**Case Study II: Advice to Benedict Maximov**

**Nina Mocheva**

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| **From:** | **Nina Mocheva** |
| **To:** | **Efwon Group and Mr. Benedict Maximov** |
| **Re:** | **Proposed Strategy for Dealing with the Efwon Group and Its Stakeholders** |
| **Date:** | **April 15, 2024** |

1. Introduction
2. We were asked to propose a legal strategy that lays out a path forward to address the insolvency risks currently threatening the Efwon Group’s viability, covering, at least, the matters enumerated below (see “Issues”), in order to facilitate the deal with KuasaNas, save the Maximov F1 team and safeguard Mr. Maximov’s position at the same time.
3. In this memorandum we propose a group-wide financial restructuring for the Efwon Group through conducting three parallel preventive restructuring plan proceedings in the Netherlands for Efwon Investments, Efwon Romania and Efwon Trading B.V., with the latter also dealing with the release of the guarantees provided by Efwon Singapore. These proceedings should be consolidated within the same Dutch court to ensure coordination of the proposed plans for the whole Group. Finally, a non-main proceeding should be opened in the U.S. to ensure the recognition and enforceability of the Dutch restructuring plan over Efwon Investments, and the territorial insolvency proceeding already commenced in Romania should be converted in a non-main proceeding, to ensure preservation of the Romania-based assets of the Efwon Group.
4. The proposed group-wide restructuring is likely to maximize the benefits and advantages of the applicable legal regimes that would affect each of those cases related to resolving the insolvency of the Efwon Group or of some of its companies, with the objective to facilitate the deal with KuasaNas, the position of Efwon Investments and Mr. Maksimov’s ownership of the Maximov F1 Team, while keeping the related costs at a reasonable level.
5. Efwon Group Background and Problem
6. Mr. Benedict Maximov established Efwon Investments, a financial vehicle organized and existing under the laws of Texas, and capitalized as follows: (i) an equity investment of US$100 MM by Mr. Maximov; and (ii) US$250 MM of secured debt (the “US Facility”) provided by a syndicate of US banks (the “US Lenders”).
7. Subsequently, Mr. Maximov established Efwon Trading B.V., a holding company in the Netherlands (“Efwon Trading”) under the laws of the Netherlands, which in turn established two wholly owned subsidiaries: (i) Efwon Romania; and (ii) Efwon Singapore. We will refer to all those vehicles collectively as the “Efwon Group”.
8. The US Facility was secured as follows: (i) security over real estate of Mr. Maximov valued at US$75 MM (multiple locations); (ii) pledge over borrower’s cash flows; (iii) pledge over the borrower’s shares; and (iv) pledge over Efwon Trading shares (wholly owned by Mr. Maximov).
9. The initial capitalization allowed the Efwon Group to finance:
   1. The acquisition of the assets and liabilities (cars, facilities, team and F1 licenses) of a Romanian F1 team for US$50 MM, following which the Efwon Group started competing in the 2015 season as Team Maximov; and
   2. Team Maximov’s participation in the 2015 – 2017 F1 seasons (at roughly US$100 yearly).
10. In order to finance the 2018 season, Efwon Trading obtained a high-yield senior secured US$100 MM loan (the “Monaco Loan”) from a Monaco-based lender (the “Monaco Lender”). The Monaco Loan was secured by (i) a pledge over the revenues of Efwon Trading and its subsidiaries Efwon Romania and Efwon Singapore; and (ii) corporate guarantees issued by its subsidiaries Efwon Romania and Efwon Singapore.
11. The budget for the seasons 2019 – 2023 was financed entirely through a 5-year exclusive sponsorship entered into with Kretek Indonesia (US$100 MM per annum) and a portion of the revenues of each season.
12. This puts the known financial liabilities of the Efwon Group at around US$350 MM in debt and US$100 MM in equity. This does not take into consideration the amounts of principal that have been repaid over the years, nor any non-financial liabilities.
13. The Maximov Team collected roughly US$30 MM in revenue in the 2015 season when it ranked 17th, and US$60 MM in revenue in the 2016 season revenue when it ranked 10th. Team Maximov went all the way up to 6th place in the following seasons (presumably, so did the revenue).
14. At the end of the 2022 season, Kretek Indonesia informally indicated that it does not intend to renew its sponsorship for 2024 onward. Thus, the Efwon Group had to identify a replacement sponsor.
15. Efwon Singapore located KuasaNas, a state-owned Malaysian company, potentially interested to sponsor the Team and likely able to offer funding in excess of US$100 MM annually. KuasaNas conditioned its sponsorship on acquiring a majority stake (51%) in the Team and eventually move the Team to Malaysia.
16. In the last race of 2023, the Romanian drivers were injured and filed claims in Romanian courts, citing defects in safety and management, which may award them substantial compensation if successful.
17. As part of a legal strategy and as an interim measure, the lawyers of the Romanian drivers filed an insolvency petition against Efwon Romania in the Romania bankruptcy court and have obtained freezing injunctions over Efwon Romania assets and income, pending the Romania bankruptcy court’s order to open insolvency proceedings.
18. The drivers’ tort claims and potential opening of insolvency proceeding of Efwon Romania may cause the company to default on its payments to Efwon Trading due in early 2024. This, in turn, will lead to default on Efwon Trading’s obligations to Efwon Investments and placing it in risk of insolvency. Efwon Trading may default on its obligations to the Monaco lender which could lead to enforcement actions and potentially bankruptcy.
19. The US lenders are considering foreclosing on their security provided by Efwon Investments. The Monaco lender is also considering its options for the loan it extended to Efwon Trading, which is secured on the latter’s revenues, as well as those of Efwon Singapore and Efwon Romania and guaranteed by all three companies (EfwonTrading, Efwon Romania and Efwon Singapore).
20. KuasaNas still has to go through the Malaysian Government review of its intended contract but is also pre-conditioning its sponsorship to the Efwon Group on the quick resolution of the impending insolvency issues. KuasaNas will only agree to invest and participate in the Group if its financial situation is stabilized, and insolvency is avoided at all Group levels.
21. We have attached for convenience a table of the members of the Efwon Group and its relevant stakeholders as Appendix A.
22. Assumptions
23. The F1 registration for a new team is overly expensive so we have assumed that maintaining the F1 licenses must be a priority of any group restructuring.
24. Assuming, for purposes of the options considered in this memo, that the Efwon Group’s revenue remained unchanged for the subsequent seasons, the Efwon Group must have made at least US$60 MM a year from 2018 through 2023, for a total revenue of $360 MM. This is a conservative assumption given that the Team improved significantly in the F1 ranking. Had revenue increased proportionally as the team moved up through the rankings, their income -excluding sponsorships- could have been as high as US$600 MM.
25. In addition to that, the team received US$600 MM from its exclusive sponsorship agreement with Kretek, up to 2023.
26. That’s roughly a billion dollars income in 9 seasons, averaging US$100 MM revenue per year. This is a fairly significant and consistent income, and we will use this amount as the proforma cash flow of the Efwon Group for purposes of the options to be analyzed.
27. Based on the information provided to us, Efwon Trading established the Efwon Romania subsidiary for purposes of obtaining the licenses accorded by the Fédération Internationale de l’Automobile (FIA). We assume that Efwon Romania is established under the laws of Romania and has a registered office in Romania, which seems also supported by the fact that Mr. Maximov subsequently “put in” resident directors (full time staff), at the Romanian subsidiary.
28. Based on the information provided to us and for purposes of this analysis, we assume that neither of the Efwon Group members is insolvent, rather each Group member is “at a risk of insolvency”.
29. We will assume that labor and tax obligations, if any, are negligible when compared to the financial debt of the Efwon Group and the interests of creditors in either class will be significantly aligned with any plan that provides a viable pathway to recovery of the whole Group.
30. Issues
31. As requested by the General Counsel of Mr. Maximov, in this memorandum we will address the following issues:
    1. propose a strategy for dealing with the Efwon group and its various stakeholders in a quick and cost-efficient manner;
    2. determine whether one or more insolvency proceedings or (preventive) restructuring frameworks are required to achieve the goal of selling a stake in the group to KuasaNas (assuming the intended contract receive government clearance);
    3. determine where and how these proceedings will take place;
    4. determine how these proceedings may (or may not) interact or influence each other;
    5. assess what impediments may exist to proceedings taking place;
    6. identify what advantages / disadvantages may exist in relation to proceedings being organised in the way we propose;
    7. analyse how the application of the European Insolvency Regulation and / or UNCITRAL Model Law and / or other international instruments may assist or impede the strategy we propose to implement;
    8. advise whether Efwon (with hindsight) should have structured through England rather than the Netherlands;
    9. advise on the possible outcomes for each of the various stakeholders and the likelihood of their acceptance, or, in the event, they do not accept, whether the proposed may be imposed on them.
32. **Proposed Strategy for Dealing with the Efwon Group and Its Stakeholders**
33. **Proposed Group Restructuring Strategy**
34. KuasaNas has expressed an interest in becoming the new sponsor of Team Maximov, with an offer to fund in excess of US$100 MM annually, subject to certain conditions, which include a majority stake in the team and a relocation to Malaysia. Upon the developments of Efwon Group, KuasaNas has reiterated its interest and offered to pay a portion of its consideration at the closing table of the Efwon Group restructuring, provided that the Efwon Group’s insolvency risk is adequately managed and that their investment is insulated from the financial turmoil.
35. You have indicated to us that the KuasaNas proposal is, given timing considerations and the current circumstances, the Efwon Group’s only viable choice.
36. For our proposed plan to prosper, it will be critical to count on KuasaNas commitment and on their cash contribution at settlement date. There are various options for KuasaNas to acquire a 51% interest in the equity of the Team:
    1. Acquisition of 51% of the shares of Efwon Romania. This option is less than optimal as the cash would flow directly into the balance sheet of Efwon Romania, it would be amenable to a freeze by local courts and increase the leverage of the Drivers, if their claim is not settled upfront.
    2. Acquisition of the Monaco Loan and subsequent conversion into equity of Efwon Trading for at least 51% of its shares (subject to valuation). This would allow, subject to the amount converted, for the release of the corporate guarantees of Efwon Romania and Efwon Singapore, and the release of the pledge over future cash flows of the HoldCo and its subsidiaries. Because the US Lenders are structurally subordinated to the Monaco Loan, this option would give more leverage to KuasaNas but the restructuring plan would need to cover both, the acquisition of the Monaco Loan by KuasaNas and its conversion into at least 51% of Efwon Trading, to be implemented via an issuance of new shares of Efwon Trading to be subscribed by KuasaNas.
    3. Acquisition of 51% of the shares of Efwon Trading in a direct stock purchase from Mr. Maximov or from the estate, for which purpose the US Lenders shall partially waive their pledge over those 51% of shares of Efwon Trading;
37. We find that the optimal approach is the [acquisition of 51% of Efwon Trading shares directly], provided that at closing:
    1. KuasaNas acquires 51% of the shares of Efwon Trading from Mr. Maximov and any cash consideration from this transaction goes to finance the restructuring plan;
    2. If acquisition is implemented directly (option (c) above), then the Monaco Loan must be restructured and the current guarantees supporting it must be released, in exchange for a security interest in Efwon Investment shares and/or cash flows, while the senior lenders of the US Facility retain their security over assets (which presumably covers an amount in excess of their outstanding balance);
    3. The outstanding balance of the mezzanine and junior loans within the US Facility are forgiven (as there probably is no legitimate expectation of recovery in an insolvency), alternatively, they agree to a reprogramming including a subordination of their claims to the Monaco Lender;
    4. If no agreement can be reached with the mezzanine and junior lenders under the US Facility and the Dutch Court lacks the powers to write off those obligations, consideration should be given to the advantages of filing -in parallel- a Chapter 11 vis-à-vis Efwon Investment.
    5. Mr. Benedict Maximov should enter into a sponsor support agreement to further capitalize the Group (equity or deeply subordinated debt), as a way to show alignment of interests and his conviction about the viability of the plan.
    6. The Romanian Drivers claims must be settled, if possible, with cash resulting from the settlement, from equity or debt from the sponsor Mr. Maximov, or with shares of Efwon Investment.
38. **Proposed Group Legal Strategy**
39. We propose to achieve the Efwon Group restructuring through instituting three separate preventive restructuring proceedings in the Netherlands, to be filed at the same time in the Amsterdam Court, by Efwon Investments, Efwon Trading and Efwon Romania, under the new Dutch Act on the Confirmation of Out-of-Court Restructuring Plans (Wet Homologatie Onderhands Akkoord or the “WHOA Act”) will allows debtors to propose a plan and restructure their debts outside of formal insolvency proceedings.[[1]](#footnote-1)
40. Separate WHOA plan proceedings would be required for each group member involved in an operational restructuring or a financial restructuring involving non-group debt because the non-group debt of one member cannot be restructured in a Dutch plan proceeding filed by a different member.
41. In order to be eligible to file for a WHOA plan restructuring, the Efwon Group members should not be insolvent at the time of filing but are “in a condition where it is reasonably plausible that [they] will not be able to continue paying [their] debts."
42. The advantage of the WHOA restructuring is that requires limited court intervention while allowing for:

* Extensive control of the Efwon Group through its debtor-in-possession process: The debtor retains possession of its property and the authority to manage and dispose of its assets during the proceedings (i.e., no administrator or supervisor takes control of the debtor’s assets). The debtor can continue to conduct its business as usual.
* Moratorium: Initiating plan proceedings can be accompanied by requesting a court-ordered stay for a maximum of eight months. This stay will stop creditors from enforcing their rights, including the right to invoke termination clauses in contracts and attachments can also be lifted. Such stay will be necessary to prevent the U.S. lenders from enforcing on their claims against Efwon Investments, the Monaco lender to invoke its guarantees over the three Group entities and the Romanian drivers to continue their enforcement actions in Romania (after petitioning the Romanian court to recognize the WHOA plan proceedings for Efwon Romania in the Netherlands as main proceedings, and requesting to convert the initiated territorial insolvency proceedings against Efwon Romania into secondary proceedings, as discussed in more detail below).
* Plan proposal can made by the debtor or by a restructuring expert: By default, the debtor is in charge of offering a plan. Creditors, shareholders and employee representatives are not allowed to offer a plan themselves. This will allow Mr. Maximov and the Group to have broad control over the restructuring options and to coordinate across the three WHOA plans.
* Post-petition financing: new financing can be sanctioned under the WHOA and is clawback proof.
* Only creditors or shareholders whose rights are affected by a plan may vote for the proposed plan. Class formation is based on the similarity of new and existing rights of class participants.
* Cross-class cram down: If the plan is approved by at least one class of affected creditors, the plan may be confirmed by the court. Once the court has confirmed a plan, it will bind all creditors regardless of their rank and whether or not they have voted in favor of the plan.

1. Since recognition of the Dutch-plan proceedings will be required for Efwon Investments in the U.S. and Efwon Romania in Romania, we propose that each entity requests the Amsterdam District Court to appoint the same Restructuring Expert to act as the Insolvency Practitioner for all three proceedings, and who may bring necessary actions before the courts of other relevant jurisdictions (the U.S, Romania and Singapore).
2. Procedural consolidation is possible under the Dutch insolvency regime (“Faillissementswet”, hereinafter the “Dutch Bankruptcy Act” or the “DBA”) and is recommended in the case of the Efwon Group restructuring, since it would involve three separate restructuring plans. Pursuant to Article 369(8) DBA, these multiple plans in relation to various group companies may all be dealt with by the same court.[[2]](#footnote-2) Consolidation should be requested by all three WHOA plan petitioners (Efwon Trading, Efwon Investments and Efwon Romania) when filing their petitions with the Amsterdam District Court.
3. The WHOA Act provides for two different possible tracks which are identical in terms of process, with the only difference than one is conducted in a confidential manner and the other one is public:

- Public track: suitable for complex multiple class restructurings, and

- Non-public track: more suitable for targeted single class restructurings.

1. If a plan is conducted in a public track, it will automatically be recognised in each EU Member State since it is a covered (pre) insolvency proceeding under the EU Insolvency Regulation (EIR recast).[[3]](#footnote-3) The non-public track is not recognised under the EIR recast and therefore it is not recommended in the case of the Efwon Group restructuring. Therefore, we recommend that all three WHOA restructurings are conducted as public track restructurings.
2. The Amsterdam District Court, when determining whether it has jurisdiction over the three WHOA plan proceedings for Efwon Trading, Efwon Investments and Efwon Romania, “shall of its own motion” examine whether it has jurisdiction pursuant to Article 3 of the EIR, which will qualify all three as main proceedings for each member under the EIR.[[4]](#footnote-4)
3. As soon as the WHOA proceedings commence as “main proceedings” covered by the EIR, the Insolvency Practitioner should be appointed and request the Romania court to convert the pending insolvency order filed by the Romanian drivers there into a secondary insolvency proceeding against Efwon Romania.[[5]](#footnote-5) Based on the facts presented to us, the proceedings pending before the Romania bankruptcy court are of an “interim measure” nature and no insolvency order has been made by that court against Efwon Romania (the drivers in the Romania proceedings have obtain “freezing injunctions over the company’s assets and income”, “pending an order being made”. After the Romania bankruptcy court opens secondary insolvency proceedings, a moratorium against the individual enforcement actions files by the drivers for compensation should be stayed, at the request of the WHOA Insolvency Practitioner, pursuant to his/her powers under Article 21(2) EIR.
4. As soon as the Insolvency Practitioner is appointed, he/she should request the opening of a foreign nonmain proceedings against Efwon Investments with the Texas Bankruptcy Court under Chapter 15 of the U.S. Bankruptcy Code which will trigger a moratorium on enforcement actions against Efwon Investments.
5. The Efwon restructuring may be achieved without a separate WHOA proceeding for Efwon Singapore since it may be released of its group-related debt guarantee within the Efwon Trading WHOA plan proceeding. In a WHOA enterprise group restructuring, there is a possibility for the release of affiliate-guaranteed debt obligations. Thus, since the Monaco loan is incurred by Efwon Trading but is also guaranteed by Efwon Romania and Efwon Singapore, a group restructuring requires that the debt adjustments made with respect to one member be effective as to all co-obligors.[[6]](#footnote-6)
6. After all three WHOA Plans are confirmed by the court, recognition should be sought in the U.S. and Singapore under Chapter 15 of the U.S. Bankruptcy Code and the Singapore Model Law, respectively; recognition in Romania will be under the EIR.
7. **Applicable International Instruments for Cross-Border Insolvency Matters in the Efwon Group Restructuring: the European Insolvency Regulation and the UNCITRAL Model Law**
8. In relation to the proposed legal strategy for the Efwon Group restructuring, we will review the relevant provisions to the Efwon Group situation of the applicable international instruments, and related national laws with respect to cross-border insolvency situations. Then, we will determine the centre of main interest (COMI) for the Group members which will in turn allow us to achieve the Group Restructuring in the above proposed manner.

**The European Insolvency Regulation[[7]](#footnote-7)**

1. Given that two of the Group members are based in European Union (EU) Member States – Efron Trading (Netherlands) and Efwon (Romania) – with Efwon Trading, being the entity, which established two Group subsidiaries (Efwon Romania and Efwon Singapore), wholly owned by Efwon Trading, we will first review the European Insolvency Regulation Recast (EIR) and its application over insolvency proceedings within the EU.
2. The EIR provides an EU-level (except Denmark) regime of jurisdiction and for recognition of (pre) insolvency proceedings opened in different EU member states, for recognition and enforcement of insolvency-related judgments, for rules on the law applicable to insolvency issues, for rules on the interplay between main and secondary proceedings and for procedures on lodging claims. Rules on substantive insolvency law are not included in the EIR, rather they are left to national insolvency laws. All EU Member States had to transpose into their national insolvency legislation the 2019 EU Preventive Restructuring Directive[[8]](#footnote-8), including the Netherlands and Romania.
3. While the previous EIR presupposed the insolvency of the debtor, the EIR recast also covers public pre-insolvency proceedings based on insolvency-related laws concerning (the prevention of) a debtor's insolvency or financial distress. The mere likelihood of insolvency is sufficient, provided that the proceedings aim to avoid the debtor's insolvency.
4. Article 2(4) EIR provided[[9]](#footnote-9) that ‘insolvency proceedings’ meant the proceedings listed in Annex A which included the specific national insolvency proceedings covered by the EIR, and Annex B covered the practitioners referred to in the EIR. The EIR Recast was amended through Regulation (EU) 2021/2260 of 15 December 2021 (Amendment Regulation). The Amendment Regulation replaces Annexes A and B of the EIR, after 8 EU Member States informed the EU Commission of the implementation of new restructuring proceedings in their respective national laws. Preventive restructuring procedures such as the Dutch WHOA scheme (but only its public track described below) and four Romanian pre-insolvency and insolvency procedures are now covered under the EIR recast.[[10]](#footnote-10)
5. The center of main interests (COMI) is defined in the EIR recast as ‘the place where the debtor conducts the administration of its interests on a regular basis, and which is ascertainable by third parties’.[[11]](#footnote-11) The second paragraph of Article 3(1) provides that in the case of a company or legal person there is a rebuttable presumption that the place of its registered office is the COMI.
6. This is important in order to determine in which jurisdiction the debtor can open a main insolvency proceeding for purposes of achieving a restructuring plan.
7. The EIR allows for secondary insolvency proceedings to be opened to in parallel with the main insolvency proceedings. Secondary insolvency proceedings may be opened in the Member State where the debtor has an establishment. Establishment is defined by the EIR as “‘establishment’ means any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets”.[[12]](#footnote-12) The effects of secondary insolvency proceedings are limited to the assets located in that State.[[13]](#footnote-13)
8. The EIR also allows local creditors and public authorities to request opening of territorial insolvency proceedings in the Member State where the debtor has an establishment, prior to opening of the main insolvency proceedings.[[14]](#footnote-14) After main insolvency proceedings are opened, the territorial insolvency proceedings become secondary insolvency proceedings.[[15]](#footnote-15)
9. It should also be noted that if there has been a request to open insolvency proceedings, the court may order preservation measures prior to deciding on that request. An order of this kind is recognized in other member states under Article 32(1) EIR. However, preservation measures of this kind do not imply a decision on the presence of a COMI or an establishment. It follows, for example, that a preservation measure ordered in Romania should be automatically recognized in the Netherlands, but if a concurrent request to open main proceedings is pending in the Netherlands and the Dutch court holds that the COMI is in the Netherlands and opens main proceedings there before such proceedings are opened in Romania, main proceedings can no longer be opened in Romania.[[16]](#footnote-16) In the case of the Efwon Romania insolvency filing petitioned by the Romania drivers, based on the facts presented to us, it appears that the Romanian court has only afforded freezing injunctions over Efwon Romania’s assets and income, as a form of a interim measure, and has not opened insolvency proceedings yet, hence the Romanian court order is still pending on that matter and Efwon Romania can request the opening of main insolvency proceedings in the Netherlands.
10. Shortly after the adoption of the old EIR, a difference of opinion arose as to whether the COMI was primarily located where the managerial decisions were taken (the ‘head function’) or rather where the debtor’s actions were visible to third parties.
11. Prior to the EIR Recast, two notable cases defined the existence of COMI. In the *Eurofood* case[[17]](#footnote-17), the Irish court (where Eurofood had its registered office and which was first seized with an insolvency petition) held that the Parma court (where Eurofood’s Parent Company had a registered office and which opened an insolvency proceeding against Eurofood one month after the Irish proceeding) could not open main proceedings because proceedings were opened first by the Irish court and, the Parma judgment was contrary to public policy as Eurofood’s creditors had not received a notice of the hearing and because the Irish Administrator had not been furnished with the petition or other papers grounding the application until after the hearing had taken place.
12. The *Eurofood* case was taken to the European Court of Justice (ECJ) which held ‘in the system established by the EIR for determining the competence of the courts of the Member States, each debtor constituting a distinct legal entity is subject to its own court jurisdiction’.[[18]](#footnote-18) The ECJ further held that ‘(W)here a company carries on its business in the territory of the Member State where its 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 enough to rebut the presumption laid down by the Regulation.”[[19]](#footnote-19) The ECJ judgment emphasized the requirement that third parties could ascertain the COMI, by identifying the place of the registered office. Rebuttal of the presumption must be based on their perception.
13. In the *Interedil v Intesa* case,[[20]](#footnote-20) the ECJ was petitioned with a case in which a registered office had been transferred from Italy to London. The ECJ held that the COMI may not be at the place of the registered office if, from the viewpoint of third parties, the place in which the company’s central administration is located differs from the registered office. The location of immovable property owned by the debtor company, in respect of which the company had entered into a lease agreement, and the existence in that member state of a contract concluded with a financial institution, may be regarded as objective factors and, in the light of the fact that they are likely to be matters in the public domain, as factors that are ascertainable by third parties. However, even in such a case a comprehensive assessment of all the relevant factors is required in order to establish whether “the company’s actual centre of management and supervision and of the management of its interests is located in that other Member State”.
14. The EIR recast now clarifies that the COMI shall be the place where the debtor regularly administers its interests, and which can be ascertained by third parties. The decisive factor is thus clarified as not merely the debtor's intention but also the creditors' perception of where the debtor administers its interests.[[21]](#footnote-21)

**UNCITRAL Model Law on Cross-Border Insolvency 1997 (the Model Law)[[22]](#footnote-22)**

1. Designed to provide effective mechanisms for dealing with cross-border insolvency cases, the UNCITRAL Model Law was conceived in 1997 with the objective of facilitating the optimal management of cross-border insolvency. It aims is to achieve this is by providing an adoptable, consistent framework for countries to recognize foreign insolvency proceedings. As of 2024 legislation based on or influenced by the Model Law has been adopted in 60 States in a total of 63 jurisdictions.[[23]](#footnote-23)
2. For a foreign proceeding to be recognized under the UNCITRAL Model Law, the foreign proceeding must be either a foreign main proceeding or a foreign nonmain proceeding. A foreign main proceeding is one taking place in the country where the debtor has the center of its main interests (“COMI”). A foreign non-main proceeding is one taking place in a country where the debtor has an establishment, i.e., a place of operations where the debtor carries out a non-transitory economic activity.[[24]](#footnote-24)
3. Recognition of a foreign main proceeding has an automatic effect on the debtor’s assets and the conduct of creditors (e.g., protection from creditor enforcement actions and preventing of lawsuits), and recognition of a foreign non-main proceeding permits such relief, but it is not automatic. In addition, the status of a proceeding as a foreign main proceeding often effects crucial choice of law determinations, such as the fixing of the law governing whether transactions entered into prior to the commencement of insolvency proceedings may be avoidable by an administrator.
4. The COMI determination is among the requirements for recognition of a foreign main proceeding that will enable a domestic court to assist the foreign proceeding. Recognition is essentially an eligibility test of whether there are sufficient “connecting factors” between the debtor and the foreign court to warrant recognition of the foreign proceeding. As the EIR, the Model Law also contains a presumption that a debtor’s country of registration is its COMI.[[25]](#footnote-25) Unlike the EIR, in the Model Law, the presumption is designed to facilitate the recognition of foreign insolvency proceedings and the provision of assistance to those proceedings. Under the EIR, the decision on COMI is made by the court seized with an application for commencement of insolvency proceedings at the time of consideration of that application. Under the Model Law, a request for recognition of a foreign proceeding may be made at any time after the commencement of that proceeding.

**US Chapter 15 and the Singapore Model Law**

1. Both the US and Singapore have enacted national legislation based on the UNCITRAL Model Law, which is important in our case since two of the Efwon Group entities are registered in the US and Singapore, and have creditors in those locations, which may impact the resolution of the Efwon group restructuring.
2. Enacted in 2005, the US Chapter 15 is patterned on the 1997 UNCITRAL Model Law on Cross-Border Insolvency (the “Model Law”).[[26]](#footnote-26) Singapore adopted the UNCITRAL Model Law on Cross-Border Insolvency in 2017 (Singapore Model Law), to aid in the recognition of, and assistance to, foreign insolvency proceedings and insolvency office holders.
3. U.S. courts have repeatedly ruled in favor of a value-preservation group-wide solution, even with respect to recognizing foreign main proceedings against an entity incorporated in another jurisdiction (different from the one where the main insolvency proceedings were open). For example, in the case of *OAS S.A*. ("*OAS*") and its affiliates, the U.S. bankruptcy court was confronted with the recognition of insolvency proceedings in Brazil which was challenged by a group of U.S. creditors. The U.S. Bankruptcy Court for the Southern District of New York ruled in favor of OAS, holding that: (i) a foreign representative need not be appointed by a foreign court, but may be authorized to seek chapter 15 recognition by a foreign debtor's board of directors; (ii) OAS's foreign representative successfully established that the debtor's "center of main interests" ("COMI") for purposes of chapter 15 was Brazil rather than its country of incorporation (Austria); and (iii) recognition of the Brazilian proceedings was not manifestly contrary to U.S. public policy.[[27]](#footnote-27)
4. The *OAS* decision is an endorsement of the foreign proceedings and the manner in which they are conducted before Brazilian courts.
5. Since we do not propose to open Dutch main proceedings for Efwon Singapore, rather to alleviate it from its guarantee to the Monaco loan through the Dutch Plan proceeding for Efwon Trading (as explained in more detail below), we do not envisage a problem for the Singapore courts’ recognition of the Dutch proceedings as foreign main proceedings, and assisting the Dutch-appointed administrator for Efwon Trading in case he/she needs to request protection of the Efwon assets in Singapore or if a recognition of the Dutch plan is necessary in Singapore. Prior to 18 October 2023, there were two exceptions under the Singapore Model Law, to the recognition of foreign proceedings. The potentially relevant exception in our case is that the Singapore court could refuse to recognize a foreign restructuring or insolvency proceeding on the ground that recognition would be "contrary to the public policy of Singapore"[[28]](#footnote-28). This was considered a lower threshold than that under the UNCITRAL Model Law, which refers to an action which is "manifestly contrary" to the public policy of the state where recognition is sought.
6. Recent Singapore court decisions issued over the last 6 months demonstrate that Singapore bankruptcy courts are supportive to value-preserving solutions. Notably, on January 18, 2024, the Singapore International Commercial Court (SICC) issued its first insolvency-related ruling. In *Re PT Garuda Indonesia (Persero) Tbk [2024] SGHC(I) 1*, the SICC granted recognition in Singapore of an Indonesian debtor-airline's "suspension of payments" proceeding under the Singapore Model Law. The SICC recognized and enforced the terms of a composition plan approved by creditors and confirmed by an Indonesian court. The SICC overruled objections to recognition made by aircraft lessors asserting, among other things, that recognition of the Indonesian proceeding would violate Singapore's public policy because creditors were treated unfairly in the debtor's composition plan.[[29]](#footnote-29)

**Interplay between EIR, the UNCITRAL Model Law and the US Chapter 15**

1. The EIR recast, the UNCITRAL Model Law, and Chapter 15 include a presumption that the COMI is located at the debtor’s registered office, which may be interpreted to mean that there could be no group COMI if the group members’ registered offices are in different jurisdictions as is the case with the Efwon Group (each member of the Efwon Group is registered in a different jurisdiction, assuming that Efwon Romania is registered in Romania. The presumption may be rebutted if we show through the governance structure of Efwon that the COMI of the subsidiaries are at the location of the group headquarters if the decision-making for the subsidiary takes place there, which could put all Efwon members’ COMIs in a single jurisdiction and permit a group restructuring in the Netherlands if it can be demonstrated that the group is governed and decisions are made through Efwon Trading based in the Netherlands. After all, Efwon Trading has set up the Romania and Singapore subsidiaries, and the Efwon Investment financing is channelled through Efwon Trading. The EIR also provides for a group COMI: “The introduction of rules on the insolvency proceedings of groups of companies should not limit the possibility for a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the centre of main interests of those companies is located in a single Member State.”[[30]](#footnote-30)
2. **Potential Impediments for the Proposed Efwon Restructuring Approach**
3. A potential impediment to restructure the Efwon Group through multiple WHOA proceeding is if any of the petitioning members is already insolvent at the time of filing. As explained above, the WHOA plan procedure is a type of pre-insolvency procedure and only a debtor for whom “it can reasonably be assumed” that “will not be able to continue paying its debts as they fall due” is eligible to file for it.[[31]](#footnote-31)
4. Since the WHOA Act is relatively recent, to our knowledge, the Dutch Courts have not been tested yet with a petition from a non-Dutch debtor, in a main proceeding (plenary) proceeding. There have already been several successful WHOA plan restructurings in the context of enterprise groups, but the Dutch proceedings so far have only been used for the Dutch entities of international groups.[[32]](#footnote-32) Thus, some of the Efwon stakeholders might be concerned and may prefer to use already tested options, such as the U.S. Chapter 11 procedure. In the Efwon case, the U.S. lenders may decide to challenge the recognition of the WHOA proceedings for Efwon Investments in U.S. courts, but in our view, the U.S. court will rule in favor of the Efwon Group.
5. Another impediment may be if the Romanian bankruptcy court, which was first seized with an insolvency petition in the case of Efwon Romania objects to the Netherdlands COMI and the jurisdiction of the Dutch court over Efwon Romania’s restructuring, on the basis of the registered office presumption of the EIR. That said, since it does not appear that the Romania insolvency order has been made yet, and the latest amendment of the EIR supports the value-preservation approach in the case of restructuring of groups[[33]](#footnote-33), in our view, this is unlikely.
6. **Should Efwon Have Structured through England Rather Than the Netherlands**
7. England has been a popular jurisdiction for global restructurings for a long time through its schemes of arrangement (which do not qualify as insolvency procedure) and it recently also introduced a hybrid restructuring option through the new UK Plan (Part 26A).[[34]](#footnote-34)
8. The UK Plan unlike the scheme of arrangement, would have qualified as an insolvency proceeding for purposes of the EIR. However, the UK’s departure from the EU deprives English restructurings of the automatic EU-wide enforcement they previously enjoyed. The UK-EU Trade and Cooperation Agreement does not address insolvency law and thus there has been a “hard Brexit” for the English restructuring practice.[[35]](#footnote-35) Hence, the tools that gave English restructurings EU-wide effect are no longer available: the EIR no longer applies to English insolvency proceedings and the Brussels I Regulation[[36]](#footnote-36) no longer applies to English schemes.[[37]](#footnote-37)
9. With respect to the Efwon Group situation, the only scenario when an UK scheme would have been more advantageous is in a situation when the proceedings should include non-insolvent members of the group in the EU. Since most EU jurisdictions require a state of insolvency or pre-insolvency for the availability of restructuring tools, which is also reflected in the Dutch WHOA procedure, this makes the WHOA inapplicable for cases where it is necessary to include solvent, or potentially solvent, group members in the restructuring plan. The English scheme (but not the new UK Plan), not being limited to insolvency situations, used to benefit from enforceability in the EU under the Brussels I Regulation but the latter no longer applies in the UK.
10. In the above scenario, we would have proposed an Efwon restructuring using an English scheme (if Efwon had structured through England rather than the Netherlands, or if it had sufficient connection with England which is enough for UK courts to assume jurisdiction). The U.S. courts regularly recognize English schemes under Chapter 15, so the non-insolvency or pre-insolvency status of the debtor would not have posed problems to apply the UK scheme.
11. **Potential Outcomes for the Various Stakeholders and Likelihood of Acceptance**
12. Considering that labor and tax obligations are likely negligible by comparison to the financial and non-financial debt of the Efwon Group, and that most of its revenue -other than sponsorships- came from its share in the broadcasting revenues of the Formula One Group, any restructuring that allows for the continued participation of Team Maximov in the 2024 season, and onwards, will be strongly preferred.
13. The matrix below illustrates the expected outcome of the restructuring and instances where Plan imposition may be required. Financial creditors have received, so far, several payments of principal, interests and commissions.

|  |  |  |
| --- | --- | --- |
| **Party** | **Expected outcome under the Plan Proposal** | **Necessity to impose Plan** |
| **Monaco Lender** | * It has already collected a portion of its Loan and it should be comfortable accepting some form of subordination of its credit (debt to equity conversion, structural or contractual subordination). | Potentially - to make the Monaco Lender move its credits up one level (structurally subordinating it). |
| **US Senior Lenders** | * They have collected some amount of principal, but a balance remains and gives them a seat at the restructuring table. | The Group needs them to agree with the Plan, they are a preferred class in the Efwon Investments WHOA. |
| **US Mezzanine Lenders** | * This class of lenders are so deeply subordinated that their likelihood of recovery in insolvency seems remote. * These lenders should consider other options, including but not limited to conversion of debt to equity. | Potentially - to write down the balances of those loans as they would not be worse off if the plan gets approved. |
| **US Junior Lenders** |
| **Benedict Maximov** | Equity investment into the Team Maximov may need to be increased, to show continued support and alignment of interests. | Potentially - to secure a sponsor support agreement or a complete dilution of the shares in Efwon Trading. |

1. Conclusion
2. The recent developments in cross-border court decisions have largely ignored entity-specific COMI in order to achieve a value-preservation solution at the enterprise-level. Courts in many jurisdictions have approved the restructuring of enterprise group debt even though several group members had foreign COMIs. This makes our proposed strategy for a Group restructuring of the various Efwon members in one jurisdiction, the Netherlands, a plausible and potentially most cost-efficient approach in this case.
3. The Dutch WHOA scheme successfully combining elements from the UK scheme of arrangement and the U.S. Chapter 11, have already gained successful traction for purposes of group enterprises restructuring (e.g., in Diebold Nixdorf, McDermott and Mercon restructurings) and Dutch bankruptcy judges have already proven their value-preservation approach. Therefore, attempting the proposed strategy, even though elements of it have not yet been tested (such as WHOA restructuring of non-Dutch members of groups), should not pose risks or major concerns.
4. The outcomes of the Dutch public track restructuring as proposed, will be enforceable across the EU under the EIR, as well as in Model Law jurisdictions, such as the U.S. and Singapore. U.S. courts have already recognized a WHOA plan as a foreign main proceeding under Chapter 15 (in the case of the Diebold Nixdrof group restructuring), which also allows the WHOA plan to be enforced against creditors in the US, making it an attractive option for the cross-border restructuring of the Efwon Group.

**Appendix A: Structure of Efwon Group**

|  |  |  |  |
| --- | --- | --- | --- |
| **Relevant Parties** | | | |
| **Efwon Group:** | **Benedict Maximov** (US based entrepreneur)  Sole shareholder | | |
| **Efwon Investments** (Texas)  (the US entity) | **Efwon Trading N.V.** (Netherlands) (the Dutch entity) | |
| **Efwon Romania** (Romania) (the Romanian Borrower) | **Efwon Singapore** (Singapore) |
| **Lenders** | **U.S .Lenders**   1. 2 senior lenders: up to US$100 MM 2. 2 mezzanine lenders: up to US$60 MM 3. 5 junior lenders: up to US$90 MM   **Monaco Lender**   1. European bank who lent US$100 MM to cover the 2017 season budget | | |
| **Other Creditors** | **Drivers’** claims for damages suffered in car crash in the last race of 2023 | | |
| **Sponsors** | **Kretek (Indonesia)**: current sponsor (sponsorship might terminate at end of 2023 season)  **KuasaNas (Malaysia)**: potential sponsorship starting in 2024 | | |
| **Formula One Group** | Formula One Group is the entity that:   1. Issues the licenses and permits required to operate of the F1; and 2. Pays to each F1 team, including Team Maximov, their share in the broadcasting rights. | | |
|  |  | | |

1. Act on the Confirmation of Private Restructuring Plans (Wet homologatie onderhands akkoord or WHOA), entered into force on 1 January 2021. [↑](#footnote-ref-1)
2. Rb. Noord-Holland 19 February 2021, ECLI:NL:RBNHO:2021:1398 (Jurlights). [↑](#footnote-ref-2)
3. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) and Regulation (EU) 2021/2260 of 15 December 2021 (Amendment Regulation). [↑](#footnote-ref-3)
4. The Amsterdam court judgment opening insolvency proceedings shall specify the grounds on which the jurisdiction of the court is based, and, in particular, whether jurisdiction is based on Article 3(1) of the EIR. [↑](#footnote-ref-4)
5. Pursuant to Article 3(2) and 3(4), last paragraph of the EIR in connection with Recital 37, EIR. [↑](#footnote-ref-5)
6. Provided that the requirement Article 372 DBA are met, one plan may suffice for Efwon Trading and Efwon Singapore. [↑](#footnote-ref-6)
7. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast). [↑](#footnote-ref-7)
8. Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency). [↑](#footnote-ref-8)
9. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848 [↑](#footnote-ref-9)
10. *See* https://www.simmons-simmons.com/en/publications/cky2qoe0o150m0a90i5zb334u/amendment-of-the-recast-european-insolvency-regulation. [↑](#footnote-ref-10)
11. Article 3(1) EIR. [↑](#footnote-ref-11)
12. Article 2(10) EIR. [↑](#footnote-ref-12)
13. Recital 23 EIR. [↑](#footnote-ref-13)
14. Recital 37 EIR. [↑](#footnote-ref-14)
15. Article 3(4), last paragraph. [↑](#footnote-ref-15)
16. Recital 15 EIR. [↑](#footnote-ref-16)
17. The Eurofood judgment, ECJ 2 May 2006, C-341/04, ECLI/281. [↑](#footnote-ref-17)
18. Paragraphs 29-30. [↑](#footnote-ref-18)
19. Paragraph 36. [↑](#footnote-ref-19)
20. ECJ 20 October 2011, C-396/09, ECLI:EU:C:2011:671, *Interedil v Intesa*. [↑](#footnote-ref-20)
21. Article 3(1) EIR recast. [↑](#footnote-ref-21)
22. https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border\_insolvency [↑](#footnote-ref-22)
23. https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border\_insolvency/status [↑](#footnote-ref-23)
24. Articles 2(b), (c), (f), 17(2), Model Law. [↑](#footnote-ref-24)
25. Article 16, chapter 15 §1516, Model Law. [↑](#footnote-ref-25)
26. 11 U.S.C. §§1501-1532. [↑](#footnote-ref-26)
27. In In re OAS S.A., 533 B.R. 83 (Bankr. S.D.N.Y. 2015). [↑](#footnote-ref-27)
28. Article 6, Singapore Model Law. [↑](#footnote-ref-28)
29. https://www.jonesday.com/en/insights/2024/03/singapore-international-commercial-court-issues-first-decision-on-recognition-of-crossborder-bankruptcy-cases-under-mode. [↑](#footnote-ref-29)
30. Recital 53 EIR. [↑](#footnote-ref-30)
31. Article 370(1), WHOA Act. [↑](#footnote-ref-31)
32. This has been the case of the recent WHOA plan of the McDermott Group, where only the Dutch B.V. was restructured in the Netherlands, in combination with an English restructuring plan for the UK group member, CB&I UK Limited (CB&I). Also, the recent Diebold Nixdorf restructuring included combined Chapter 11 proceedings in the US (US plan) and WHOA proceedings in the Netherlands (WHOA plan). [↑](#footnote-ref-32)
33. The new provisions, included in Chapter V of the EIR recast, are aimed at ensuring the efficient administration of insolvency proceedings of groups for the first time. [↑](#footnote-ref-33)
34. A restructuring procedure for companies in financial difficulty, operative provisions are contained in Part 26A of the UK Companies Act 2006. [↑](#footnote-ref-34)
35. Katharina Crinson & Nicholas Cooper, Ouch, it’s a hard Brexit for UK restructuring and insolvency – but life goes on (Freshfields Bruckhaus Deringer 2021), https://transactions.freshfields.com/post/102gof4/ouch-its-a-hard-brexit-for-uk-restructuring-and-insolvency-but-life-goes-on (last visited 5 October 2021). [↑](#footnote-ref-35)
36. Art. 1(2)(b) Brussels I Regulation provides that the regulation shall not apply to: “bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings”. [↑](#footnote-ref-36)
37. Ibid. [↑](#footnote-ref-37)