LANDER & ROGERS

Memorandum of Advice

NOTE: This advice is fictitious and prepared for the purpose of the INSOL International Global Insolvency Practice Course 2023/24024

Case Study II - Part 1

Date	15 April 2024	**Matter No.**	INSOL GIPC
To	Benedict Maximov		
From	Jonathon Turner		
Re	Proposed Cross-Border Restructure of Efwon Group		

INTRODUCTION

1. You have engaged us to provide advice in respect of the potential restructure of the following companies:

   (a) Efwon Investments Inc, a company established in Texas, USA (**Efwon Investments**);

   (b) Efwon Trading BV, a company established in Netherlands (**Efwon Trading**);

   (c) Efwon Romania T/AS "Team Maximov", a company established in Romania (**Efwon Romania**); and

   (d) Efwon Singapore, a company established in Singapore (**Efwon Singapore**),

   together the (**Efwon Group**). A corporate structure chart in respect of the Efwon Group is at **Schedule One** to this memorandum.

2. The Efwon Group has been a competitor in the FIA's F1 competition since 2015 and is in severe financial distress. Urgent assistance is required in order to ensure that the Efwon Group can compete in the F1 2024 season and remain as a going concern.

3. We have been asked to advise Mr Maximov (**You**) as to how to:

   (a) protect:

      (i) Your position as:

         (A) sole shareholder of both Efwon Trading and Efwon Investments;

         (B) lender to Efwon Investments;

(C) provider of real property security in the amount of $75 million; and

(D) owner of Team Maximov.

(ii) the position of Efwon Investments;

(b) facilitate and conclude the sponsorship deal with KuasaNas; and

(c) save Team Maximov.

EXECUTIVE SUMMARY

4. By way of executive summary, we note the following:

(a) In light of the instructions provided to date, we consider that restructuring of the Efwon Group and its various stakeholders is necessary in order to be able to protect Your position and save Team Maximov. In particular, we suggest the following:

(i) implementation of a restructuring plan pursuant to a public Dutch WHOA in the Netherlands in respect of Efwon Trading supported by a stay/cooling down period obtained from the Dutch courts (**Proposed Restructuring Plan**);

(ii) the Proposed Restructuring Plan could be recognised in the US pursuant to Chapter 15 of the US Bankruptcy Code (**Bankruptcy Code**), in Romania pursuant to the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (**EIR Recast**) and in Singapore pursuant to the Singapore Model Law;

(iii) the Proposed Restructuring Plan would also be replicated in parallel US proceedings under Chapter 11 in respect of Efwon Investments. In particular, this will assist to obtain super senior status for any new/emergency funds advanced in support of the Proposed Restructuring Plan;

(iv) the Proposed Restructuring Plan will facilitate financial and operational restructuring, including:

(A) permanent debt reduction through the compromise of debt in respect of the US Syndicated Facility, the Maximov Loan, the Monaco Loan, and the inter-company loans;

(B) amend-and-extend style amendments to the terms of the existing facilities. In particular, the US Syndicated Facility to extend the term of that loan (noting it expires and becomes due and payable in 2024) and to reduce the interest component that has increased to LIBOR plus 6%;

(C) the sale of the assets of Efwon Romania, which will require the lifting of the Freezing Orders, to a new Malaysian subsidiary, Efwon Malaysia;

(D) entry into a new sponsorship arrangement between KuasaNas and Efwon Singapore to secure the future funding requests of the business;

(E) assuming that KuasaNas is agreeable, Efwon Malaysia to be held 51% by Efwon Trading thereby maintaining Your majority control and the remaining 49% to be held by KuasaNas potentially in consideration of the compromise of part or all of the Maximov loan and for rebranding "Team KuasaNas Maximov";

(F) the transfer of the business to Malaysia with the contracting of new Malaysian based drivers and entering into a contractual relationship with the Sepang race track;

(G) payment of an agreed amount, advanced up front by KuasaNas under the new sponsorship agreement or potentially by way of super-senior funding provided by the US Senior Lenders, to the Romanian drivers to satisfy this claim, remove the freezing injunction and then for the orderly wind down of Efwon Romania pursuant to the existing proceedings;

(H) potential new super senior financing through existing financiers or shareholders or sponsorship; and

(I) leveraging new sponsor connections to undertake an operational restructure including in respect of drivers, car improvements and reduction of operating costs through arrangements with Sepang racetrack.

(b) An overview of the implementation of the Proposed Restructuring Plan and our reasoning for this preliminary recommendation is set out at paragraphs 9 to 30 below.

(c) The revised corporate structure following the Proposed Restructuring Plan is set out at **Schedule Three**.

(d) The additional information and clarification we require to finalise our advice and recommendations in respect of the Proposed Restructuring Plan are identified at paragraph 8 below.

(e) We have considered the application of the EIR Recast, Chapter 15 of the US Bankruptcy Code and UNCITRAL Model Law on Cross Border Insolvency (**Model Law**) at paragraphs 31 to 53 below.

(f) Pursuant to paragraphs 54 to 67 below, and subject to further consideration once the matters requested in paragraph 8 have been dealt with, we do not currently consider that the Efwon Group ought to have structured through England rather than the Netherlands.

(g) We have summarised the potential outcomes for each of the stakeholders at paragraphs 68 to 78 below.

BACKGROUND

Corporate Structure

5. We have set out at **Schedule One** our understanding of the current structure of the Efwon Group.

Loans and Secured Creditors

6. We have set out at **Schedule Two** a table summarising the various facilities relevant to the proposed restructure and the relevant security obtained by the respective lenders.

Additional Background and Assumptions

7. In addition to the matters identified in Schedules One and Two, which are incorporated into this memorandum, we note the following material matters from the instructions that you have provided:

    (a) the sponsor between 2018 to 2023, Kretek, has indicated that it will not renew its sponsorship for the period 2024 and onwards leaving a capital shortfall of c. US$100m a season;

    (b) a potential replacement sponsor, KuasaNas, which is a Malaysian state-owned company, has indicated its interest and would be in a position to offer sponsorship of over US$100m per season (noting that the F1 budget cap is currently $135m a season) on the following conditions:

        (i) it is able to acquire a majority stake in the team (51%); and

        (ii) the team moves to Malaysia.

        In light of the financial distress of the entities, KuasaNas has now asserted an additional condition that the insolvency issues affecting the companies are dealt with promptly and will only invest if all entities are returned to a stability;

    (c) the move to Malaysia has potential operational efficiencies and benefits, including the ability to acquire new drivers and the ability to use the Sepang GP racetrack;

    (d) in the last race of the 2023 season, the Romanian drivers were injured and have subsequently brought claims before the Romanian courts seeking substantial compensation. In addition, their lawyers have filed for the insolvency of Efwon Romania and have obtained, pending an order being made, freezing injunctions over the company's assets and income (**Freezing Orders**);

    (e) the effect of the Freezing Orders is that Efwon Romania will default on payments to Efwon Trading due to be made in early 2024, which in turn will result in Efwon Trading defaulting on its payment obligations. This raises the potential insolvency of Efwon Trading;

    (f) US syndicate members and Monaco lenders are nervous and considering their position in light of the forementioned financial distress;

    (g) the Independent Business Review (**IBR**) produced at the request of the US lenders confirmed that Efwon Group will need to undergo an operational restructure but that this will not address the fundamental issue. That is, the Efwon Group is over leveraged and is unable to service its current level of debt without a sponsorship deal; and

(h) in the limited time now available, KuasaNas is the only potential sponsor available. Importantly, KuasaNas have signalled that they would be willing to pay part of the total consideration for the deal directly on the closing thereof.

ADDITIONAL INFORMATION

8. Having considered the instructions and information provided to date. We consider that the following information or documentation is necessary in order to enable us to finalise our advice and to confirm our recommendation to You. In particular, we require the following:

(a) confirmation of the governing law of the following facilities and loan arrangements (in particular whether English or New York law applies): (i) Maximov Loan; (ii) US Syndicated Facility; (iii) Efwon Investments Loan; (iv) Monaco Loan; and (v) Efwon Trading Loan.

(b) confirmation of whether or not the Maximov Loan was unsecured or secured;

(c) provisions of any contracts, agreements, licenses, or arrangements with Efwon Romania, including, but not limited to, the FIA Licence, any trademarks and other intellectual property and the broadcasting/revenue agreement between Efwon Romania and the FIA. We will then review to confirm that they do not contain any assignment, *ipso facto*, change of control or other classes that would limit the ability to transfer the assets of Efwon Romania (in particular the Licence) to the new entity, Efwon Malaysia;

(d) the willingness of the secured creditors to provide any standstill agreements and to compromise parts of their debt and/or extend terms (in this regard reference can be made to the INSOL Principles for Multi Creditor Workouts (2nd ed.), Principles 1, 2 and 4);

(e) an indication of whether KuasaNas is willing to negotiate its 'conditions' or there is no room for manoeuvre in this respect;

(f) financial records of the Efwon Group, in particular that confirm the current asset/liability position of the Efwon Group ((e.g. what money has been retained in the business, cash at bank, the amount of loan repayments and current balances of such loans). Further, recent cash flow forecasts, management accounts and/or budgets;

(g) any expected changes to the financial parameters of F1, in particular with respect to the budget cap and the share of broadcasting revenue;

(h) greater clarity in respect of the returns/revenues for the seasons 2017 to 2022 in circumstances where the instructions only confirm that in the 2015 and 2016 seasons the return/revenue of Efwon Romania was $30m and $60m;

(i) the ability of the License to be transferred from Efwon Romania to Efwon Malaysia and the position that the FIA and other teams are likely to take;

(j) the tax position of the entities within the Efwon Group;

(k) the position of employees and whether or not their entitlements have been fully paid up to date;

(l) an up to valuation of the assets of Team Maximov noting that they were acquired for US$50m in 2014; and

(m) legal advice as to the strength of the claims of the Romanian drivers and the likely quantum of damages in the event they were successful in any such claim. This will assist to determine an appropriate 'settlement amount' to be offered to the Romanian drivers either as part of the Restructuring Plan or outside of this.

REASONING

Proposed Restructuring Plan

9. We have set out in the executive summary, the outline of the Proposed Restructuring Plan. An updated corporate structure chart is also set out at **Schedule Three**. Our reasoning for the proposed structure is as follows.

Efwon Trading and the Dutch System

10. Efwon Trading, which is a Dutch company, being the primary financing party within the Efwon Group, is central to any potential restructure.

11. Under the Dutch insolvency regime, there are two types of insolvency proceedings available to corporate entities being: bankruptcy and suspension of payments. However, consistent with the EU directive on Restructuring and Insolvency of 20 June 2019, the Dutch system was reformed in January 2021 to introduce a new restructuring process detailed further below at paragraphs 14 to 26.

12. For the following reasons, we consider that utilising a restructuring regime rather than a formal insolvency regime is more likely to protect Your interests and save Team Maximov: (i) there is only a limited time now available before the start of the 2024 season; (ii) the only available sponsor, KuasaNas, has made it a condition that every group return to stability; (iii) a restructuring process, as compared to a realisation process under an insolvency, is more likely to preserve enterprise value and maximise the chances of the business continuing as a going concern. Accordingly, this advice does not consider the bankruptcy or suspension of payments processes under the Dutch Bankruptcy Act 1893 (**DBA**).

13. Further, before considering the restructuring regime, it is necessary to make reference to a number of features of the Dutch insolvency and restructuring regime that are relevant to the current circumstances. In particular, we note that:

    (a) the Dutch system is generally seen as a 'creditor friendly' jurisdiction;

    (b) the principle of freedom of contract (*pacta sun servanda*) is a foundation of the Dutch system (i.e. a contract is essentially binding on the parties to the contract such that secured creditors may enforce their claims against secured assets with minimal limitation);

    (c) consistent with this, secured creditors can enforce notwithstanding insolvency proceedings, unless a cool-down period has been granted by the Dutch courts;

    (d) under Dutch law, and consistent with the principle of freedom of contract, a voluntary act of a person resulting in prejudice to its creditors can in certain circumstances be avoided under preference laws if there is a subsequent bankruptcy. This risk of claw back may inhibit restructuring initiatives;

(e) Dutch law doesn't provide for super senior status to be granted to emergency funding. Priority follows from ordinary rules that favour earlier in time registrations. While protection against claw-back may be possible by way of application to the Court, any amendment to the priority of secured creditors would generally need the agreement of other secured creditors; and

(f) Dutch insolvency law does not provide for the consolidation of bankruptcies of group companies.

Dutch WHOA

14. As previously noted, the DBA was amended by the introduction of an Act on Court Confirmation of Extrajudicial Restructuring Plans or Wet Homologatie Onderhands Akkord (commonly referred to as "WHOA" or "Dutch Scheme").

15. The WHOA allows a debtor to propose a restructuring plan to all or some of their creditors (preferred, ordinary, or secured) and shareholders (where relevant). In the event that certain procedural and voting requirements are met, the debtor can then request that the court provide confirmation of this restructuring plan. The result being that the restructuring plan (if it fulfils certain conditions) is then binding on all affected creditors, regardless of their approval of the plan. It is this ability to bind dissenting creditors and to provide flexibility in outcomes that makes the Dutch WHOA an attractive option in these circumstances. In particular, given that it is likely that there will be a divergence in results between classes of creditors.

16. By way of overview, the key elements of the Dutch WHOA regime are as follows:

(a) it is an informal restructuring regime with limited court involvement rather than a formal insolvency regime;

(b) it is a debtor-in-possession proceeding, whereby management remain in full control of the business throughout the entire procedure, which requires very limited involvement of the court. In these circumstances, the business of Efwon Trading would continue as a going concern under Your control;

(c) a restructuring expert may be requested by creditors, if this occurs than the business will continued to be operated by the directors with expert leading the restructuring plan;

(d) a successful Dutch WHOA concludes when the court confirms the plan with the effect that it becomes binding on all shareholders and creditors (secured, preferential and ordinary);

(e) there are two types of WHOA regimes: a public and an undisclosed process. There are important differences between the two regimes which are relevant to the circumstances of this case. Under the public regime, the Dutch court will assume jurisdiction in accordance with the EIR Recast (with the public WHOA listed in Annex A of the EIR Recast) where the debtor has the Netherlands as its COMI with the effect that the Court confirmed plan will automatically be recognised in other member states of the EU. In the alternative, the undisclosed process doesn't quality for automatic recognition under the EIR Recast. While there is an obvious benefit in the confidentiality provided by the undisclosed regime, given the cross-border nature of the Efwon Group we consider that the automatic recognition provided by the public regime is of benefit in this instance. This is particularly the case given the position of Efwon Romania;

(f) the WHOA is commenced by the debtor filing a statement with the Court and does not require the consent of shareholders;

(g) the entry requirement of a Dutch WHOA provides "*is it reasonably plausible that the debtor will not be able to continue to pay its debts*". In light of the circumstances in this matter, we consider that Efwon Trading would fulfil this requirement in light of the impending default of Efwon Romania which in turn will result in Efwon Trading defaulting under its facilities;

(h) the debtor can determine the content and structure of the restructuring plan and it may be offered to all or some of its creditors or shareholders. It is an extremely flexible regime with the ability to amend creditors and shareholders rights, partially or fully release debt obligations, amend the terms of debt obligations (even if governed by foreign law) and/or include a debt for equity swap;

(i) importantly, the Dutch WHOA includes a cross-class cram-down mechanism. The relevant classes are constituted to the extent that creditors' or shareholders' interests or rights differ to the extent that they cannot be considered similar. Further, voting is limited to those categories of creditors and shareholders whose rights are affected by the plan. Adoption of the restructuring plan occurs where it is approved by two thirds majority of all classes. As such, the WHOA allows a debtor to bind a non-consenting minority of creditors in any class, or an entire dissenting class, to the restructuring agreement, as long as the agreement has the consent of the majority of that class, or of a higher-ranking class, respectively;

(j) following creditor voting, the Court will then be approached to confirm the plan. If all classes have approved the plan, then it must be declared binding on all classes. If one or more classes voted against, the court can still declare the plan universally binding thereby cramming down the dissenting creditors;

(k) benefits of the Dutch WHOA include that it is relatively quick and efficient, it is inexpensive, not subject to appeal and can be instigated alongside parallel cross-border restructuring (which is intended in these circumstances);

(l) in the context of a Dutch WHOA, creditors are unable to seek to rely on *ipso facto* clauses to prevent interruption with the restructuring plan; and

(m) while court involvement is limited, the court can be approached to implement interim measures in support of the restructuring plan. In particular, in order to circumvent the freedom of contract principle (e.g. in respect of new or emergency funding, a colling off period or the termination of onerous contracts).

17. Since the WHOA process is not a formal insolvency proceeding, creditors are, as a basic rule, not limited in taking recourse in whichever way is open to them, including through enforcement of security rights. Accordingly, in addition to commencing a public Dutch WHOA it would also be necessary to obtain a stay / cool-down period (under which a secured creditor can't enforce rights without the court's permission) in respect of both unsecured and secured creditors. The maximum period that is available is 8 months. The cool-down period would also have the effect of staying any request to open insolvency proceedings.

18. A Dutch court will grant such a cooling off period if it is prima facie shown that it is necessary to continue the business of the debtor while the plan is being prepared. In

addition, it is necessary to show that a plan has been proposed or that the debtor is committed to proposing a plan within two months of the request in the event that a restructuring expert has been appointed. In essence, the Court is required to determine whether the cooling off period is in the interests of the creditors and that the interests of those who are (temporarily) prevented from taking action are not substantially affected. In the event that we are able to demonstrate that the potential return under the Restructuring Plan is better than the relevant alternative, than it is likely to be granted. This is the case even if the plan contains a managed wind down of a particular entity within the group (see *Steinhoff*).

19. The Dutch WHOA provides a degree of protection for emergency funding and collateral furnished in accordance with the Restructuring Plan in order to circumvent the freedom of contract principle. In particular, the Court may be requested to authorise legal acts deemed necessary to continue the debtor's business during the restructuring. The Court is likely to sanction such acts provided that they serve the interests of the debtor's joint-creditors, and no material harm is done to the interests of any individual creditor. Such approval thereby limits the clawback risk associated with a subsequent bankruptcy and would be necessary in these circumstances to protect further funding advanced by KuasaNas or an existing lending.

20. While the Dutch WHOA may provide some protection for additional funding in limited circumstances, it does not, unlike Chapter 11, provide a mechanism whereby emergency funding is provided super senior status. It is for this reason that it may be beneficial to undertake a parallel Chapter 11 process of Efwon Investments in the US to provide this super senior status for any new funding advanced as part of the Restructuring Plan.

21. The Dutch WHOA regime is intended for debtors with a viable operational business but an unsustainable debt burden. This is reflected in the IBR that has been produced and as such we recommend that we implement a Restructuring Plan using the WHOA regime. Indeed, *Fitness Centres*[1] demonstrates the WHOA is fit for the implementation of far-reaching amendments to finance documentation that may be crammed down on a dissenting lender. Examples of amendments that could be made in the current circumstances are an extension to the maturity date, covenant and/or repayment holiday and amendment of applicable interest rate.

22. Similarly, in the *Royal IHC*[2] case, a WHOA was utilised to amend commitments under a senior facility agreement despite not reaching consensus with secured creditors. It was the first sanctioned WHOA involving a syndicate of lenders. The restructuring plan involved divestment and reduction of total commitments. Interestingly, while the court confirmed that it is not possible to amend the ranking of rights in rem (such as pledges or mortgages) under a WHOA, amendment of the waterfall under a deed of priority/inter-creditor agreement was allowed. This potentially opens the door to debtor-in-possession funding.

23. Further, the Dutch WHOA regime is attractive as a cross-border restructuring tool in circumstances where the framework for extrajudicial restructurings has been designed to cater not only for individual debtors but also to group companies even if the remainder of the group companies are outside of the Netherlands. In particular, it is not only the obligations of the debtor to which the WHOA directly relates but also obligations of group members (such as its parent company, subsidiaries (Efwon

[1] District Court of Amsterdam, 3 November 2021, ECLI:NL:RBAMS:2021:6522 (*Fitness Centres*)
[2] District Court of Trotterdam, 9 March 2023, ECLI:NL:RBROT:2023:2800 (*Royal IHC*)

Trading and Efwon Singapore) and sister entities (Efwon Investments) towards the main debtor's creditors can be integrated into one restructuring plan.

24. The only requirement for the Dutch court to assume jurisdiction over those liabilities of other (possibly non-Dutch companies) is that those group companies also themselves meet the pre-insolvency test identified above at paragraph 16(g) and the Dutch court would have jurisdiction if those group companies would offer a restructuring plan under the DBA themselves. It is likely that this would be the case in respect of Efwon Romania and Efwon Investmenst. Accordingly, group finance obligations, such as parent or group guarantees or sureties, can be included in the restructuring plan without the guarantors having to go through a restructuring themselves.

25. Indeed, the Dutch court may assume jurisdiction even if the debtor does not have its COMI in the Netherlands, but the restructuring is sufficiently linked to the Netherlands. In *Steinhoff*[3], the Dutch courts accepted jurisdiction on the basis of the top holding company being Dutch notwithstanding that the activities and business of the group was located elsewhere.

26. Finally, and for completeness, we note that the cram down mechanism is subject to the application of the Absolute Priority Rule. We outline the Absolute Priority Rule at paragraph 64 below. The WHOA incorporates the Absolute Priority Rule, however, the plan can still be approved when not satisfied if: at least one in the money class have accepted the plan; (ii) there are reasonable grounds for departing from the rule and the plan is fair and reasonable and not detrimental; and (iii) in the money class has been offered a cash out option if in the money in liquidation (distribution equal to what they would have achieved in liquidation).

Chapter 11 of the US Bankruptcy Code

27. We also consider that there is benefit in undertaking a parallel and supportive proceeding in respect of Efwon Investments pursuant to Chapter 11 of the US Bankruptcy Code. In circumstances where the Chapter 11 restructuring process is well known, we do not propose in this memorandum to set out the key features of this process but note that jurisdiction will be readily accepted in light of the fact that Efwon Investments is a US company.

28. In addition to the matters outlines above, we consider that there is benefit in relying on Chapter 11 including that:

    (a) a worldwide stay on enforcement action and the ban on the operation of *ipso facto* provisions would be immediately granted;

    (b) as noted above at paragraph 20, Chapter 11 is the only restructuring mechanism that allows for super-senior interim financing to be approved by the court. In order to complete the Proposed Restructuring Plan, it will be necessary to secure funding to purchase the assets of Efwon Romania and to satisfy the claims filed in Romania by the drivers. The immediate need for cash to satisfy these claims and acquire the assets of Efwon Romania may be satisfied on a super senior basis and with the provision of new security; and

    (c) the ease of recognition of US Chapter 11 proceedings in other jurisdictions either through the UNCITRAL Model Law or otherwise.

[3] District Court of Amsterdam, 21 June 2023, ECLI:NL:RBAMS:2023:4152 (*Steinhoff*).

COMMERCIAL POSITION

Financial Restructuring

29. We have identified above that a primary purpose of the Proposed Restructuring Plan is to reduce the level of debt within the Efwon Group to sustainable levels and to amend the terms of the facilities where necessary. We look forward to provision of the terms of the facilities identified in **Schedule Two** in order to complete our analysis in this regard. In the interim, we make the following observations in respect of the objectives of the Proposed Restructuring Plan in this respect:

    (a) given the US Syndicated Facility is due to expire in 2024 and the Efwon Group is unable to meet its payment obligations, the facility will need to be extended for a material period of time (potentially 5-10 years);

    (b) the interest rates will need to be reduced both in respect of the US Syndicated Facility and the Monaco Loan in order to enable serviceability and reduce the cash flow burden on the group;

    (c) given the Maximov Loan is not secured, it is likely that this loan of US$100m is to be either fully or significantly compromised in circumstances where it is likely out of the money. The compromise of this debt may engender goodwill from the creditors and sponsor to allow You to maintain majority control and avoid realising the secured real property; and

    (d) the Monaco Lender's security in respect of Efwon Trading is subordinate to the security held on Efwon Trading by the US Syndicated Facility such that it is also likely out of the money. Having said that, it does have security over Efwon Romania and Efwon Singapore such that any proposed restructuring should be undertaken on the basis that this debt will only be partly reduced.

Operational Restructuring

30. As noted in the IBR, in addition to any financial and corporate restructuring it will be necessary to undertake an operation restructure addressing the matters that have already been raised herein and in the IBR.

APPLICATION OF INTERNATIONAL INSTRUMENTS

31. In order to implement the Proposed Restructuring Plan, it may be necessary to rely on a number of international instruments, including the EIR Recast, Chapter 15 of the US Bankruptcy Code and the Singapore Model Law which adopts the UNCITRAL Model Law.

EIR Recast

32. The EIR Recast is relevant in a number of respects in this case.

33. Firstly, it is necessary to consider the provisions within Chapter V of the EIR Recast that concern "Group Insolvency" to consider whether or not they provide a regime that could be relied upon in preference to the Proposed Restructuring Plan or to support the Proposed Restructuring Plan.

34. The guiding principles for treatment of corporate groups in insolvency in the EU were set down in *Eurofood IFSC Ltd*[4]. The European Court of Justice (**ECJ**), in addition to

[4] *Eurofood IFSC Ltd* (case C - 341/04).

determining that the COMI is to be identified by reference to criteria that are both objective and ascertainable by third partes (primarily the company's debtors), it held that COMI must be determined on an entity-by-entity approach.

35. While it is generally accepted that a co-ordinated group wide solution is going to increase the chances of a group continuing to operate as a going concern, the EIR Recast does not introduce the concept of "group (enterprise) COMI". Further, it does not sanction substantive (pooling of assets or liabilities) or procedural (single insolvency proceeding) consolidation of insolvency proceedings in respect of a group of companies that all have their COMI in the EU.

36. Recital 53 of the EIR Recast entitles a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if that court finds that the COMIs of those companies are located in a single Member State. However, this is of no relevance in the current circumstances.

37. Instead, Chapter V of the EIR Recast provides a framework for co-operation and communication between the relevant stakeholders (insolvency practitioners, courts and insolvency practitioners and courts) in the context of group insolvencies. These provisions mirror the cooperation and communication required between main and secondary proceedings. The co-ordination mechanism provided for under Article 61 has been rarely utilised and is voluntary and non-binding in nature.

38. Importantly, the cooperation and coordination envisaged under the EIR Recast does not require actions that run counter to the interests of creditors in each of the insolvency proceedings involved. Instead, cooperation and coordination should be aimed at finding a solution that will leverage synergies across the group, to the benefit of all stakeholders.

39. Secondly, and having examined the "Group Insolvency" proceedings, it is necessary to examine the utility of the EIR Recast in supporting the Proposed Restructuring Plan. In particular, it may be necessary to seek recognition of the Dutch WHOA in the courts of Romania for the purpose of seeking a stay or limiting the ability of the Monaco Lender to seek to enforce its security or guarantee.

40. As previously noted in paragraph 16(e) above, the public version of the Dutch WHOA is identified in Annex A of the EIR Recast such that they will receive automatic recognition in another member state, including Romania.

41. Article 60 is of relevance in that it provides an ability to request a stay regarding assets of another group company in a different jurisdiction. An insolvency practitioner of a group company (or expert appointed under a WHOA) may request the stay of any attempt to realise assets in an insolvency proceeding of another group company if a cross-border restructuring plan has been proposed for the benefit of the group's creditors and if a stay is required to ensure the implementation of the plan. This could potentially assist in the event the insolvency proceedings of Efwon Romania were to progress and attempts were made to sell the assets of this entity in contrast to the Proposed Restructuring Plan.

Singapore Model Law (pursuant to which the UNCITRAL Model Law was adopted)

42. Efwon Singapore is a company established in Singapore.

43. Pursuant to the instructions provided, it is unknown whether or not there any liabilities owed by Efwon Trading to Efwon Singapore. We proceed on the basis that no such liabilities exist such that Efwon Singapore is not a creditor of Efwon Trading. In any

event, we note that Efwon Singapore's revenue is secured by the Monaco Loan and Efwon Singapore acts as a guarantor of that loan.

44. Accordingly, it is theoretically possible for the Monaco Lender to seek to commence recovery actions against Efwon Singapore outside of the Proposed Restructuring Plan under the Dutch WHOA.

45. Singapore has adopted the UNCITRAL Model Law on Cross-Border Insolvency pursuant to the Singapore Model Law on Cross-Border Insolvency (**Singapore Model Law**). The Singapore Model Law has taken a more expansive interpretation of the UNCITRAL Model Law than other jurisdictions (for example in Chapter 15 of the US Bankruptcy Code).

46. Similarly, the Courts have interpreted the Singapore Model Law in a manner that seeks to give effect to the international dimension of cross-border insolvencies and consistent with this international dimension. For example, in *Ascentra Holdings, Inc*[5], the Singapore Court of Appeal held the Singapore Model Law applied to voluntary solvent winding up in the Cayman Islands by giving a wide interpretation to the phrases "*foreign proceeding*" and whether "*conducted under a law relating to insolvency or adjustment of debt*".

47. US proceedings under Chapter 11 of the US Bankruptcy Code have been recognised under the Singapore Model Law[6]. Indeed, in those proceedings, the court recognised the debtor-in-possession corporation itself as the relevant foreign representative. In other words, the gateway was sufficiently broad to include debtors who remain in possession after the commencement of insolvency proceedings.

48. While we have not identified any authorities where a Dutch WHOA has been recognised as yet in Singapore, we see no reason why the position in respect of proceedings under Chapter 11 of the US Bankruptcy Code would not be adopted.

49. Accordingly, it is likely that the Proposed Restructuring plan under the Dutch WHOA would be recognised as a main foreign proceeding in Singapore such that appropriate relief, in particular, an automatic stay against creditor enforcement, could be obtained.

50. In the event required, appropriate orders could be sought in Singapore to support the Proposed Restructuring Plan and counter any attempt to circumvent this by the Monaco Lender.

Chapter 15 of the US Bankruptcy Code

51. The UNCITRAL Model Law has been adopted in the US pursuant to Chapter 15 of the US Bankruptcy Code.

52. In circumstances where Efwon Trading has its COMI in the Netherlands, the public Dutch WHOA is likely to receive automatic recognition in the US under Chapter 15. Indeed, *Diebold Nixdorf*[7] was the first occasion in which a WHOA plan was recognised as a foreign main proceeding under Chapter 15 thereby allowing the WHOA plan to be enforced against creditors in the US. This would allow enforcement against Efwon Investments.

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[5] *Ascentra Holdings, Inc v SPGK Pte Ltd* [2023] SGCA 32 (18 October 2023)
[6] *Re Genesis Asia Pacific Pte Ltd* [2023] SGHC 240 (31 August 2023)
[7] District Court of Amsterdam, 2 August 2023; ECLI:NL:RBAMS:2023:6160 (*Diebold Nixdorf*).

53. Further, in *Diebold Nixdorf*[8], the Dutch WHOA was conducted in parallel with proceedings under Chapter 11 of the US Bankruptcy Code. The US Chapter 11 restructuring plan involved debt reduction through a debt-for-equity swap. Both the Chapter 11 and Dutch WHOA plans were conditional on the successful implementation of the other plan (as would be the case in this matter). Similarly, the worldwide stay under Chapter 11 was combined with a stay under the Dutch WHOA.

STRUCTURING THROUGH ENGLAND

54. We note that it has been suggested that, with hindsight, it may have been beneficial to have structured through England.

55. Similar to the position in a number of other European jurisdictions, the UK has recently reformed their restructuring processes pursuant to the Corporate Insolvency and Governance Act 2020, which came into force on 26 June 2020 (**CIG Act**). The CIG Act introduced the new Restructuring Plan procedure in England. The Restructuring Plan is the UK alternative to the WHOA and may potentially be an attractive restructuring option if the eligibility criteria were able to be fulfilled.

56. In order to be eligible to implement a UK Restructuring Plan, the debtor must have:

"*encountered, or be likely to encounter, financial difficulties affecting its ability to carry on business as a going concern; and the purpose of the plan proposed must be to eliminate, reduce, prevent or mitigate the effect of those financial difficulties*".

57. In addition to satisfying this gateway requirement, the debtor must also establish the necessary jurisdictional elements in order for English courts to accept jurisdiction. This will be fulfilled in the event that the debtor has its COMI in England, or the debtor has a sufficient connection with the jurisdiction.

58. For completeness, we note that it is possible to amend the current corporate structure by interposing an English company to effect a change of COMI in order to capture English jurisdiction. The recent decision of the court in *Aggregate*[9] demonstrates that English courts will accept jurisdiction notwithstanding that the plan company has engaged in COMI shifting (in this case the COMI was shifted from Luxembourg to England to capture jurisdiction).

59. Further, similar to the position with schemes of arrangement, sufficient connection to the jurisdiction will be established if the company's debt documents are governed by English law or the company has an operative establishment in the UK.

60. By way of high-level overview, the key elements of the UK Restructuring Plan, which is often referred to as "Chapter 11 Lite" are as follows:

    (a) powerful and flexible court supervised restructuring process that draws from the scheme of arrangement procedure;

    (b) the Court fulfils a supervisory role and ultimately sanctions the UK Restructuring Plan;

[8] District Court of Amsterdam, 2 August 2023; ECLI:NL:RBAMS:2023:6160 (*Diebold Nixdorf*).
[9] *Re Project Lietzen Strasse Holdco S.A.R.L* [2024] EWHC 563 (Ch).

(c) similar to a scheme of arrangement, members and creditors are separated into classes based on their rights. Each class then votes in respect of the Restructuring Plan with final approval resting with the Court;

(d) there are two Court hearings. At the first hearing, the directors of the Company apply to the court to get approval to convene the relevant meetings of creditors and members. At the second hearing, the Court will determine whether the plan will be sanctioned by the Court;

(e) unlike a scheme of arrangement and the Dutch WHOA, the voting threshold requirement is 75% in value of the creditors or members within each class must approve the plan (unlike schemes of arrangement, a majority in number is not required);

(f) the UK Restructuring Plan, unlike the scheme of arrangement process, includes a cross-class cram-down mechanism. The Court will approve the Restructuring Plan notwithstanding the dissent of a class of creditors if no members of the dissenting classes would be any worse off than they would be in the event of a relevant alternative; and (ii) at least one class of creditors or members that would receive a payment or have a genuine economic interest in the company in the event of a relevant alternative has voted in favour of the plan.

61. There are a number of advantages in respect of a UK Restructuring Plan when compared to the Dutch WHOA regime, which ought to be considered when determining the approach to be taken and whether or not, in hindsight, the Efwon Group ought to have structured through England rather than the Netherlands.

62. Firstly, it is potentially the case that the WHOA will face recognition difficulties in the UK and a secured creditor may seek to avoid the consequences of the WHOA process by commencing proceedings in the UK. In particular, according to the rule in *Gibbs*[10], as a matter of English law, only the governing law of a contract may amend or discharge it. Therefore, in the absence of agreement of the creditor (by its submission to the jurisdiction in question or to otherwise participate in the foreign proceedings), it is argued that only an English law process may amend or discharge English law governed debts. Any purported amendment or discharge through a WHOA risks not being recognised by an English court should the creditor commence proceedings in England for repayment under the unamended terms of the facility agreement. It is for this reason that at paragraph 8(a) above, we have requested confirmation of the governing law of choice for the relevant facility and loan agreements noting that English or New York law is commonly utilised for large cross-border financings remains. Accordingly, a UK Restructuring Plan or scheme of arrangement may give greater certainty of outcome. However, this may be addressed by the Chapter 11 proceeding if the facilities are governed by US law.

63. The difficulties associated with the rule in *Gibbs* are heightened by the impact of Brexit whereby the UK is no longer required to automatically recognise EU insolvency proceedings.

64. Secondly, unlike Chapter 11 or the WHOA, the UK Restructuring Plan regime does not incorporate the Absolute Interest Rule. The rule provides that a junior class of creditors or shareholders cannot retain any value as part of a restructuring process unless all the more senior classes are paid in full. The absence of the Absolute

[10] *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Mataux* (1890) LR 25 QBD 399.

Priority Rule gives added flexibility to the UK Restructuring Plan which may be of appeal for certain stakeholders considering restructuring options. This is particularly the case in these circumstances given that You have an interest as a junior unsecured lender to Efwon Investments but also as a shareholder.

65. Thirdly, it is likely the case that only where the debtor has its COMI in the UK will a UK Restructuring Plan benefit from automatic recognition as a foreign main proceeding under Chapter 15 of the Bankruptcy Act in the US or pursuant to the UNCITRAL Model Law. While it is still possible for a UK Restructuring Plan to be adopted in the event that the debtor has a sufficient connection with the UK, it is unlikely to obtain automatic recognition as a foreign main proceeding under Chapter 15 or the UNCITRAL Model Law.

66. These benefits must be considered in light of the disadvantages that flow from the UK Restructuring Plan, in particular:

    (a) as a result of Brexit, the UK Restructuring Plan no longer receives automatic recognition in the EU pursuant to the EIR Recast;

    (b) there is no automatic stay or moratorium as part of the UK Restructuring Plan although it may be possible to enter into standstill arrangements or utilise the standalone moratorium regime. Any such moratorium will be limited to England; and

    (c) voting approval requirement of 75% is higher than under the Dutch WHOA or Chapter 11.

67. In the circumstances, and unless it is confirmed that the financing arrangements are governed by English law and the secured creditors are unwilling to support the Proposed Restructuring Plan, we do not consider that the Efwon Group should have structured through England.

STAKEHOLDER ENGAGEMENT

Benedict Maximov

68. By implementing the Proposed Restructuring Plan, and obtaining the necessary creditor support, we consider that Team Maximov and Your majority stake in the team can be saved. However, it is likely that certain sacrifices will be required to be made. In particular, it is likely that the Maximov Loan, which is unsecured, will be compromised in its entirety and that KuasaNas will need to be provided with a substantial stake (potentially 49% if not a majority stake) in the team.

69. In circumstances where the Maximov Loan is likely out of the money, then the total compromise of this amount can be mandated under the WHOA regime.

Efwon Investments

70. Efwon Investments will voluntarily enter into Chapter 11 proceedings and will return with reduced debt and amended terms of the US Syndicated Facility.

US Syndicate Stakeholders

71. The creditors within the US Syndicated Facility have different rights and as such are likely to have different views in respect of the Proposed Restructuring Plan. Further, they will be split into different classes for the purpose of voting in respect of the Dutch WHOA. Subject to receipt of the further financial information requested, it is likely the

case that the Mezzanine Lenders will be out of the money, and it is almost certain that the Junior Lenders will be out of the money. Accordingly, it may be possible to press on with the debt compromise by way of the cram down provisions.

Efwon Trading

72. The directors of Efwon Trading will voluntarily commence the Dutch WHOA and it will be subject to this process.

Efwon Romania

73. It is likely that the insolvency proceedings that have been commenced will be stayed pursuant to a request under the EIR Recast. Further, the financial obligations will be subject to compromise pursuant to the Dutch WHOA which will be capable of automatic recognition in the courts of Romania. There may be a debate about main or secondary proceedings.

74. The claims brought by the Drivers will also be stayed and will rank as out of the money unsecured claims that are likely to be compromised. In light of the freezing orders obtained, it may be beneficial to make a settlement payment to seek to have this matter resolved as efficiently as possible. The assets of Efwon Romania will be sold to the new Efwon Malaysia with this entity then subject to an orderly wind down.

Efwon Singapore

75. Efwon Singapore will not itself be subject to an insolvency or restructuring process. We have spoken at paragraph 44 above in respect of any attempt to circumvent the WHOA by the Monaco Lender. As a result of the WHOA, it is likely that the Monaco Loan will be partially compromised which will benefit the security provided by Efwon Singapore. Efwon Singapore is likely to be supportive of the Restructuring Plan.

New sponsor

76. KuasaNas is in a very strong bargaining position and would be entitled to fully maintain its conditions for the provision of future sponsorship revenue, including the ability to pay an amount of this revenue up front. It is not currently in any contractual relationship with the Efwon Group and as such there is no ability to mandate.

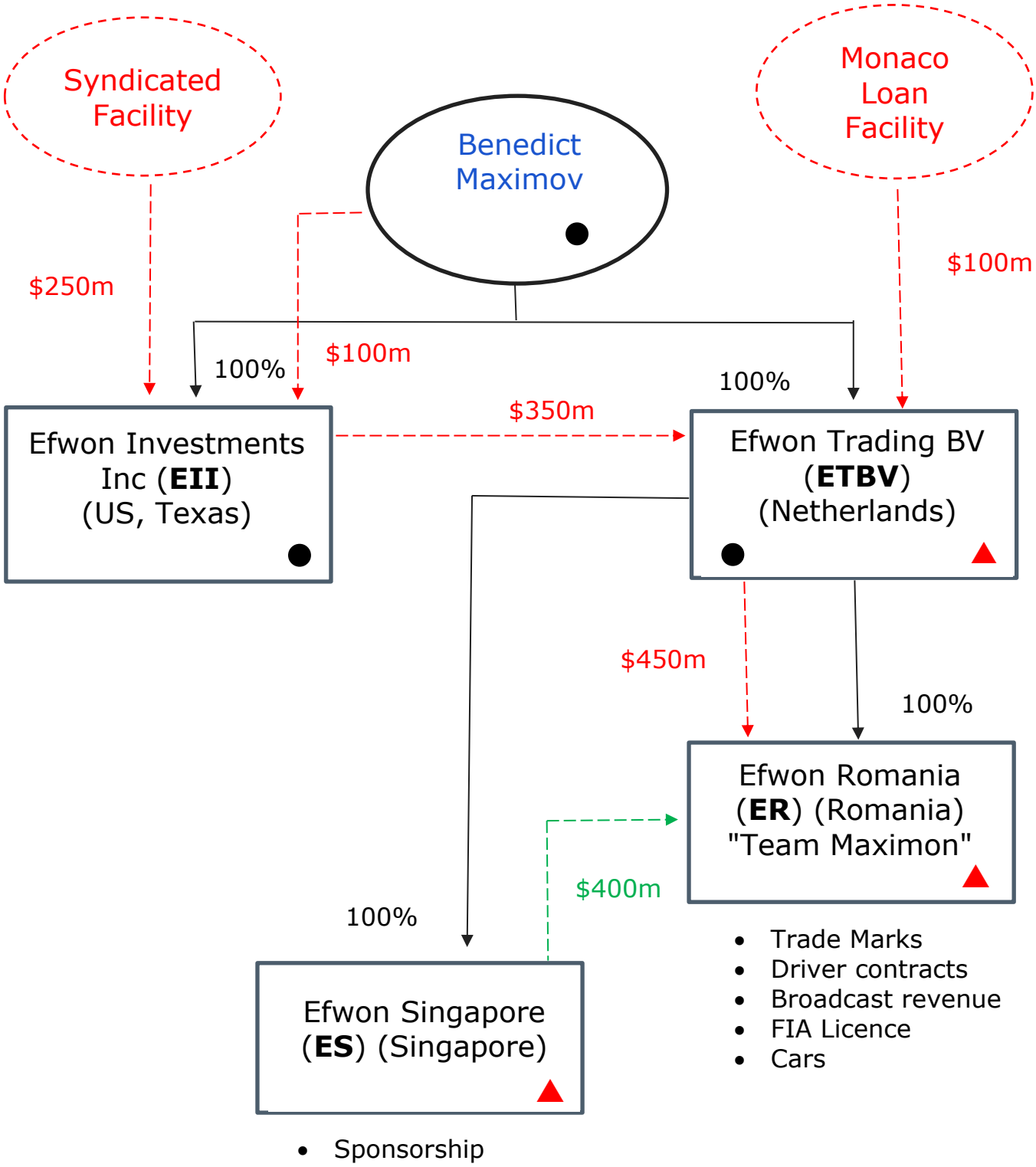
Drivers

77. In circumstances where the Drivers have already commenced litigation and a consequential winding up application (and noting the condition of KuasaNas that all group entities be stablished), it is likely that emergency funds will be required to settle the dispute with the Drivers. It may be possible to utilise the WHOA to compromise their claims in circumstances where they are ordinary unsecured creditors of Efwon Romania are unlikely to receive any return in an insolvency. Notwithstanding this, and in light of the limited time available, if may be beneficial to seek to settle these proceedings by the payment of a settlement amount.

Other stakeholders

78. There are a number of other stakeholders that will be impacted by the Proposed Restructuring Plan including, but not limited to, employees, tax authorities, the directors, the FIA, broadcasters and the other teams. We do not consider it necessary to address these stakeholders in this memorandum.

Schedule One - Current Corporate Structure



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Schedule Two - Loans and Secured Creditors

Facility	Lender	Borrower	Quantum	Security	Terms
US Syndicated Facility	• US Senior Banks (2) • Mezzanine (2) • Junior Creditors (5)	Efwon Investments	• US$100m • US$60m • US$90m (TOTAL US$250m)	1) Maximov Real Property $75m 2) Pledge on revenue; +/- pledge 3) Pledge on shares in Efwon Investments 4) Pledge on shares in Efwon Trading	Due 2024 (10 years) Interest = LIBOR + 6% (originally 4% but raised)
Maximov Loan	Benedict Maximov	Efwon Investments	US$100m	Unknown or N/A (potentially unsecured)	Unknown
Efwon Investments	Efwon Investments	Efwon Trading	US$350m	1) Future revenue of Efwon Trading	Unknown
Efwon Trading Loan	Efwon Trading	Efwon Romania	• US$150m (15) • US$100m (16) • US$100m (17) • US$100m (18) (TOTAL US$450m)	1) Broadcasting revenue of Efwon Romania	Unknown
Monaco Loan	Monaco Lender	Efwon Trading	US$100 (18)	1) Future revenue of Efwon Trading (subsequent to Efwon Investments security) 2) Efwon Romania revenue + guarantee 3) Efwon Singapore revenue + guarantee	Unknown High interest rate

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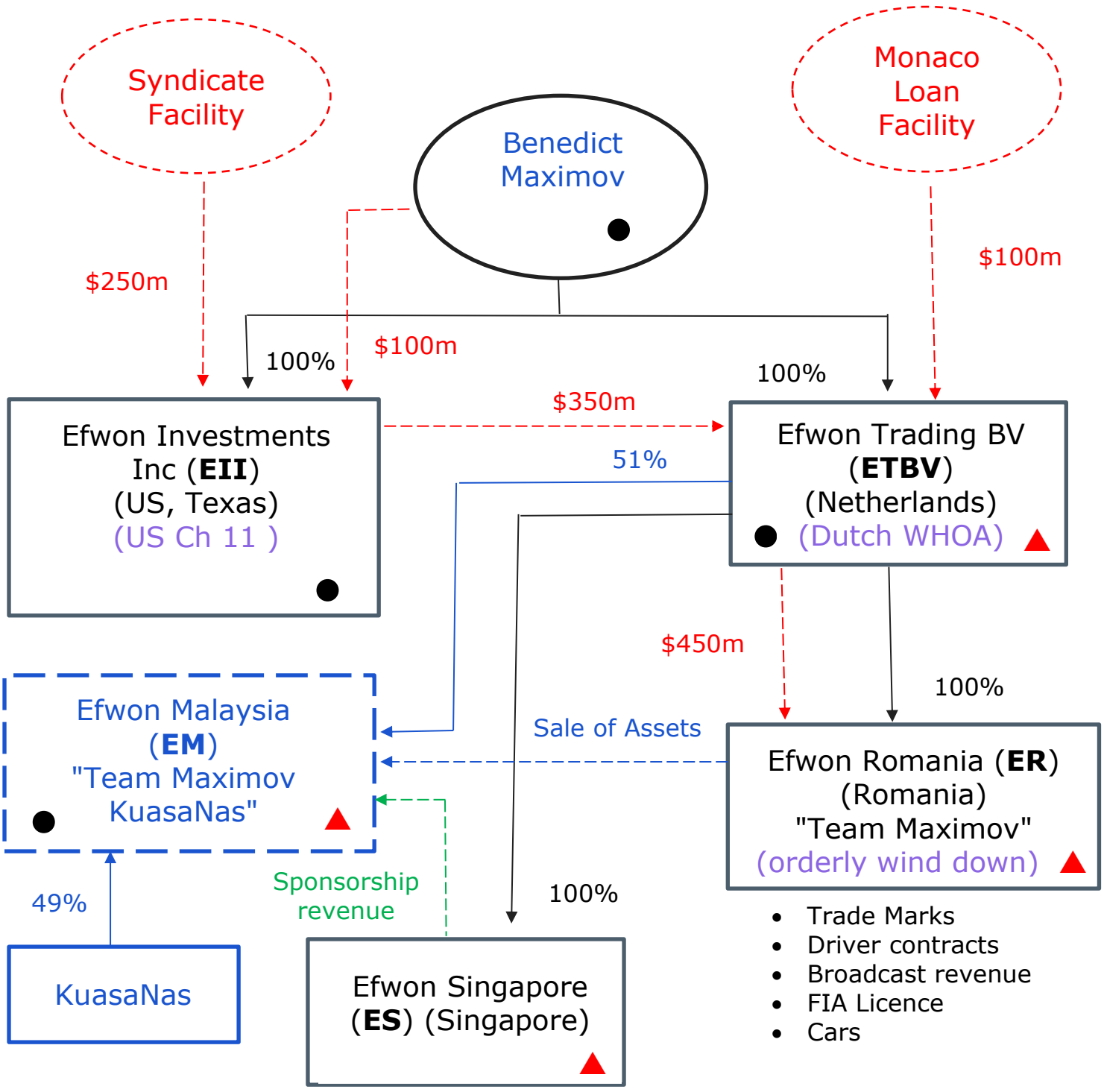
Schedule Three - Proposed New Structure



▲ = Security or Guarantee for Monaco Loan

● = Security for Syndicate Facility