

Amendments to Italian Rules Applicable to Insolvencies of Large Companies

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In connection with the current attempts to rescue Alitalia, the troubled Italian airline, on October 27, 2008, the Italian Parliament amended¹ insolvency provisions applicable to large insolvent companies² (the so-called “Marzano Law”)³ which were initially put in place to deal with the Parmalat insolvency.

In the essence, the Marzano Law provides for the appointment by the Government of a “commissioner” who is in charge of managing the business of the debtor and formulating a plan of reorganization, to be authorized by the Government⁴ and, to the extent it includes a composition with creditors, to be voted upon by creditors.

This memorandum provides an overview of the recent amendment (the “Alitalia Amendment”).

¹ The amendment was originally introduced by Decree-law No. 134 of August 28, 2008, published in the Italian Official Gazette on August 28, 2008. Under Italian law, a decree-law has the force of law only provisionally, and becomes void *ab initio* if it is not confirmed by a vote of the Parliament within 60 days of its publication, *i.e.*, in the case Decree No. 134, by October 27, 2008. Decree No. 134 was ratified with amendments by the Italian Parliament with Law No. 166 of October 27, 2008, published in the Italian Official Gazette on October 27, 2008.

² Companies with no fewer than 500 employees and aggregate indebtedness of not less than €300 million (including guarantees and collateral securing third-party debt).

³ Decree-law No. 347 of December 23, 2003, as amended.

⁴ This memorandum discusses the changes introduced by the Alitalia Amendment and, therefore, it does not provide an overview of the Marzano Law or a specific analysis of the provisions of the Marzano Law that are not affected by the Alitalia Amendment. Please refer to our alert memoranda dated January 21, 2004 and March 9, 2004 for a description of the Marzano Law. Do not hesitate to contact us should you wish to receive copies of these memoranda.

I. Forms of Reorganization

Prior to the Alitalia Amendment, the Marzano Law procedure was only available to companies pursuing a reorganization plan aimed at restructuring the company as a going concern (a “Restructuring Plan”). The Alitalia Amendment has expanded the availability of the Marzano Law Proceedings to cases where the commissioner’s plan entails instead the total or partial divestiture of the debtor’s assets to third-party purchasers, whether as a whole or as one or more lines of business (a “Divestiture Plan”).⁵

II. Extension of Proceedings to Corporate Group

A Marzano Law procedure initiated with respect to a certain debtor (the “Main Debtor”) may, on certain conditions, be extended to other insolvent entities within the same corporate group, even where these other entities do not meet the relevant eligibility requirements on a stand-alone basis. The Alitalia Amendment specifies that the Main Debtor’s corporate group for these purposes includes entities in which the Main Debtor owns an equity interest (even if only a minority stake) and that provide “substantially all of their services” to the Main Debtor, where such services are necessary for the Main Debtor’s business. Such entities may thus be made subject to the Marzano Law procedure together with the Main Debtor.⁶

III. Special Regime for Companies Providing Essential Public Services

The Alitalia Amendment laid down the following special rules for companies that provide so-called essential public services (“Public Services Companies”).⁷

A. Manner of Disposal

Unlike under the general Marzano Law regime, which requires any dispositions to be made through an auction process, the Alitalia Amendment permits the disposition of

⁵ For special rules applicable to companies providing basic public services, *see* Section III. below.

⁶ In the Alitalia case, this rule was ostensibly designed to include in Alitalia’s Marzano Law procedure also Alitalia Servizi S.p.A., a company only 49% owned by Alitalia, which provides to Alitalia certain aircraft maintenance, ground handling and call center services.

⁷ The Alitalia Amendment does not define what services constitute “essential public services” for these purposes. However, it is plausible that the notion largely coincides with that contained in Law No. 146 of June 12, 1990, the Italian statute governing labor strikes in the context of essential public services. That statute defines “essential public services” as those necessary for the enjoyment of certain civil rights protected by the Italian Constitution such as the right to life, health, liberty, security, education, travel and communication.

assets of Public Services Companies through private negotiations. In case of dispositions through private negotiations, the consideration must be at least equal to the market price of the assets as determined by a primary financial institution appointed by the Government.⁸

B. Applicability of Italian Antitrust Rules

The Alitalia Amendment provides that any concentrations involving a Public Services Company, carried out in the context of a Marzano Law procedure by June 2009, inherently satisfy fundamental public interests and, as a result, are exempted from the need to obtain clearance from the Italian Antitrust Authority (*Autorità Garante della Concorrenza e del Mercato*, “AGCM”) under the domestic merger control regime.⁹

Nonetheless, the parties must formally notify the AGCM of these transactions, together with a package of behavioral measures aimed at reducing the risk of unjustifiably unfair contractual practices. Moreover, the AGCM must fix a term (which may not be shorter than three years) within which any “monopoly resulting from such transactions must be terminated.”

C. Partial Transfers of Assets and Employees

Finally, the Alitalia Amendment introduced additional flexibility in the determination of which assets and/or employees of a Public Services Company will be transferred to a third-party purchaser. Normally, a Divestiture Plan entails the total or partial divestiture of the debtor’s assets to third-party purchasers, whether as a whole or as one or more lines of business. Also, all employees belonging to a distinct business or line of business are required to be re-employed by the purchaser, unless the commissioner and the trade unions agree on a partial transfer of employees.

The Alitalia Amendment allows the commissioner of a Public Services Company, in the context of a Divestiture Plan, to carve out portions of a distinct business or business lines and determine which employees of such business or business lines are to be transferred

⁸ Note that, as a matter of caution, a private sale of assets by a Government-controlled entity should in any event be notified to the European Commission in order to allow the Commission to assess whether the sale involves the receipt of State aid by the selling debtor or the purchaser, and should not be implemented until and unless the Commission decides not to raise objections with respect to the transaction (*see* European Commission, XXIIIrd Report on Competition Policy, Brussels-Luxembourg, 1994, paragraphs 402-404).

⁹ This provision may only apply to concentrations which do not fall within the exclusive jurisdiction of the European Commission under the EU Merger Control Regulation. Further, Italian antitrust rules banning anticompetitive agreements and the abusive exploitation of dominant positions (namely Sections 2 and 3 of Law No. 287/90) remain applicable.

to a third-party purchaser, thus permitting partial transfers of assets, as well as partial transfers of employees even without the consent of the trade unions.

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