

Italy - The Marzano Law: a Special Procedure for Large Insolvent Companies

Analysis of the Amendments Brought by the Alitalia Case

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Prompted by the urgent situation involving the Alitalia¹ airline company's insolvency, on 28 August 2008 the Italian Government proposed a set of rules that integrate and amend the special insolvency procedure issued earlier in 2003 – in the wake of Parmalat's financial collapse, *i.e.*, the so-called "Marzano Law"² – to solve massive crises of large companies' insolvencies. The amendment of the Marzano Law has been enacted by Law Decree No. 134 of 28 August 2008, converted into Law No. 166 of 27 October 2008 (the "Amended Marzano Law").

At the time of Parmalat's collapse, one other extraordinary administration procedure for large corporations – Legislative Decree No. 270 of 8 July 1999 (the "Prodi Law") – was available and still is, although it applies only to debtor companies of smaller size – but was not sufficient to tackle an insolvency case of such proportions.

A description of the main (unchanged) provisions of the Marzano Law is contained in Section I, while the Amended Marzano Law provisions are detailed at Sections II and III below.

I. Marzano Law

The Marzano Law aims at (i) enabling a swift commencement and accelerated insolvency procedure for large companies, (ii) allowing an effective restructuring of the debtor company and of its entire group, (iii) preserving trading and market position, facilitating the

restructuring of the debt and the removal of any non-strategic activity that does not adhere to the company's core business, and (iv) granting creditors protection.

Requirements

To apply for the Marzano Law, specific criteria must be satisfied by the debtor company. Particularly, a debtor company is eligible if it: (i) employed at least 500 employees (during the one-year preceding its insolvency), and (ii) accrued debts of at least Euro 300 million (including those arising from released guarantees) (the "Qualified Criteria").

In case of a group of companies, once the parent company has been admitted to the procedure under Marzano Law, the other insolvent companies of the group can be admitted to the same procedure of the parent company even if they do not meet the Qualified Criteria.

Petition

If a debtor company meets the Qualified Criteria, it may petition the Ministry of Economic Development (the "Ministry") for admission into the special insolvency procedure and file a petition for the declaration of the "state of insolvency" with the court in the town of the company's registered office. The court will issue a declaration of insolvency on the basis of the debtor's financial conditions.

The Ministry ascertains the presence of the

subjective and objective requisites and evaluates the grounds of the petition.³ If the Ministry admits the debtor company to the procedure under Marzano Law, the debtor company is deprived of its assets, which will be managed by a public officer chosen by the Ministry (the “Extraordinary Commissioner”) under the supervision of a supervisory board.⁴

Once the insolvent company is admitted to the Marzano Law procedure, creditors may no longer start or continue enforcement proceedings and/or foreclosure actions.

Restructuring Plan

The Extraordinary Commissioner must file a restructuring plan with the Ministry within 180 days after his/her appointment and file with the court a report stating: (i) the reasons that determined the company’s insolvency; (ii) the debtor’s activities; and (iii) the list of creditors of the company. The 180-day deadline can be extended for an additional maximum of 90 days by request of the Extraordinary Commissioner to the Ministry.

In the sole event that the restructuring was not approved by the Ministry, the Extraordinary Commissioner could propose a restructuring plan disposing the sale of the company’s assets.

Composition With Creditors

The Extraordinary Commissioner may provide, as part of the restructuring plan, the payment of the creditors through a composition agreement, *i.e.*, an agreement among the debtor company and the creditors (the “Composition”).

The Composition has to be approved by creditors representing the majority of claims admitted to vote or, if different classes of creditors exist, by the vote of creditors representing the majority of claims admitted in each class.

This instrument has been successfully used in the Parmalat case for the first time and it has been reflected in the ordinary bankruptcy proceedings after the reforms of the Italian bankruptcy law enacted during the period 2005-2007.⁵

Default Rules

For any matters not specifically addressed by the Marzano Law, the general provisions set forth in the Prodi Law apply.

II. Amended Marzano Law

The Amended Marzano Law has introduced significant changes to the Marzano Law, a summary of which is described in the following paragraphs.

Extension of the Insolvency Procedure to the Affiliates of the Debtor Supplying Services

In the case of a group of companies, once the parent company has been admitted to the Marzano procedure, the Extraordinary Commissioner may petition the Ministry for the admission to the procedure of the other insolvent companies of the group. The Amended Marzano Law extended the notion of “companies part of the group” also to the debtor’s affiliates that maintain a contractual relationship – on an exclusive basis – with the debtor company for the supply of services necessary to carry out the debtor’s business.

Asset Disposal

The Amended Marzano Law has extended the possibility to apply for the Marzano Law procedure also to pursue – in the immediate – an asset disposal plan for a period of two years (as needed for the Alitalia case).⁶ The Marzano Law provided for such possibility but later in time, *i.e.*, if and once the restructuring plan filed by the debtor company with the Ministry is rejected.⁷

For urgent reasons, transactions can be authorized also before the admission of the debtor company to the Marzano Law procedure.⁸

Special Provisions for Debtors Offering Public Services

The Amended Marzano Law introduced four major integrations to the Marzano Law in respect to the debtor companies offering essential public services.⁹

- (i) the possibility to file the petition also with the Italian Prime Minister and not only the

Ministry;

- (ii) the Extraordinary Commissioner may identify a buyer of the company's assets through private negotiations among parties that may guarantee continuity and an expeditious intervention. The price for the sale cannot be lower than the fair market value of the assets;¹⁰
- (iii) mergers and acquisitions related to the sale agreement must be notified to the Antitrust Authority. However, no "authorization" is required¹¹ for transactions executed by 30 June 2009, provided that such agreements serve public interests and provided that the parties supply " . . . behavioral guidelines designed to prevent risk of price fixing and other contractual conditions that place an undue burden on consumers," and, should the Antitrust Authority consider it necessary, it may prescribe appropriate changes and set a period of no fewer than three years for breaking up any monopolies that may be created;¹² and
- (iv) with the Ministry's approval, the Extraordinary Commissioner may sell – in the immediate, also before the declaration of insolvency – profitable parts and liquidate their debt while continuing to do business.

Additionally, for a period of six months, following the admission of the insolvent debtor to the Marzano Law procedure, the debtor

company may maintain any relevant authorizations, certifications, or other licenses necessary to carry out its activity.

III. Pros and Cons of the New Norm

The regulation of the extraordinary administration introduced by the Marzano Law, which inarguably entered new material into law, had the positive consequence of starting up wide-ranging and far-reaching reform of Italian bankruptcy law.

Indeed, the reform-focused norms that followed from 2005 to 2007 led to serious changes in our bankruptcy system, making it more consistent with national and international markets, which have undergone significant changes. From that new perspective, privatizing and early-stage solutions to corporate crises were favoured, and in some cases the roles of courts were limited to supervision. At the same time, creditors were assigned more wide-ranging and incisive roles with regard to managing pre-bankruptcy and bankruptcy proceedings.

As opposed, the Amended Marzano Law introduced to solve the Alitalia case seems to be a step backward with regard to the route to innovation that the legislator began to travel with the Marzano Law.

The table below shows the major pros and cons of the Amended Marzano Law:

Pros	Cons
<ul style="list-style-type: none"> • flexibility of the procedure, which today can be used both to adopt an economic-financial restructuring plan and to sell off business units • allowing a company in extraordinary administration to keep authorization and licenses needed to carry out its business • greater flexibility in choosing company business units to sell 	<ul style="list-style-type: none"> • private negotiations for sale of business units (less transparency) • ability to sell business units even before declaring state of insolvency (less protection and involvement of creditors) • proceedings subject to ministerial (political) oversight • weaker role for creditors due to their lack of involvement in the restructuring plan • exception to antitrust norm that allows and provides <i>de facto</i> authorization for monopolies

The above table describes the ways in which the Amended Marzano Law is a *de facto* norm created in an *ad hoc* manner to solve the crisis of one specific company – Italy’s national airline.

However, the uncertainties introduced with the Amended Marzano Law may also offer different and broader opportunities for both for creditors, investors and debtors.

Finally, the creation of a delegated act to reform the extraordinary administration procedure – as is currently being considered – that could, on the one hand, unify the two procedures called for by the Amended Marzano Law and Prodi Law and, on the other, instigate thorough revision of criminal bankruptcy regulations, is seen as a positive development.

IV. Further Amendments to Marzano Law and to the Bankruptcy Law

In addition to the new provisions introduced by the Amended Marzano Law, the Ministry of economic development, on 2 October 2008, proposed a draft of delegated law (*disegno di legge delega*), whereby the Parliament should instruct the Government to issue, within 12 months, one or more legislative decrees aimed at reorganizing the existing extraordinary administration procedures (the “Proposed Law”).

In particular, the Proposed Law should introduce a further reform of the Italian insolvency laws providing:

- (i) the unification of the special insolvency procedures provided for under Prodi Law and Amended Marzano Law; and
- (ii) the amendment of the bankruptcy crimes provisions under the ordinary bankruptcy law, Royal Decree, 16 March 1942, No. 267, as recently amended in 2005, 2006 and 2007 (the “Bankruptcy Law”).

Unification of the Extraordinary Administration Procedures

As mentioned in the introduction to this Memorandum, today in Italy two different extraordinary administration procedures coexist: the extraordinary administration

procedure under the Amended Marzano Law previously examined, and the one under the Prodi Law (together the “Procedures”).

The Prodi Law applies to medium-and-large sized insolvent companies, whilst the Amended Marzano Law applies to large-sized insolvent companies. In other words, the application of one of the two Procedures, which differ in their contents and rules, depends on the size of the insolvent company.

In order to simplify and harmonize the discipline of the insolvency of large corporations, the Italian Government intends to merge the Amended Marzano Law and the Prodi Law into a new law with this specific purpose.

This unification will certainly create a clearer and simplified context in which professionals, creditors and distressed investors may operate. The benefits of this drafted reform, however, can be evaluated only once the draft of the legislative decrees has been presented to the Parliament.

Amendment to the Criminal Provision of the Bankruptcy Law

The Proposed Law also aims at amending the current chapter of the Bankruptcy Law dedicated to bankruptcy crimes in order to line up the relevant criminal provisions with the new tools and principles introduced by the recent reforms of the Bankruptcy Law.

The scope of the Proposed Law is to provide a specific discipline of the bankruptcy crimes, also in the context of the unified extraordinary administration procedure, and particularly:

- (i) fraudulent bankruptcy crimes such as:
 - hiding, destruction or dissimulation of the assets of the company, or reorganization of non-existent debts in order to prejudice the creditors;
 - embezzlement, destruction or falsification of corporate books and records;
 - preferential payments, in order to favor certain creditors and prejudice others;
 - willful misconduct in causing the bankruptcy; and

(ii) other bankruptcy crimes, such as recourse negligently postponed the filing for insolvency, thus deepening the company's insolvency or any other negligent act or omission that may deepen company's

insolvency.

In addition, the Proposed Law will also extend the criminal liability for the above bankruptcy crimes to the head officers of the insolvent company.

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¹ Alitalia – Linee Aeree Italiane S.p.A. (“Alitalia”) is an Italian airline company transporting passengers and cargo throughout the world since 1947. Alitalia is 49.9% owned by the Italian Treasury. The rest, 51%, is privately owned by no relevant/major shareholder. Alitalia has been loss-making for years, struggling *inter alia* against fierce competition and high fuel costs.

² Reference is made to Law Decree No. 347 of 23 December 2003, converted to Law No. 39 of 8 February 2004, as subsequently amended.

³ The assessment of the state of insolvency is exclusively within the discretion of the Court, although the ministerial provisions are effective immediately albeit conditional on the decision of the court that declares the state of insolvency.

⁴ The supervisory board is composed by independents and experts (3 to 5) appointed by the Ministry.

⁵ Law Decree No. 35 of 14 March 2005, converted in Law No. 80 of 14 May 2005; Legislative Decree No. of 9 January 2006 and Legislative Decree No. 169 of 12 September 2007.

⁶ For Alitalia the only possibility was to have a third party purchasing significant stake in the company in a short period of time; whereas Parmalat was able to restructure successfully through a composition agreement with the creditors.

⁷ Article 4, paragraph 2 and paragraph 4-*bis* of the Marzano Law, whereby an asset disposal plan can be filed within 60 days following the rejection of the restructuring plan filed by the Extraordinary Commissioner by the Ministry. In fact, the Extraordinary Commissioner must file a restructuring plan with the Ministry within 180 days after his/her appointment. Therefore, it could take up to 6 or 7 months before the debtor company may dispose of its assets. Pursuant to the Marzano Law, the Extraordinary Commissioner may also request to the Ministry an extension of an additional 90 days; in the latter case, an asset disposal may occur 9 months or 10 months following the Extraordinary Commissioner's appointment.

⁸ Article 5, paragraph 1.

⁹ Pursuant to Article 1 of Law 12 June 1990, No. 146, “essential public services” are all those services aimed at granting and protecting the exercise of the fundamental individual right of the person recognized by the Italian constitution, such as the right to life, healthcare, freedom, safety, freedom of circulation, social pensions, education and freedom of communication.

¹⁰ The fair market value is assessed by a financial independent expert indicated by the Ministry's decree.

¹¹ Except in cases of abuse of a dominant position and restrictive agreements. See Articles 2 and 3 of Law of 10 October 1990, No. 287.

¹² The Italian Antitrust Authority has approved the merger between Alitalia and Air One with decision No. 58 of 3 December 2008.