Pre-insolvency restructuring: procedural steps

Step	Panel's recommendation	Draft EU Directive	UK	Fundamental rights
General	Maximum flexibility for the proponent of the plan to design a bespoke process that is tailored to the case at hand.	Recital 18: efficiency / flexible procedure.	Flexibility is a key benefit of a UK scheme of arrangement over composition mechanisms in other jurisdictions and, for example, the CVA process in the UK e.g. the legislation does not specify the notice period for creditor meetings and the court can tailor this to the circumstances.	Art. 6 ECHR and art. 1 FP ECHR do not require certain specific procedural hurdles to be in place: the ECtHR will take a comprehensive view to test whether the principles of fair trial were complied with, and whether affected parties have had a reasonable opportunity to effectively challenge the interference with their property rights. The principles of 'fair balance' and 'proportionality' are leading.
	Maximum speed and efficiency: requires court involvement to be limited and appeal to be excluded.	Art. 4(3): court involvement only where necessary and proportionate to safeguard rights of affected parties.		Time limits cannot be not be too short: affected parties must have the right to prepare their case.
	Procedure to be handled by specialised insolvency court with commercial / financial experience and expertise.	Art. 24(1): judges shall receive initial and further training to a level appropriate to their responsibilities.		
Commencement	Conceptually, not only the debtor but also creditors should have the right to propose a plan. The panellists have differing views as to whether affording creditors the right to propose a plan would be desirable in practical terms.	Art. 4(4): plan can be proposed by debtor, by creditor only with agreement of the debtor.	This is technically the case in the UK but the obligation to prepare a disclosure statement and statutory provisions regarding directors etc. mean that this has not been utilised. Any legislation would need to include an obligation on the debtor to assist the creditors to produce the disclosure statement and would, ideally, limit any potential liability for creditors.	

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Commencement (continued)	The exercise of the right to propose a plan that can be imposed on dissenting parties requires that a court test (ultimately at the confirmation stage) that the debtor is or inevitably will become insolvent. Dissenting view from the UK.	Art. 4(1): likelihood of insolvency, but no formal requirement.	One of the advantages of the UK scheme is that insolvency is not a pre-requisite to jurisdiction. It can also be used by solvent companies. For example, in respect of amendments to a credit agreement where all the lenders must agree to the amendments, a scheme can be used to effect the amendments with the statutory consent threshold.	No 'pre-insolvency' test required ex art. 1 FP ECHR: states have a wide margin of appreciation in determining when interference with property rights is justified in the general interest. The ECtHR will respect the legislature's judgment of political, economic and social issues. However the financial state of 'pre-insolvency' would be an Important factor to determine whether a 'fair balance' is struck.
	No court entry test for the debtor (insolvency or pre-insolvency can be tested ultimately at the confirmation stage).	Court entry test not required.	The legislation should be flexible and allow the debtor to choose whether or not it wishes to seek directions at an early stage. E.g. if there were a significant jurisdictional issue it may wish to. For more straightforward cases this could be dispensed with. The two stage process of a UK scheme has been criticised for this reason.	
	Court entry test for creditors required (if they are afforded the right to propose a plan).	Court entry test not required (but permission of the debtor is).	This would allow creditors to propose an alternate plan and to seek orders regarding assistance.	
	Debtor in possession: if a monitor is appointed, his tasks should be limited to facilitating the adoption and implementation of a plan (the debtor should not be divested or lose control over the ordinary course of business).	Art. 5(1): DIP Art. 5(2): Monitor not mandatory but possible where stay or cross-class cram-down necessary. Proposed directive is silent on the duties and powers that a monitor should have.		Leaving the debtor in possession is in line with the freedom to conduct a business (art 16 EU Charter).

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Stay	On application only; can be requested by the debtor and the proponent of the plan (if not the debtor).	Art. 6(1): application right unclear.	One of the widely accepted weaknesses of the UK scheme. Whilst schemes have been proposed together with administration (which includes a stay) this is viewed as a drastic measure because of the additional requirements that administration imports.	Stay does interfere with the right to peaceful enjoyment of property. Can however be justified, for the sake of value preservation, for a limited period of time.
	Stay should be granted if court is satisfied that i) the debtor is or inevitably will become insolvent, and ii) there is a realistic prospect of successfully implementing a restructuring plan.	Art. 6(1): Stay must be necessary to support negotiations.		There should be a fair balance between the 'regulation' of property and the general interest.
Stay (continued)	Limited to specific creditors pursuing or threatening to pursue enforcement action; notification to those creditors only, no general publicity.	Art. 6(2): for all types of creditors, including secured and preferential creditors; Art. 6(3): exception for employees unless protected by other means. Art. 6(2) Stay may be general, covering all creditors, or limited, covering one or more individual creditors.		The possibility of having a targeted stay would lead to a stay that does not affect parties if not necessary for a successful outcome of the restructuring procedure.

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	Maximum duration in principle 4 months, can be extended in exceptional circumstances but in any event no longer than 12 months.	Art. 6(4): max. 4 months; Art. 6(5)-(7): extension possible up to 12 months at most.		Length of stay should balance the general interest (successfully restructure the business to preserve value, jobs etc.) and the infringement with property rights. Extension of the stay is only possible via a court decision. The court should consider whether the stay is still proportionate.
	Creditors can request a (partial) lifting of the stay if they are not adequately protected or the stay in respect of them is not necessary for the purpose the restructuring.	Art. 6(8)/(9): lifting of stay possible at the request of creditors if creditors would be 'unfairly prejudiced' by a stay. 7(1): stay suspends the obligation. Consequences for claims against guarantors?		Creditors should be able to request a (partial) lifting of the stay if the interference with their property rights is no(t) (longer) proportionate: the duration of the stay and any absence of adequate protection might be an important factor.
Early decision by the court	At the request of the plan proponent, the court should be able to give binding decisions at an early stage, notably before the vote, on all issues that can create uncertainty and can be resolved at an early stage, i.e. before the vote (e.g. regarding jurisdiction, satisfaction of insolvency requirement, adequacy of provided information, admittance of claims, class formation, and, perhaps most importantly, valuation).	Nothing on this in the Directive: Art. 13(1) suggests that only a final decision is envisaged. Article 9 prescribes that the class formation is to be examined at the confirmation stage.	See comment above re two stage process of a scheme.	The principles of art. 6 ECHR apply to interlocutory decisions, when i) the right at stake in the procedure is 'civil' within the meaning of the convention and ii) the interlocutory judgment effectively determines the civil right or obligation.
	Early decisions should be binding at the confirmation stage.			Art. 6 ECHR does not guarantee a right to appeal.

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	At the request of only the proponent of the plan. The plan proponent must be able to skip interim determinations if it is more efficient to concentrate all required determinations in confirmation stage. Opposing parties must not be able to seek interim determinations for the purpose of frustrating or delaying the process.			Affected parties must have a reasonable opportunity to effectively challenge the interference with their property rights. However, the ECtHR declared "*demands of flexibility and efficiency are fully compatible with the protection of human rights and may justify limitations on several principles.*
Mandatory prior approval of disclosure statement	Not required: adequacy of provided information tests ultimately at the confirmation stage The proponent of the plan can choose to seek an early determination on this point if a material dispute exists and it is more efficient to resolve the uncertainty upfront.	Nothing on this in the Directive.	See above.	To have an overall fair process, all relevant information should be provided for by the plan offeror, whether the offeror has done so can be tested in a later stage (e.g. confirmation hearing), and or earlier if the proponent of the plan so desires.
Hearing to convene creditors' meeting	Not required.	Art. 9(3): Examination of class composition at the confirmation stage	Two stage process: compulsory hearing to convene meetings.	
Restructuring plan	Plan does not have to include all capital providers, but can be limited to a selection.	Art. 8(1(c): affected parties only; however, non-affected parties must be mentioned, Art. 8(1)(e).		

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	No statutory prescriptions as to the commercial content of the plan.	Art. 8(1): a number of non-commercial prescriptions.		
	Plan can bind all types of capital providers.	Art. 8(1): no restrictions; Art. 12: equity holders and secured creditors may be included.		
	Plan can bind creditors with claims against third parties / group companies, provided the same requirements are satisfied with respect to the third party as would apply if a separate plan were proposed in respect of the third party.	Not mentioned in the Directive.		
	Can the plan also provide for a settlement of (similar) disputed claims? Panellists still forming their views, may touch on human rights.	Not mentioned in the Directive.		The plan can provide for a settlement of (similar) disputed claims: UK courts held that 'adjucation schemes' would not lead to an infringement of art. 6 ECHR (Hawk, Pan Atlantic, British Aviation). 'Fair balance' (art. 1 FP) issue: conceivable that the 'pre-insolvency'-test is (even) more pressing in these cases.
Voting	Voting in classes	Art. 9(2)/(4): voting in classes	The recommendations substantially follow the UK approach.	

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	Parties may (but do not have to) be placed in the same class only if i) their existing ("old") rights and ii) the new rights that they are offered under the plan are sufficiently similar. Rules required for dealing with "collateral interests" / conflicts of interests	Art. 9(2): class formation criteria prescribed: class must comprise claims or interests with rights that are sufficiently similar to justify considering the members of the class a homogeneous group with commonality of interest. Only reference to existing rights. No explicit reference to new rights. No rules for dealing with conflicts of interest / cross-holdings.	Conflicts of interest (cross-holdings) are dealt with in the context of the test at the sanctioning stage whether each class has been fairly represented.	
Voting (continued)	Formal meetings should not be required. Voting should be able to take place through ballots or electronically Bond restructurings require voting to be conducted through the electronic exchanges and clearing systems. The legislation should be as flexible as possible in order to cover future advances in this area.	Meeting not required (Art. 9(5): consultation and agreement). Nothing on the details in the Directive	The scheme process gives the court the discretion to determine how the meetings should be held. The debtor then has to ensure that evidence, by way of affidavit, is filed at court so that there is evidence that the statutory majorities have been satisfied.	See above: Flexibility is allowed, as long as the procedure results in an opportunity for *"effectively challenging the measures interfering with property rights".*
	Plan should be deemed to be accepted if a majority in each class votes in favour. The requisite majority should be determined solely on the basis of	Art. 9(4): Majority of the amount of claims or interests; simple value majority, but MS may require up to 75% nothing on "those present and voting"	There has been debate in various jurisdictions as to whether or not to use par values or discounted prices for the debt. The latter creates too much uncertainty.	

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	the nominal amount of the claims or shares of the parties participating in the vote (e.g. 2/3). No head count.		The numerosity test is an anachronistic feature of the UK scheme. It serves no useful purpose, particularly where the court can review the overall fairness of the plan at a later stage.	
	Vote only binding on those who were invited to participate in the vote and provided the democratic decision making process is in order (adequate information provided, class formation correct, no fraud, etc).	Art. 14: Binding on those identified in the plan (subject to confirmation), but not on those not involved in the adoption of the plan.	This replicates a key successful feature of the UK scheme. This flexibility allows plans to be implemented in the least damaging way. It also reflects the fact that, in many cases, trade creditor and employee claims are not compromised because they are important to the success of the business as a going concern.	Affected parties should have a fair possibility of defending their interests and express their views about the proposed interference with their property rights: when parties had no such chance, they cannot be bound by the plan.
Court confirmation	Confirmation hearing / decision not mandatory in all cases.	Art. 10(1): Confirmation only if plan affects the interests of affected dissenting parties or if new finance is provided for.		
	Confirmation hearing takes place only if an interested party requests one within a certain period (e.g. two weeks) after the vote	Confirmation *ex officio*, not only where applied for.	Challenges to UK schemes have been largely unsuccessful and the most common cause of failure is a technical irregularity (such as a defective explanatory statement or class composition).	
	If no confirmation hearing is requested, the plan becomes automatically binding and effective after the given period (e.g. two weeks) has expired.	Nothing on this in the Directive.		

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	Substantive confirmation criteria will be dealt with in the panel on confirmation and cram down.	Art. 10(2): confirmation criteria; Art. 11: introduction of cross-class cram-down mandatory.		Confirmation criteria are key: fair compensation is key to determine whether infringement with 'posessions' is justified (art. 1 FP).
	Obligation for parties to raise complaints as early as possible at penalty of loss of the right to raise the complaint at the confirmation stage.	Nothing on this in the Directive.		
	Ability for the court to confirm a plan notwithstanding flaws in the process, provided that it is clear that the same result would have been achieved absent the flaws (e.g. defect in admission of claims, class formation, counting of votes, etc).	Art. 10(2): adoption in accordance with Art. 9 and notification of all known affected creditors mandatory.	UK court has no jurisdiction to sanction the scheme if the jurisdictional and statutory requirements have not been met. Is this sensible in all cases if there is immaterial prejudice to the creditors or there is no other alternative to a much worse insolvency outcome?	
	Plan becomes binding on all those who are given and notified of the opportunity to request and participate in the confirmation hearing.	Art. 14 (cf above).		Affected parties should have a fair possibility of defending their interests and express their views about the proposed interference with their property rights: when parties had no such chance, they cannot be bound by the plan.
	Confirmation hearing / decision not public.	Nothing on this in the Directive.	UK process is public.	ECtHR seems fairly strict: hearings can only be in camera in case any of the exceptions set out in art. 6(1) ECHR applies. It seems that mere fact that company-sensitive, financial information is shared during the trial, does not justify categorically closing

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				the doors. The ECtHR has stressed in the past some limitations can be justified if this supports *'protecting the rights of creditors and safeguarding the proper administration of the bankruptcy estate'.*
Appeal	No appeal against confirmation decision (or any other court decisions in the context of the restructuring)	Art. 15(1): Appeal mandatory, no suspensive effect.	Limited scope for appeals in the UK, leave has to be granted and brought within time limits set out in the CPR CoA tends to expedite hearings but Supreme Court/ECJ hearing could take many months/a year, which is obviously undesirable.	Art. 6 ECHR does not guarantee a right to appeal; in Back v Finland (about the Finnish debt adjustment procedure) the ECtHR found that there was no infringement of art. 1 FP, i.a. since the court carried out a thorough and careful assessment of the case and that applicant had a right to a full review by an appellate court. Appeals on limited grounds, without suspensive effect provide an extra safeguard.