss further those and / or any other aspect of this Advice Letter with your and / or your professional advisors.

We have intentionally kept this Advice Letter “light” on procedural detail (such as the required means of communicating to known creditors details of proposed restructuring: numbered paragraph 28 below).

*Your specific areas of concern*

1. In addition to an explanation or / proposed strategy for the Efwon Group, you seek guidance on the specific issue as to whether one or more insolvency proceeding(s) will be needed for the purposes of achieving a sale in the stake in the Efwon Group to KuasaNas.

2. Subject to the answer in respect of Para 1, where (that is, in which jurisdiction or jurisdiction(s)) such proceeding(s) need to occur.

3. You ask us to consider what might impede such proceedings; the advantages / disadvantages to proceedings (if any) proposed; also, based on what factors and (if different) information we would determine the above. Pointing out any information outstanding.

4. As to implementation of our proposed strategy, whether either or both of the European Insolvency Regulation and / or UNICTRAL Model Law would be applicable. If so, in what way(s).

5. Finally, you wish us to deal with the impact (if any) on our analysis and proposals to you of Britain’s exit from the European Union (aka “Brexit”).

*Executive summary of Advice*

6. Brexit, as it is called, will not impact.

7. Your stated preference as to solution of a United States Bankruptcy Code Chapter 11 restructuring (“Chapter 11”), while strictly viable, is neither inexpensive nor the best option. We deal with Chapter 11 near the end of this Advice Letter for completeness (Paras. 54-59).

8. Balancing all factors, we advise that (i) the attempts on behalf of the drivers at initiating insolvency proceedings in respect of Efwon Romania (page 4 of the Briefing Document) are opposed on the basis both of solvency (that is, in contradistinction to *insolvency*), as well as the lack of necessary creditor status of the drivers and (ii) the restructuring tool known under applicable Romanian law as the *preventive concordat* be used as the single necessary formal insolvency process required in delivery of a solution.

9. There are currently several impacting “unknowns”. First, the current financial information in respect of Efwon Romania. We are told, simply, that as at the date of the drivers initiating their attempts in respect of insolvency Efwon Romania was able to pay debts as they fall due. The most recent financial statements should be sought. The extent of cash holdings, the respective payment and (if known) sponsorship packages for each driver should also be ascertained, if possible.

10. In the context of a Chapter 11 restructuring the European Insolvency Regulation (“the EIR”) would not be relevant but the UNCITRAL Model Law on Cross-Border Insolvency 1997 (“the Model Law”) would be. The EIR would allow for the *preventive concordat* to be the main insolvency proceed. On the facts as currently known, the scope for cross-border assistance that the EIR offers does not arise.

*Suggested integrated (non-Chapter 11) strategy*

11. The necessary first step is to set aside the insolvency proceedings initiated in respect of Efwon Romania. This would be on the dual basis that (i) Efwon Romania is not insolvent and (ii) that the Drivers are not creditors to it.

12. Romania’s insolvency Law No. 85/2014 regarding preventing insolvency and insolvency proceedings (“the Insolvency Code”) provides that a debtor is only insolvent when it has insufficient funds to pay **its certain, liquid and due debts**.[[1]](#endnote-1)

13. A “creditor” is not entitled to request the opening of insolvency proceedings unless its claim on the debtor's assets is certain, liquid and due for more than 60 days.[[2]](#endnote-2) The putative creditors (that is, the drivers) do not currently fit within that definition.

14. Current prospects of defeating that attempt to initiate insolvency proceedings are therefore high. Following that, Efwon Romania should deploy one of Romania’s several pre-insolvency proceedings aimed at reaching a restructuring agreement with Efwon England, its main creditor.

15. Specifically, Efwon Romania should proceed by way of the *preventive concordat* in the Insolvency Code.[[3]](#endnote-3)

16. A *preventive concordat* offers a wide temporary moratorium (as explained below) that would provide Efwon Romania the leverage to dispose of the freezing order and finalise a deal with KuasaNas. It would be the single insolvency process required by which to deliver to you the solution sought.

*The preventive concordat explained*

17. It is an agreement between a debtor in financial difficulty and creditors that hold at least 75% of accepted and undisputed value of claims.

18. It is subject to confirmation by the relevant type of specialist Romanian (“syndic”) judge. The proceedings must be opened at the request of Efwon Romania[[4]](#endnote-4) proposing a workout and recovery plan with the aim of covering creditors’ claims and with it the creditors’ support. One of the major benefits of the approval of a *preventive concordat* is that an insolvency procedure cannot be opened against the debtor during the period of negotiation.

19 The agreement (that is, the *concord*) to be proposed would be the same as similarly contemplated in the context of any US Chapter 11. Efwon Romania would offer to sell KuasaNas for fair value a 51% share in Efwon Romania. We understand that 51% is have significant value even net of debts owed to Efwon England. The relevant licence is worth a considerable amount and Efwon Romania had been servicing debt until the freezing order obtained by the drivers in furtherance of their injury claims.

20. While KuasaNas will require an audit and valuation of Efwon Romania, 51% of the shares in the company appears likely to be valued well above US$100million. We understand that Efwon England, as an undisputed creditor, agrees with the proposal.

21. As the solution to the immediate problem of the freezing order, provision should be made for the drivers’ claims by securing funds for payment of damages either by use of escrow or (if available under applicable Romanian court processes) payment into court. This could still be made expressly subject to findings of liability. Meaning that the funds would come back to Efwon Romania if the drivers lost their respective claims.

22. Efwon England and Efwon Romania hold bargaining leverage in structuring such a deal with the drivers because under applicable Romanian law Efwon England ranks as a preferential creditor.[[5]](#endnote-5)

23. Because of how large Efwon Romania’s debt to Efwon England is, there is likely to be very little left, if anything, if the company were to be subject to a liquidation. In that scenario, the drivers would be left to take their chances in the waterfall of priorities. On that basis that they are very likely to agree to voluntarily release their freezing order if sums were secured in accordance with Para. 21. Additionally, the moratorium that the *preventive concordat* offers will make leave it clear to the professional advisors of the drivers that their clients’ best interests would be served by way of a negotiated outcome.

24. As a court-driven process, in the context of a *preventive concordat* the Romanian syndic Judge has the following responsibilities[[6]](#endnote-6):

* 1. to appoint the interim concordat administrator;
	2. to approve, at the request of the concordat administrator, the *preventive concordat*;
	3. to ascertain, at the request of any unsigned creditor of the preventive arrangement, the fulfillment of the conditions required to be registered on the list of creditors who have adhered to the preventive arrangement;
	4. to order by conclusion, the temporary suspension of the forced executions against the debtor, based on the offer of preventive composition formulated by the debtor and sent to the creditors;
	5. to judge the actions in resolution of the *preventive concordat*.

25. As a debtor in financial difficulty, by Efwon Romania submitting to the competent court the procedure functions as a request to open the preventive concordat.[[7]](#endnote-7) By that request, the debtor proposes an individual to act as the temporary concordat administrator among the insolvency practitioners authorised according to the law.

26. The syndic Judge then appoints the *provisional* concordat administratorby and within 30 days from his appointment, the concordat administrator in conjunction with the debtor compiles the list of creditors and the preventive concordat offer.[[8]](#endnote-8)

27. On the present facts, the creditors would be Efwon England and the other sundry creditors of the business. As stated at Para. 13, the drivers do not have a claim pursuant to Romanian law. The drivers are therefore not creditors.

28. Notice of the preventive composition agreement is then to be given by the provisional composition administrator to the creditors. The preventive composition offer must then be submitted to the registry of the court, where it will be registered in a special register.

29. The preventive composition offer sent to Efwon Romania’s creditors will also include the draft preventive agreement, to which must be attached Efwon Romania’s statement regarding its financial situation. This includes the list of known creditors, including those whose claims are challenged in whole or in part. On the known facts, it is highly unlikely that the substantial debt to Efwon England would be disputed.

30. The draft preventive composition must set out in detail the following:

(i) Efwon Romania's assets and liabilities, certified by an accounting expert or audited by an auditor authorised Romania law;

(ii) the causes of the financial difficulty (in this case the litigation as instituted by the drivers - including the related injunction - and the current lack of a sponsor). Also (if applicable) the measures taken by Efwon Romania to overcome it until the submission of the final preventive composition offer (in this case the proposal to sell 51% of the shares of Efwon Romania to KuasaNas, relocate the company to Malaysia and deposit a sum into court to satisfy any judgment debt that is ordered by the Drivers);

(iii) projection of the finances / accounting looking forward for the next 24 months.

31. The draft preventive arrangement must include a recovery plan, which provides for at least the following:

1. reorganisation of Efwon Romania’s activity, through measures such as: restructuring the Efwon Romania’s management, modification of the functional structure, reduction of staff or any other measures considered necessary;
2. details as to the ways in which Efwon Romania intends to overcome the current state of financial difficulty;
3. in the case of contracts whose maturity exceeds the term of 24 months provided for, sufficient detail on the composition agreement for those creditors which payment rescheduling is proposed outside this period. After closing the composition procedure, these payments will continue according to the relevant contracts;
4. that satisfaction of the receivables established by the composition agreement is 24 months from the date of its approval, with the possibility of extension by 12 months; note that in the first year it is mandatory to pay at least 20% of the value of the receivables established by the composition. In the present case this obviously would not be a difficulty if KuasaNas is able to purchase the 51% equity in the team.

33. To secure necessary creditor support on the draft preventive composition agreement, Efwon Romania may convene one or more negotiation meeting(s) with creditors, collective or individual. Those take place in the presence of the composition administrator proposed by the debtor. Such meeting(s), or negotiations must settle the final preventive composition (for voting) within 60 calendar days.

34. It is important to treat that as only an upper threshold on timing. Speed is key, not least because of the need to ensure creditor confidence. The precautionary composition is considered approved by the creditors if voted for by creditors representing at least 75% of the value of the accepted and uncontested claims.[[9]](#endnote-9)

35. Following approval of the concordat by the creditors, the concordat administrator requests the syndic Judge to approve the *preventive concordat*. For approval, the syndic judge verifies the cumulative fulfillment of the following conditions:[[10]](#endnote-10)

(i) the value of the disputed and / or disputed receivables does not exceed 25% of the credit mass (which is not the case on the known facts); and

(ii) the preventive arrangement was approved by the creditors, which represents at least 75% of the value of the accepted and uncontested receivables (given the identity of the main known creditor – Efwon England – this is not problematic either).

36. Subject to the above, the syndic judge then approves the *preventive concordat* by a decision pronounced in the open court, after summoning and listening to the concordat administrator.[[11]](#endnote-11)

37. From the date of communication of the decision approving the preventive agreement, the moratorium comes into effect, such that:

1. individual prosecutions by the signatory creditors on the debtor are suspended by law;
2. the rights of creditors to request the forced execution of claims against the debtorare stayed; (crucially)
3. insolvency procedures towards the debtor cannot be opened;[[12]](#endnote-12)
4. any creditor who obtains an enforceable title over the debtor during the procedure and prior to the approval may file a request to adhere to the composition agreement or may recover his claim by any other means provided by law.

38. As indicated above, it is the moratorium that will encourage the drivers to accept the concept of secured funds (whether by escrow or payment into court) in exchange for the release of the freezing order.

*The European Directive 2019/1023 on preventive restructuring framework*

39. Romania implemented the European Directive 2019/1023 on preventive restructuring framework (“the Directive”) as of early 2020. One of the main purposes of the Directive is to introduce a preventive restructuring framework available for debtors in financial difficulties when there is a likelihood of insolvency, with a view to preventing the insolvency and ensuring the viability of the debtor. This underpins the implementation and subsequent operation of the *preventive concordat* as described above.

40. The Directive mandates member states to introduce a minimum standard framework for preventive restructuring available to debtors in financial difficulty and to provide measures to increase the efficiency of restructuring procedures, including by having those measures take place outside of court. These new standards attempt to move EU Member States further in the direction of debtor-in-possession-type insolvency regimes such as Chapter 11 (in the US) and Schemes of Arrangement (England & Wales).

41. Key elements of the procedure envisaged by the Directive include: (a) debtors remaining in possession of their assets and day-to-day operation of their business; (b) a stay of individual enforcement actions; (c) the ability to propose a restructuring plan that includes a cross-class cram-down mechanism whereby the plan is imposed on dissenting creditors in a class (holding no less than 25 percent of claims in that class) and across classes (subject to certain protections); and (d) protection for new financing and other restructuring-related transactions.

42. As explained above, Romania already has a debtor-in-possession procedure for reorganisation which can effect the proposed restructuring relatively quickly (a regime that pre-dates implementation of the Directive). The *preventive concordat* also has the benefit of an extensive moratorium, as also explained above. The Directive adds nothing unlike EU Regulations, EU Directives do not have automatic effect. It came into effect under domestic Romanian law in July 2022.[[13]](#endnote-13)

*European Insolvency Regulation recast (the “EIR”)*

43. Although not relevant in a US Chapter 11 context, the EIR is relevant in respect of the proposed strategy. The EIR creates a framework for resolving insolvencies in the European Union, particularly among EU member states. Although national legislatures retain the power to decide on the content of insolvency proceedings (for example, the ranking of claims, rules on directors’ liability, available restructuring options), issues of jurisdiction, applicable law, enforcement and recognition, cooperation and communication between Insolvency Practitioners and courts, are largely harmonised through the mandatory EU law, laid down in the EIR.

44. The EIR Recast extends not only to “traditional” liquidation-oriented procedures, but also to proceedings aimed at rescuing the debtor from financial distress. Annex A of EIR, which list of the proceedings covered, includes the Romanian *preventive concordat*. This additional[[14]](#endnote-14) and well-recognised framework reinforces the strength of our commendation.

45. Following Efwon Romania’s request for a *preventive concordat* it will have to inform the court, consistent with article 3(1) of the EIR, that it is seeking to open main insolvency proceedings because its centre of main interests (“COMI”) is Romania. Such proceedings would have universal scope and aim to encompass all Efwon Romania’s assets. The EIR defines COMI as the place where the debtor conducts the administration of its interests on a regular basis, and which is ascertainable by third parties (Article 3(1)). Given Efwon Romania is a going concern having employees and other assets relevant to the F1 business in Romania there could be no sensible argument that its COMI is *not* located in Romania. As reflected by the drivers having issued proceedings and initiated insolvency procedures there.

46. Following the opening of main insolvency proceeding the EIR will play no significant role in the Romanian proceedings. The applicable insolvency law, the COMI being in Romania, will be Romanian law.[[15]](#endnote-15) Additionally, on the known facts there appears no need for use of the cross-border “tools” which the EIR provides.

*Achieving the KuasaNas deal (aka, saving the Efwon Group)*

47. Once the *preventive concordat* is confirmed by the syndic Judge as set out above, the concordat administrator they can pursue the sale of 51% of the issues share capital in Efwon Romania to KuasaNas for fair value a 51% share in Efwon Romania. You should treat as a virtual certainty that this process would require audited financial statements for Efwon Romania.

48. Some part of those sale proceedings will likely be required to secure funds in return for the release of the freezing injunction (Para. 21)

49. Net of that important issue, the sale proceeds would be available funds to service the debts owed to Efwon England, which would then be able to service its debts to Efwon Delaware and the Monaco creditor.

50. That would then clear the way for Efwon Romania to migrate its entire business to Malaysia. The process of migration could be achieved either (i) by winding up the affairs of the company in Romania and transferring the assets to Malaysia, or (ii) by transferring the company itself to Malaysia. Whether (ii) was possible would be an issue of Romanian company law.

*Current weaknesses in our ability – fully – to advise*

51. We have already stated that we do not see use of the US Bankruptcy Code Chapter 11 process as the offering optimal solution. That said, and for the sake of completeness, we cover from Paras. 54-59 specific aspects of the Chapter 11.

52. Before that, we flag the following as information that it would be better to have for us fully and comprehensively to advise. In providing that list, of course we recognise the commercial realities both that there is seldom such a thing as “full information” when advising in the context of possible insolvency and that this type of situation is – by its very nature fluid / evolving.

53. Subject to that, further information in respect of Efwon Romania that would be useful to have includes:

 (i) the detailed financial status (financial statements);

 (ii) the cash position;

(iii) (for the envisaged KuasaNas deal) a professional valuation (or at least readiness for same);

1. details of the financial package / compensations for the drivers;
2. approval for us to obtain necessary information on the applicable Malaysian regulatory regime (impacting the scope for the share sale / purchase)

*Your suggestion – United States Chapter 11 Bankruptcy Proceedings*

54. Having set out above that which we believe to be the most viable strategy, for completeness we set out some relevant details of the Chapter 11 process. Although it is likely that the reorganisation of the Efwon Group could be dealt with via Chapter 11, doing so is neither the most cost-effective nor time-sensitive solution.

55. Under the applicable legal regime (the Model Law), both England and Romania domestic proceedings take precedence over foreign ones (which a Chapter 11 would be). So, the recognition of US Chapter 11 proceedings would not prevent local creditors from initiating or continuing collective insolvency proceedings commenced in Romania anyway.

56. In addition to that, the relief (aka “outcome” or “help”) available to the US Trustee under a Chapter 11 would be subject to compliance with Romania’s procedural requirementsas well as to the protection of local creditors and other interested parties against undue prejudice. The drivers, with their ongoing litigation, their freezing order, and their insolvency proceedings (which by then would be before the Romanian court) would be in a position of strength.

57. The recognition of the US Trustee and enforcement of the US order in the face of drivers’ proceedings would be a much less straight forward prospect. The Model Law does at least preserve the possibility of excluding or limiting any action in favour of foreign proceedings based on public policy. But in our experience that seldom occurs.

58. Seeking assistance via the Model Law in England and / or Romania in respect of a US order as made under Chapter 11 will be further complicated by the fact that a US trustee in such a position does not qualify as acting in furtherance of either a foreign main, or non-main proceedings, one of which being a requirement of recognition and assistance under the Model Law. This is because a foreign main-proceedings is one which takes place in the jurisdiction where the debtor has its COMI. A foreign non-main proceeding is one other than a foreign main proceeding, taking place in a jurisdiction where the debtor has an *establishment*. An establishment is any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services. Efwon Romania does not have that. Therefore, and because the US foreign representative will be unable to certify in respect of either, the prospects of him or her obtaining assistance under the Model Law are low.

59. Another deterrent in respect of Chapter 11 is the significantly increased costs comparative to the strategy that we recommend. Efwon Delaware and its subsidiaries would be responsible for paying, on an ongoing basis, their post-petition business expenses, their counsel and other advisors as well as the counsel and advisors of the unsecured creditors’ committee, any other statutory committees and any other creditor who may have contractual entitlements to payment of fees in enforcement proceedings. It is rare that a debtor can finance the proceedings from ordinary business revenue.

*The (non) impact of Brexit on a US strategy (if adopted)*

60. Following the end of Brexit transitional period in December 2020 ending on 11PM on 31 December 2020, the benefit of the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (“EIR Recast”) between the UK and the EU was lost in respect of new insolvency proceedings. The EIR will continue to apply to insolvencies involving the UK, where the main proceeding was opened prior to the expiry of the transitional period.

61. The Insolvency (Amendment) (EU Exit) Regulations 2019 (SI 2019/46 ("Exit Regulations") retain the existing jurisdiction in the UK under the EIR, reinforcing the position that the UK courts will largely continue to apply the EIR to insolvencies opened prior to the end of the transition period without any changes (Regulation 4).

62. None of the above would impact a US Chapter 11 strategy. That is because a Chapter 11 strategy would be seeking enforcement of a US Order and recognition of a US trustee which would be entirely governed by the Model Law, both in the UK and in Romania.

Yours sincerely,

**Tim Prudhoe**

**Summary of relevant facts**

Efwon Investments Limited (Delaware) (“Efwon Delaware”): obtained loans totaling US$250M from a syndicate of banks under the following terms:

(i) secured partly on several homes of yours across the world collectively worth some US$75M, a pledge on projected revenue to flow back from the intended investment in the F1 sport, a pledge over the shares of Efwon Delaware and finally a negative pledge for the entire value of the loan;

1. to be repaid in 10 years, with an interest rate of LIBOR + 2%, and with a structure of 2 senior banks (exposure of US$100M), 2 mezzanine financial creditors (US$60) and 5 junior financial creditors holding an exposure of US$90M.

The syndicate of banks are said to have become concerned following recent events regarding other companies within the group over the last 6 months to a year; resulting in the fear that the syndicate intends to foreclose on Efwon Delaware’s shares (among other things).

Efwon Trading Limited (“Efwon England”) a direct English subsidiary of Efwon Delaware. Efwon was advanced US$350M by Efwon Delaware by which to fund the F1 investment. Efwon England has used all UD$350M advanced by which to fund its subsidiary Efwon Romania. Efwon England is liable to a Monaco bank in the sum of US$100M.

Efwon England is impeded in repayment efforts to both Efwon Delaware and the Monaco bank by legal proceedings involving Efwon Romania.

Efwon Romania, incorporated in Romania, is the holder of the F1 licences. Efwon Romania presently carries on the F1 racing enterprise, owns the constructors’ assets relevant to that and employs the F1 drivers, Adrian Dragavei and Marian Suta. In the last race of the 2018 season, the drivers were injured. They have cited defects in safety and management issues have initiated claims in Romania where, if they succeed, substantial compensation is likely to be awarded against Efwon Romania.

As part of their strategy and as an interim measure, lawyers acting for the drivers have filed for the insolvency of Efwon Romania; interim freezing injunctions have been obtained over the Efwon Romania’s assets and income. For those reasons, Efwon Romania is expected to default on payment obligations to Efwon Trading. Such defaults would trigger a similar outcome “up the chain” (Efwon England and Efwon Delaware).

1. Law No. 85/2014; art 5(29) - Insolvency is that state of the debtor's patrimony which is characterized by the insufficiency of the funds available for the payment of certain, liquid and due debts, as follows:

a) the insolvency of the debtor is presumed when, after 60 days from the due date, he has not paid his debt to the creditor; the presumption is relative;

b) the insolvency is imminent when it is proved that the debtor will not be able to pay at maturity the due debts committed, with the funds available at the due date; [↑](#endnote-ref-1)
2. Law No. 85/2014; art 5(20) [↑](#endnote-ref-2)
3. Law No. 85/2014; Chapter III [↑](#endnote-ref-3)
4. Law No. 85/2014; art 16 [↑](#endnote-ref-4)
5. Law No. 85/2014; art 5(15), art 159 [↑](#endnote-ref-5)
6. Law No. 85/2014; art 17 [↑](#endnote-ref-6)
7. Law No. 85/2014; art 23 [↑](#endnote-ref-7)
8. Law No. 85/2014; art 23 [↑](#endnote-ref-8)
9. Law No. 85/2014; art 27 [↑](#endnote-ref-9)
10. Law No. 85/2014; art 28 [↑](#endnote-ref-10)
11. Law No. 85/2014; art 28 [↑](#endnote-ref-11)
12. Law No. 85/2014; art 31 [↑](#endnote-ref-12)
13. Law No. 216/2022, amending Law No. 85/2014 [↑](#endnote-ref-13)
14. [↑](#endnote-ref-14)
15. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast); art 7 [↑](#endnote-ref-15)