

May 2009

The New Extraordinary Administration Proceedings for Large Insolvent Companies in Italy

Gabriella Covino and Rita Gismondi – Gianni, Origoni, Grippo & Partners (Italy)

The Italian extraordinary administration proceedings (the “**EA**”) is both a court and an administrative-directed procedure available to large insolvent companies and aimed at protecting the company’s assets, goodwill and employees through the continuation, reactivation or conversion of business activities.

The EA is ruled by the Italian Law Decree no. 347/2003 as subsequently amended (the so-called “**Marzano Law**”), which was enacted in connection with the Parmalat collapse and has been recently amended in order to face the insolvency status of certain Alitalia group companies (*i.e.*, Alitalia – Linee Aeree Italiane S.p.A., Alitalia Express S.p.A., Volare S.p.A., Alitalia Servizi S.p.A. and Alitalia Airport S.p.A).

In particular, the latest amendments (i) deal with the restructuring of companies performing their activities into sectors of essential public utility services, when the crisis is not only financial, but also of an industrial nature, and (ii) focus on the continuation of the business activities of the entities admitted to the EA. More recently, the EA has also been applied to the Ittierre Group, one of the leading players in the luxury goods sector, that designs, produces, and distributes high-quality products under fully owned brands (Gianfranco Ferré, Malo, and Extè) or under license agreements (VJC Versace, Versace Sport, Just Cavalli, C’N’C Costume National, and Galliano). The main features of the EA are highlighted below.

1. Requirements for admission to the EA

The new EA is applicable to large insolvent companies having (i) not less than 500 employees for at least one year, and (ii) debts, including those arising from the issuance of guarantees, for an aggregate amount of at least 300 million Euro. In case of a group of companies, once the parent company has been admitted to the EA, also the other insolvent companies belonging to the same group may be involved in such insolvency procedure, even though they do not meet the above dimensional and indebtedness requirements. In particular, the notion of “*group of companies*” includes also those companies which are linked, in a substantially exclusive way, by contractual relations with the company admitted to the EA for the supplying of services necessary to the performance of the relevant activities.

On a formal standpoint, under the EA the insolvency proceedings are separate and distinct for each legal entity of the group and creditors are paid on the basis of the assets and liabilities *ratio* of each legal entity. Indeed, creditors are entitled to file proof of claims regarding the whole amount of their credit with respect to each of their debtor’s estate.

The extension of the EA to other group companies is mainly aimed at ensuring a common management of the insolvency proceedings within the group, in so far as this is appropriate to make easier the objectives of the EA through the economic or production relationships existing between the group companies. Accordingly, as a matter of fact, the proceedings opened for each insolvent entity of the group, although separate, would be coordinated and managed on a common basis, e.g. in relation to strategic management decisions, sale of certain assets and businesses, possible proposal of composition

with creditors (which could be the same for all the insolvent entities of the group admitted to EA, like in the Parmalat case).

2. Main procedural steps of the EA

The EA requires that the company wishing to enter the procedure shall file both an application to the Italian Minister for Economic Development (“**MED**”), and a petition to the competent bankruptcy Court. The MED shall decide on the admission of the insolvent company to the EA and appoint one or three extraordinary commissioner(s), while the Court shall ascertain the state of insolvency of the company. Once the insolvent company is admitted to the EA, creditors are no more entitled to start and/or continue any enforcement and/or cautionary proceedings (rule similar to the “automatic stay”).

3. The Plan

The EA is based on a plan aimed at either the (i) restructuring of the economic and financial situation of the company, or (ii) sale of the company’s assets, which may imply, for those companies performing their activities in sectors of essential public utility services, also the assignment of pending contracts to a third party. In particular, under the new Marzano Law the choice of the purchaser of the company’s assets (and assignee of the relevant pending contracts) would be made directly by the extraordinary commissioner(s), on the basis of the following criteria:

- a) the purchaser/assignee shall guarantee the midterm continuation of the business activities, the rapidity of the intervention and the fulfilment of the requirements provided by the domestic and European applicable legislation; and
- b) the purchase price offered shall not be lower than the market price, as resulting b) from the report drafted by a leading and independent consultant.

In light of the above, in the framework of the Alitalia case, the extraordinary commissioner was authorized by the MED to the sale/assignment of certain assets and contracts in favour of CAI – Compagnia Aerea Italiana S.p.A. (“**CAI**”), a company established by certain major Italian industrial and financial investors, by means of private negotiations. This is one of the main new features of the new EA. In particular, the agreement for the sale of assets and contracts refers to, among others:

- assets: (i) aircrafts; (ii) rights of landing and take-off; (iii) trademarks and domain names; (iv) know-how;
- contracts relevant in order to guarantee the air transport service without interruption (e.g., aircrafts leasing contracts, supplying contracts); and
- credits and debts concerning the above contracts.

With reference to pending contracts in which the insolvent company is a party, the new law provides that the same would continue to be effective, until the extraordinary commissioner(s)’s decides to continue or terminate the same. In this respect, the extraordinary commissioner(s) may terminate the pending agreements at his sole discretion and at any stage of the EA.

4. The possible proposal of composition with creditors

The plan filed under the EA may provide for:

- restructuring of debts and satisfaction of creditors’ claims through any technical or legal means, including assumption of debts, mergers or other corporate transactions: in particular, the composition can allow for the allocation to creditors or classes of creditors, or companies in which they have holdings, of stock/shareholdings, quotas or bonds, including bonds convertible into shares, or other financial instruments and debt instruments;
- the transfer of the assets of the debtor to a contracting party (the so called “*assuntore*”);
- the division of creditors into classes, according to their legal position and uniform economic interests; and
- different treatment for creditors belonging to different classes.

The above legal remedy is a clear example of the new approach of the Italian insolvency regime, which is oriented to find arrangements between the financially troubled or insolvent companies and relevant creditors and based on more flexible legal tools.

5. Other new features of the new EA

Among the new interesting features of the new law is the exemption from any Italian Antitrust Authority authorizations for concentrations concerning companies performing their activities into sectors of essential public utility service and admitted to the EA. In any case, said companies shall give advance notice to the Italian Antitrust Authority, jointly with a proposal for suitable measures in order to prevent the risk of imposition of prices or other contractual conditions unjustifiably burdensome for the consumers following the execution of the operation. The Italian Antitrust Authority may authorize said measures with any relevant modifications and integrations that may be deemed necessary, and it may impose a term (in any case not shorter than three years) within which possible positions of monopoly must cease. Furthermore, such companies are entitled to maintain, for a six-month period from the admission to the EA, any authorizations, certifications, licenses, concessions or other deeds or titles granted by the competent Authorities for the execution and the management of the relevant activities.

In its whole, the new law now seems to provide a more flexible regime for companies under EA and wider powers to the extraordinary commissioner in order to meet the needs of the reorganization and restructuring of the insolvent companies. Indeed, the new EA seems to be a more debtor friendly proceeding, being it the main purpose of same to keep on going and running the company, as well as to protect the business and the employment.

However, with particular reference to the Alitalia case, the effects of the proposed plan as well as the timing of relevant distributions are still uncertain, in particular with reference to the *recovery ratios* for the Alitalia creditors (especially unsecured creditors and bondholders).

Time will tell if the legal framework has been changed enough in Italy to truly facilitate corporate restructurings, as well as to satisfy creditors' interests.