

# THE RESTRUCTURING PLAN AND THE ROLE OF FOREIGN INVESTMENTS IN THE ITALIAN SYSTEM

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## INTRODUCTION

Why should investors still be interested in Italy? With the collapse of some of the biggest Italian corporations, like Alitalia and Ilva, now is the time to rethink the role of foreign investments in the country. This Article seeks to demonstrate the suitability of regulations for establishing a restructuring plan, specifically targeting those regulations meant to harmonize market prerogatives with public interests during a time of economic crisis. In particular, this Article explores the interplay between corporate contingencies

and the role of the public administration in the pursuit of a dynamic governance strategy for the Italian economic system using the inductive method.<sup>1</sup>

Recent reforms in the Italian insolvency regulatory framework, with ongoing amendments on restructuring plans, have created momentum for a reorganization of domestic corporate strategies vis-à-vis investor demands. Drawing lessons from the Italian experience, this Article challenges traditional ways of approaching bankruptcy proceedings and offers a contextually richer understanding the advantages to restructuring plans.

A restructuring plan in the Italian domestic legal system through a ‘forward-looking’ strategy aims to achieve a fresh start for debtors’ business affairs. As a result, the advantages to undertake a restructuring plan is that an economic balance can be preserved through a less formal and more flexible tool as opposed to judicial intervention, which is typical in bankruptcy procedures. In this fashion, the restructuring plan could encourage broader state engagement in times of economic crisis, aiming to promptly and effectively address market prerogatives and public interests.

This study will shed light on the way the Italian business reorganization process is aimed at fostering growth and economic stability. Determining how a new legal framework could attract foreign investment is key to assessing success in the Italian model. In this respect, not only may restructuring plans serve as a basis for

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<sup>1</sup> The inductive method represents a preferred theory in contemporary international law. See William Thomas Worster, *The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches*, 45 GEO. J. INT'L L. 445 (2014). This method aims to garner inferences from particular events, acts, or phenomena in order to derive a general rule. Whether it is impossible to draw verdicts on the inferences that were ascertained, the validity of the conclusion lies on the quality of evidence used to support it. See John Vickers, *The Problem of Induction* § 2, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., rev. ed. 2010), <http://plato.stanford.edu/entries/induction-problem/>. In order to provide adequate and genuine evidence, the Article takes into account emblematic cases of corporate contingencies with regard to the Italian economic system, in order to support the analysis on restructuring models.

economic revival, but also as a bulwark for social protection.

## I. Background

### A. Restructuring Plans: A ‘Forward-looking’ Model

Restructuring plans represent a concrete legal tool for public intervention in the economy. These plans not only aim at preserving the productive body of the corporation, but also ensure job security in order to promote economic equilibrium.<sup>2</sup> The management of the ongoing economic crisis would be best taken out through these ‘forward-looking’ models, which have two central goals. On one hand, such a model aims at promoting continuity in business activity through the attraction of foreign direct investment (“FDI”). On the other hand, it fosters built-in defenses for the domestic system through the recovery of production capacity and social protection, which ultimately support job security. As a result, forward-looking restructuring plans support national and international core business goals while also creating a fertile legal and administrative ground for foreign investors.

Restructuring is one strategy for corporations to avoid a total termination of their business, while also achieving economic continuity in the market. This is a public policy that aims to mitigate economic and social consequences, while negotiating different positions taken by investors and owners that hold company equity, as well as lenders and creditors who control debt. The rationale is to provide an effective and prompt solution to an emergency in the corporate condition.<sup>3</sup>

The restructuring process entails radical reforms in a

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<sup>2</sup> See PATRICK A. GAUGHAN, *MERGERS, ACQUISITIONS, AND CORPORATE RESTRUCTURINGS*, 433 (6th ed., 2015) (analyzing restructuring plans in bankruptcy as a creative corporate finance tool, posing as an alternative to liquidation).

<sup>3</sup> Colin Anderson & David Morrison, *The Commencement of the Company Rescue: How and when does it start?*, in *INTERNATIONAL INSOLVENCY LAW: THEMES AND PERSPECTIVES*, 83, 83–85 (Paul J. Omar ed., 2008) (analyzing the rise of the so-called “rescue culture” and the determination of a rescue regime in insolvency procedure).

corporation's organization and structure in order to address serious financial and operational issues that could lead to shut down or liquidation. During this process, the organization's ownership changes and new contractual relationships are formed with creditors, debt holders, shareholders, employees, and other stakeholders. Ideally, restructuring will lead to the creation of businesses that are more likely to attract FDI with sound policy and regulatory framework supporting them. This ultimately revives the corporation to be a productive and profitable entity. Policymakers have struggled with large corporate business crises, as they hold an endemic risk tied to industry and large-scale unemployment. In other words, this is a public policy problem that needs to be addressed with appropriate legal tools, driven by flexibility and urgency.

Despite their relevance, restructuring plans have hardly been implemented through organic domestic regulation in response to a major corporate business crisis. Instead, such situations have historically been deferred to *ad hoc* laws for singular enterprises about to collapse. Both the rationale and effects of restructuring plans, with regard to 2007-8 global economic crisis, have rarely been the subject of research by international scholars. Within this framework, a "rescue culture" has emerged as demonstrated by the recent guidelines on insolvency authored by UNCITRAL and the World Bank.<sup>4</sup>

The traditional legal instruments that have dealt with business crises are grounded in bankruptcy law, which defers to the judiciary to determine the competence of the corporation's dismissal. Threats of another global economic crisis establish the need for different responses, as well as more effective and prompt solutions. In this

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<sup>4</sup> See IAN F. FLETCHER, *INSOLVENCY IN PRIVATE INTERNATIONAL LAW* 500–503 (2d ed., 2005) (on the quest for international standards and principles in insolvency procedures, set out by the major international institutions, as UNCITRAL or the World Bank in 1999); see also TERENCE C. HALLIDAY & BRUCE G. CARRUTHERS, *BANKRUPT: GLOBAL LAWMAKING AND SYSTEMIC FINANCIAL CRISIS* 96–112 (2009) (analyzing the role of International Financial Institutions in developing a global regulation on bankruptcy for national insolvency systems).

light, domestic policymakers are resorting to new legal instruments like restructuring plans in order to provide corporate executives a stronger role and, in turn, with an augmented power of intervention in domestic markets. Indeed, since financial insolvencies trigger economic and social alarms, it is paramount for governmental authorities to provide quick and prompt answers at the disposal of large corporations.<sup>5</sup>

## B. The ‘Domino Effect’

The problem of the financial instability of large corporations is usually intertwined with cyclical economic crises. As a result, sovereign states have typically faced the issue of relying on *ad hoc* laws in order to intervene in a particular industry or for a particular corporation.<sup>6</sup> As the global financial crisis spread around the world, governments have grappled with the idea of establishing general regulations for corporate restructuring. Not only would a general domestic regulation further an economic purpose in the realm of public policy, but it would also tackle the social side effects embedded in the crisis.<sup>7</sup>

With public interests at stake, the intervention of government entities is necessary for complete economic recovery and the safeguarding of social values. In fact, contingencies of large corporations trigger significant repercussions, almost like a domino effect. The crisis generates an economic breakdown amplified with effects on all the ancillary activities and subsidiaries of such large multinational corporations.<sup>8</sup> Additionally, the crisis produces severe

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<sup>5</sup> See, e.g., RODRIGO OLIVARES-CAMINAL ET AL., DEBT RESTRUCTURING 36 (2011) (analyzing the legal framework of restructuring plans); see also Christine M. Cumming, *Managing Crises Without Government Guarantees: How Do We Get There?*, in OECD Journal: Financial Market Trends 2011, No. 2 (2012), 15-7 (analyzing the role of government in managing the financial crisis).

<sup>6</sup> See FLETCHER, *supra* note 4, at 137–139 (on the evolution of insolvency regulation in private international law, from the sphere of natural persons to business corporations).

<sup>7</sup> See GERARD MCCORMACK, CORPORATE RESCUE LAW: AN ANGLO-AMERICAN PERSPECTIVE 209 (2008).

<sup>8</sup> See Jongho Kim, *Corporate Restructuring Through Spin-Off Reorganization Plan: A Korean Case Study*, 23 PACE INT'L L. REV. 41, 43 (2011).

societal dilemmas, the most salient of which being unemployment.<sup>9</sup> Therefore, the countless consequences of large corporate crises are the issue motivating policy-makers find holistic economic and social policy solutions for these large-scale economic problems.<sup>10</sup>

### **C. Dichotomy Between Restructuring Plans and Bankruptcy Procedures**

The distinction between bankruptcy procedures and restructuring plans lies within the rationale of each method. While the former is oriented to provide credit protection, the latter is focused on business continuity. For example, bankruptcy regulation is primarily based on credit protection and only through composition with creditors, it allows for the continuation of the business activity. Restructuring plans on the other hand, utilize economic and social safeguards with the expulsion of the executive management from the business entity, to help deliver a revitalized organization to new investors.<sup>11</sup> In this framework, analyzing the experience of the U.S. legal system, through the standards embedded in Chapter 7 and Chapter 11 of the United States Bankruptcy Code, may serve as an example to point out the main features and differences between bankruptcy procedures and restructuring plans.

Bankruptcy procedure is a legal mechanism purely based on liquidating the corporation in a solvency crisis. Interpretation of the meaning of crisis can range from temporary difficulties to a full state of insolvency. It aims to completely dismantle the enterprise, through the sale of its assets and with the consequent banishment of the corporation from the market. These procedures are designed to

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<sup>9</sup> See e.g., LAURA HORN, REGULATING CORPORATE GOVERNANCE IN THE EU: TOWARDS A MARKETIZATION OF CORPORATE CONTROL 168–69 (2012).

<sup>10</sup> See Anderson & Morrison, *supra* note 3, at 87–90 (analyzing the discipline of companies rescue through a comparative perspective, shedding light on the British, Australian, and American systems).

<sup>11</sup> See Daniel Hayek, Christina Meyer & Chantal Joris, *Restructuring over Liquidation*, 48 INT'L FIN. L. REV., 48, 48–51 (2015) (analyzing the dual choice between restructuring and liquidating corporations in distress).

seek protection for creditors.<sup>12</sup>

Bankruptcy agreements consist of a negotiation settlement, in which the decision to continue the business activity is not imposed by law, but is left to the parties involved to determine. In other words, the balance between liquidation and continuation is a private decision once the status of liability is settled. In the latter case, parties shall demonstrate that continuation is practical to the satisfaction of creditors.<sup>13</sup>

Regulation for restructuring plans take a completely different approach. For example, protection of the production system along with the continuity of business prevail over the interests of the creditors. Therefore, through a reconciliation of the interests at stake, the liquidation of corporate assets is mitigated with an eye towards market prerogatives and other public needs.

Restructuring plan regulations also have a special procedure in which domestic policymakers tend to balance the interests at stake while prioritizing the preservation of the business entity. To be found eligible under the restructuring plan regulations, the enterprise must be in a state of insolvency. In this situation, insolvency is defined as a non-transitory state in which the entrepreneur is unable to regularly fulfill corporate obligations.<sup>14</sup> Once the enterprise is found to be eligible, the plan can be activated through different scenarios; either as a result of the failure of private negotiations, or as a default provision. However, private agreements are not always sufficient to grant a business continuation of the

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<sup>12</sup> Harry Rajak, *The Culture of Bankruptcy* 3, 17–25, in INTERNATIONAL INSOLVENCY LAW *supra* note 3 (analyzing bankruptcy regulation through a comparative perspective, describing the evolution of the British and the American systems).

<sup>13</sup> See generally GAUGHAN, *supra* note 2, at 433 (analyzing when bankruptcy is the best option); see also CHRISTOPHER A. WARD, ET AL., AMERICAN BANKRUPTCY INSTITUTE, THE CHIEF RESTRUCTURING OFFICER'S GUIDE TO BANKRUPTCY: VIEWS FROM LEADING INSOLVENCY PROFESSIONALS 10 (2013).

<sup>14</sup> LAWRENCE WESTBROOK, ET AL., A GLOBAL VIEW OF BUSINESS INSOLVENCY SYSTEMS 65 (2010) (analyzing liquidation procedures and the role of liquidators in domestic systems from a comparative perspective).

enterprise.<sup>15</sup>

In conclusion, external and internal considerations must be taken into account during large economic crises that negatively impact major business entities. If the business executives lose their legitimacy or credibility, or if they are no longer willing to continue managing the enterprise, then it is the role of the country's regulatory system to intervene through a restructuring plan to protect the public interests at stake. In other words, restructuring regulations are a set of domestic policies that preserve productivity and employment stability, while maintaining the balance between the interests of all the relevant stakeholders, not solely creditors.<sup>16</sup> The framework created thus far demonstrates how restructuring plans can re-establish the economic balance of corporations in crisis, and how tailored regulatory frameworks can attract FDI into domestic systems.

## II. Analysis

### A. The Italian System

The regulation of restructuring plans has a long tradition in the Italian system, where it has been regulated for nearly forty years with different models being adopted over that time period. In recent times, such regulation caught the attention of investors worldwide, as the financial crisis triggered new challenges for the Italian economic system.<sup>17</sup> The cases of ILVA and Alitalia, considered amongst the largest domestic Italian corporations, demonstrate the

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<sup>15</sup> See MCCORMACK *supra* note 7, at 251.

<sup>16</sup> See MARK S. SCARBERRY ET AL., BUSINESS REORGANIZATION IN BANKRUPTCY: CASES AND MATERIALS 812 (4th ed., 2012).

<sup>17</sup> See Tiziana Del Prete & Matteo Smacchi, *Italy*, in THE RESTRUCTURING REVIEW, 152, 152 (Christopher Mallon ed., 7th ed., 2014); *see e.g.*, Stefania Pacchi Pescucci, *L'amministrazione Straordinaria delle Imprese di Rilevanti Dimensioni [Restructuring Plans of Large Corporations]*, in TRATTATO DI DIRITTO DELLE PROCEDURE CONCURSUALI, 833, 833 (U. Apice ed., 2011); *see also* Vittorio Zanichelli, *L'amministrazione Straordinaria [The Restructuring Plans]*, in FALLIMENTO E ALTRE PROCEDURE CONCURSUALI, 2010, 2074 (Giuseppe Fauceglia & Luciano Panzani, eds., 2009).



need for an effective policy and regulatory framework on restructuring plans. After analyzing the evolution of the Italian system, this Article will focus on current reforms, which are deemed necessary to create a sound framework for attracting FDI into Italy.

## B. The Italian Regulatory Framework

In 1979, the Italian Parliament introduced for the first time a regulation on business crises of large corporations.<sup>18</sup> In order to make it compatible with the European Union framework on competition law in the late 1990s, the regulation underwent a revision process. On June 17, 1999 the European Court of Justice found the Italian law incompatible with European standards and specifically, with the regime on competition and state aid.<sup>19</sup> The EU system does not allow automatic state aid, especially without any sort of distinction between meritorious and unworthy enterprises.

Following the Court's ruling on compliance with the EU legal framework on competition, Italy further revised the regulatory system with Legislative Decree no. 270 in 1999.<sup>20</sup> This was the so-called "Prodi" procedure, named after Minister Romano Prodi. With this reform, Italy opted for a model that required reliance on the judiciary to administer the plan.<sup>21</sup> Italian courts were then pressed to decide, whether the application of the Prodi procedure was compliant with the already existing restructuring regulatory system. The Italian Constitutional Court affirmed that the new procedure was compliant and that governmental authorities should both implement and manage the restructuring plan.<sup>22</sup>

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<sup>18</sup> The first regulation on restructuring plans for large enterprises was adopted with the Law Decree 30 January 1979, n. 26 – converted with modifications into the Law no. 953 of 3 April 1979. *See* Decreto Legge 3 aprile 1979, n.95, G.U. Apr. 4, 1979, n.94 (It.).

<sup>19</sup> Case C-295/97, *Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA v. International Factors Italia SpA*, 1999 E.C.R. I-03735.

<sup>20</sup> D.L. n.94/1979 (It.).

<sup>21</sup> *See* Steffen Koch, *Restructuring: The German Approach*, 3 *INSOLVENCY & RESTRUCTURING INT'L*, 27, 28 (2009) (analyzing the judiciary-based model, also with regard to its application in the German system).

<sup>22</sup> The Italian Constitutional Court analyzed the compliance of the procedure of the Law Decree n.26/1979 under the standards of the Italian Constitution. *See*

According to the restructuring regulation, only three classes of actors are authorized to initiate such procedures, including: the business' executives; one or more creditors of the enterprise; or the public prosecutor, *ex officio*.<sup>23</sup> Once the request to restructure is received, the Court issues a decision to declare the state of insolvency. The Court then appoints a judicial committee, determining whether the management of the enterprise should be left to the insolvent entrepreneur or entrusted to the latter body – composed of either one or three commissioners – previously designated by the Ministry of Economic Development.<sup>24</sup>

After declaring a state of insolvency, the Court opens an observation period, which consists of two different phases: First, there is a period of 30 days granted to the judicial commission; then, there is another period of 30 days for the Court to decide whether the situation is ripe to begin the restructuring plan, based on the opinion of the Ministry of Economic Development and observations presented by creditors.<sup>25</sup>

In its report, the judicial committee indicates the causes of the state of insolvency and expresses, with reasoned assessment, that either current conditions support the implementation of a restructuring plan or do not. The report carries out a prognosis of the situation and methods for recovering the economic balance of the business activity. Moreover, the document includes an analysis and estimate of the corporation's assets, a list of creditors, and an

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Corte Cost., 11 novembre 1987, n. 401; *see also* Corte Cost., 20 dicembre 1982, n. 244 (as the Court stated, compliance of the regulation with restructuring plans is grounded in the rationale of rehabilitation, which is of paramount interest to all relevant stakeholders, including creditors).

<sup>23</sup> Decreto Legislativo 8 luglio 1999, n.270, art. 2, G.U Aug. 9, 1999, n.185 (It.) (regulating the procedure for invoking restructuring plan in the Italian system).

<sup>24</sup> *See* Giorgio Oppo, *Profilo Sistemático dell'Amministrazione Straordinaria delle Grandi Imprese in Crisi* [System Profiles of Restructuring Plans of Large Corporations in Crisis], in *VIRIVISTA DI DIRITTO CIVILE*, 233 *et seq.* (1981) (discussion about the procedural aspects of the regulation).

<sup>25</sup> *See* Renato Rordorf, *Le Procedure Concorsuali e la «Par condicio» fra Diritto Positivo, Usi Alternativi e Prospettive di Riforma*, *LA TUTELA DEI DIRITTI SOGGETTIVI NELLE PROCEDURE CONCORSUALI*, QUADERNI DEL C.S.M., n.25, 15 *et seq.* (1989).

indication of their respective interests. This preliminary procedure gives grounds for the Court to formulate its own assessments regarding the measure to be implemented.<sup>26</sup>

The Court, after analyzing the report of the judicial committee, has two options.<sup>27</sup> Given suggestions to recover the economic balance, the Court could start the restructuring plan of the business entity; otherwise, it could issue a bankruptcy decree.

If the Court decides to establish a restructuring procedure, then government agencies were authorized to take action. The Ministry of Economic Development, within five days, appoints an extraordinary committee composed by one or three Commissioners,<sup>28</sup> typically constituted of the same individuals who had already served as judicial commissioner.<sup>29</sup>

In 2003, the Italian parliament passed a reform to the “Prodi” procedure, moving to an executive-managed model. The so-called “Marzano” procedure, named after the proposing Minister Antonio Marzano, established “urgent measures for industrial restructuring of large enterprises in crisis in order to intervene in a concrete case of emergency.”<sup>30</sup> This reform was initiated in response to problems within the Italian agricultural industry, as swift public intervention was needed.<sup>31</sup>

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<sup>26</sup> See e.g. Pescucci, *supra* note 17.

<sup>27</sup> D. Lgs. n. 270/1999, arts. 27–30 (regulating procedural aspects and the role the Judiciary plays in it, authorizing restructuring plans).

<sup>28</sup> *Id.* art. 38 (regulating the composition and tasks of the extraordinary committee).

<sup>29</sup> See Giorgio Marinucci, *La nuova disciplina dell'amministrazione straordinaria delle grandi imprese in stato di insolvenza* [The New Regulation on Restructuring Plans of Large Corporations in State of Insolvency], Commentary to D. Lgs. n.270/1999, 299 (Angelo Castagnola & Roberto Sacchi eds., 2000).

<sup>30</sup> Decreto Legge 23 dicembre 2003, n.347, Dec. 24, 2003, G.U. n.298 (It.).

<sup>31</sup> See generally Stefano Ambrosini, *Fallimento, Soluzioni Negoziato della Crisi e Disciplina Bancaria dopo le riforme del 2015 e 2016* [Insolvency, Negotiated Solutions of Crisis and Banking Discipline after 2015 and 2016 Reforms], in STRUMENTI DEL DIRITTO FALLIMENTARE, 779 (A. Signorelli ed., 2017).

This new model incorporated the need for swift and timely interventions. Under this reform, executive authorities, following a request to public authorities, could now autonomously decide whether the conditions for the restructuring plan are met and how to deal with the crisis. Shifting away from the prior model, the Italian parliament designed a relevant role for government to play in such plan. Under this framework, the Ministry of Economic Development was entrusted as a third and impartial authority to manage the procedure. Indeed, government intervention seemed to better suit the challenges faced by large corporations, where social and economic principles are more centrally at stake.<sup>32</sup>

Under the Marzano reform, judicial administration is set aside from the procedure for three reasons. First, managing business crises does not fall under the Italian judiciary's mandate. Second, the judiciary lacks the adequate tools for crisis management as the length of judicial procedures do not correspond well with the need to achieve a swift resolution and appreciation of social interests, for which public administration may better serve. Third, only the government has the instruments to promote industrial restructuring and conversion processes.<sup>33</sup>

Pursuant to this new reform on restructuring, state intervention in crisis management is tailored to the impact that the crisis has in the public sector. Thus, the greater the impact is, the quicker the intervention should be. With a reasonable pleading and appropriate documentation, corporations dealing with financial emergencies may request the Court for insolvency status and the Ministry of Economic Development for the immediate admission to the

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<sup>32</sup> See ROBERTO MARRAFFA, AMMINISTRAZIONE STRAORDINARIA DELLE GRANDI IMPRESE IN CRISI E TUTELA DEI CREDITORI [RESTRUCTURING PLANS OF LARGE CORPORATIONS IN CRISIS AND CREDITORS' PROTECTION] 6–7 (2012) (analyzing the role of the government in the procedure); see generally Luca Ponti & Francesca Spadetto, *L'amministrazione Straordinaria Delle Grandi Imprese In Crisi* [Restructuring Plans of Large Corporations] (2006) (highlighting the need for alternative insolvency procedures to bankruptcy for large corporations).

<sup>33</sup> See Fabrizio Di Marzo & Francesco Macario, *Amministrazione Straordinaria delle Grandi Imprese in Stato di Insolvenza* [Restructuring Plans of Large Corporations in Insolvency Status], in TRATTATO DELLE PROCEDURE CONCORDI, 601 (A. Jorio, B.N. Sassani eds., 2017).

restructuring plan. In order to identify the subjects eligible for restructuring plans, current Italian procedures set out two requirements based on employment features and patrimonial structure.<sup>34</sup> First, the corporation shall have more than two hundred subordinate employees for at least one year. Second, it holds total amount of debts in the amount of two-thirds or more of both total assets and revenues from sales and services in the previous financial year. In the case of a holding company, the activation of a restructuring plan does not extend to the entity's other companies. Conditions for access to the restructuring plan for a complete holding company are determined in the prospects for recovering economic balance, or the opportunity to successfully manage the insolvency of the group.<sup>35</sup> Nonetheless, once the Ministry of Economic Development receives a pleading a holding company, it retains the authority to directly admit the holding company to the restructuring plan.

Designing the restructuring plan is a task given to the same committee appointed by the Ministry of Economic Development, under the supervision of the Ministry itself. This operation must be tailored to comply with domestic industrial policy guidelines, in order to safeguard the unity of business entities, while also taking the interests of creditors into account. Within 60 days from the first decree, the committee submits a final draft of the restructuring plan to the Ministry of Economic Development.<sup>36</sup> Within 15 days from the executive decree, the Court declares the insolvency status of the corporation.

Throughout the execution of the plan, dialogue between the committee and the Ministry is maintained through regular reports on the business performance of the corporation submitted every three

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<sup>34</sup> D.L. n.347/2003, art. 2 (It.) (identifying the subjects eligible for restructuring plans).

<sup>35</sup> See Nicolò Baccetti, *Requisiti per l'ammissione [Requirements for Admission]*, in LA LEGGE MARZANO, COMMENTARIO, 1–45 (Angelo Castagnola & Roberto Sacchi eds., 2006) (analyzing the prospects of recovering as a requirement for the procedure).

<sup>36</sup> D.L. n. 347/2003, art. 54 (It.) ((defining the procedural requirements necessary to issue a restructuring plan).

months, including a status of implementation of the program. During this time, the committee is entitled to take control of the enterprise's management by administering corporate assets.<sup>37</sup> Eventually, at the end of the procedure, a final report indicates whether the objectives were met, or whether the procedure failed. If, over the course of the implementation period, the restructuring plan is found to no longer be effectively applied, the committee can request the Court to convert the restructuring plan into a bankruptcy procedure.

### C. Case Studies: ILVA and Alitalia

This analysis will now shed light on the state of emergency for two major Italian corporations, ILVA and Alitalia. Considered to be economic backbones for the national economic system, these corporations serve as empirical studies to benchmark the role of restructuring plans moving forward.

ILVA is a large Italian corporation with a long standing tradition in the steel sector.<sup>38</sup> Founded in 1905, it helped guide Italy through its industrialization process. Today, the corporation has more than twelve thousand employees, with its main office in Taranto. Since 2015, ILVA has been undergoing a restructuring plan pursuant to the Marzano procedure.<sup>39</sup> The plan encompassed the whole group of ILVA, including subsidiaries in order to reorder and re-launch the industrial potential of the corporation. In line with the purpose of the restructuring regime, the plan has three main goals. First, it aims to safeguard productivity. Since ILVA has a productive structure with several branches across Italy, the restructuring plan seems to be a sound strategy for both local prosperity and the stability of the national economy. Second, it aims to deliver a solid and reliable result that will ensure business prosperity and sustainable growth into the future. Third, it seeks to create a strategic

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<sup>37</sup> *Id.* art. 40 (delimiting the competence of the committee).

<sup>38</sup> ILVA GROUP, <http://www.gruppoilva.com/en> (last visited Sept. 27, 2018).

<sup>39</sup> With the Ministerial Decree of 21 January 2015, ILVA s.p.a. has entered restructuring plan procedures for shifting corporate management under the control of an extraordinary committee, pursuant to the Law Decree no. 347, 2003. See Decreto Ministeriale 21 gennaio 2015 pursuant to D.L. n.347/2003. See also *supra* IIIA.

role for ILVA, not only at the national level, but also in international markets, so that it can interact with foreign partners and attract foreign investors.<sup>40</sup>

The ILVA restructuring plan resulted in an acquisition proposal issued by AM Investco Italy, a joint venture represented by 85% ArcelorMittal and 15% Marcegaglia Group. Following the proposal, and after hearing relevant stakeholders involved in the process on June 5, 2017, the Ministry of Economic Development signed a decree to start adjudication for the ILVA industrial complex.<sup>41</sup> The EU Commission is scrutinizing the validity of this decision under the EU standards on competition law, and it will presumably issue a decision by October 26, 2017.<sup>42</sup>

Established in 1947, Alitalia has more than eleven thousand employees, therefore meeting the requirements to be considered a large corporation under Italian legislation. The company has been going through a long-term financial crisis since 2008, spanning two different regimes of ownership.<sup>43</sup> With continued losses in Spring 2017, the corporation attempted to negotiate an agreement for business recapitalization between the corporate management board and trade unions. Nonetheless, an internal referendum held on April

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<sup>40</sup> *Extraordinary Administration, ILVA GROUP*, <http://www.gruppoilva.com/en/governance/governance/extraordinary-administration> (last visited Sept. 27, 2018).

<sup>41</sup> *See Firmato il decreto di aggiudicazione del complesso industriale del Gruppo Ilva ad Am Investco Italy*, MINISTRY OF ECON. DEV. (Jun. 5, 2017), <http://www.sviluppoeconomico.gov.it/index.php/it/per-i-media/comunicati-stampa/2036649-calenda-firma-il-decreto-di-aggiudicazione-del-complesso-industriale-del-gruppo-ilva-ad-am-investco-italy>.

<sup>42</sup> *See Matteo Menghella, Ilva, contatti Mittal-Arvedi bussa in vista del verdetto dell'antitrust europeo*, IL SOLE 24 ORE (Sept. 23, 2017) [http://www.ilsole24ore.com/art/impresa-e-territori/2017-09-23/ilva-arvedi-bussa-vista-un-no-dell-antitrust--184620.shtml?uuid=AEjYKeYC&refresh\\_ce=1](http://www.ilsole24ore.com/art/impresa-e-territori/2017-09-23/ilva-arvedi-bussa-vista-un-no-dell-antitrust--184620.shtml?uuid=AEjYKeYC&refresh_ce=1).

<sup>43</sup> Alitalia was first acquired by CAI (Compagnia Aerea Italiana) Group in 2009, and then in 2015 it started a joint venture with Etihad Airways, where the latter holds 49% of corporate capital. *See Alitalia*, AIRLINEFILES.COM <http://airlinefiles.com/alitalia?showall=1&limitstart=> (last visited Sept. 27, 2018).

25, 2017 rejected this agreement.<sup>44</sup> As a result of the referendum, and given the financial distress of the corporation, on May 2, 2017 the board filed a request to the Government for a restructuring plan.<sup>45</sup> The Ministry for Economic Development, pursuant to the Marzano procedure, appointed an *ad hoc* committee for the corporation to carry out interim management.<sup>46</sup> Since the Government excluded *a priori* in its declarations, the opportunity to nationalize the company through a public bid process, the committee has been working on a new plan to reposition the corporation in domestic and international markets.<sup>47</sup>

Restructuring plans are necessary for cases like ILVA and Alitalia, two pillars of the Italian economic system. The Government's decision to initiate the plans not only aims to safeguard corporations amongst the largest in the Italian economy, but also to avoid systemic economic risk. Considering the scale of their operations, downward economic and social effects would impact the country not only at the local level, but also on a national scale. In this respect, undergoing a restructuring plan with the intent of attracting FDI may represent a fresh start for these debtors' business affairs. It is therefore essential that Italy secures a legal and administrative framework to establish a fertile ground for foreign investors in respect to these two companies. To this end, the opportunity for reformation of the current restructuring plan regulations is particularly timely and necessary.

#### **D. The Opportunity for Reform and Future Scenarios**

Italian policymakers are currently discussing a reform on

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<sup>44</sup> See Giorgio Pogliotti, *Referendum Alitalia, vince il «no»*, IL SOLE 24 ORE (Apr. 25, 2017) <http://www.ilsole24ore.com/art/notizie/2017-04-24/referendum-alitalia-vince-no-230012.shtml>.

<sup>45</sup> *Comunicato Stampa 2 maggio 2017*, ALITALIA (May 2, 2017), <http://corporate.alitalia.it/it/media/comunicati-sai/2017-05-02.html>.

<sup>46</sup> Decreto 2 maggio 2017, G.U. May 6, 2017, n.104 (It.) *pursuant to* D.L. n. 347/2003 (It.).

<sup>47</sup> See Giorgio Pogliotti, *Alitalia, i Commissari: oltre 600 milioni ancora disponibili*, IL SOLE 24 ORE (Jun. 14, 2017), [http://www.ilsole24ore.com/art/notizie/2017-06-14/alitalia-commissari-oltre-600-milioni-ancora-disponibili--173420.shtml?uid=AEuSnYeB&refresh\\_ce=1](http://www.ilsole24ore.com/art/notizie/2017-06-14/alitalia-commissari-oltre-600-milioni-ancora-disponibili--173420.shtml?uid=AEuSnYeB&refresh_ce=1).



domestic insolvency procedures within the parliament. The Ministry of Justice's commission, established in 2015 by executive decree, was tasked to create proposals for amendments to the current regulation for insolvency procedures. The Ministry of Justice, through its relevant subcommittees and in coordination with the Ministry of Economic Development, aims to provide an organic framework that harmonizes the judiciary's needs with administrative prerogatives in restructuring plans for large corporations in crisis.<sup>48</sup>

The reform integrates provisions contained in Legislative Decree no. 270/1999, or the Prodi procedure, with those embedded in Law Decree n. 347/2003 and subsequent amendments, or the Marzano procedure, for possible regulatory improvements.<sup>49</sup> Based on the principle of transparency, these procedures promote independence and integrity.

The goal is to create a harmonized regulatory framework that is able to foster the revitalization of troubled businesses and solve financial crises for Italian corporations. The subject matter of the reform is limited to large corporations, in order to prevent systemic risks in the domestic economy.

Reforms to the restructuring regulations include procedural steps like structural requirements for corporations to be admitted to a restructuring plan, and the criteria for the appointment of the extraordinary committee. It harmonizes domestic regulation within the EU framework to comply with the EU Commission Recommendation 2003/361/EC set forth on May 6, 2003 which the defined micro, small, and medium sized enterprises, and also raises the minimum number of employees for the corporation to be eligible

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<sup>48</sup> See Luciano Panzani, *Conservazione dell'impresa, interesse pubblico e tutela dei creditori: considerazioni a margine della Proposta di direttiva in tema di armonizzazione delle procedure di ristrutturazione* [Conservation of the Business, of Public Interest and Creditors' Protection: Considerations as a Result of the Proposal for a Directive on Harmonization of Restructuring Procedures], *CRISI D'IMPRESA E FALLIMENTO* (Sept. 11, 2017), <http://blog.ilcaso.it/libreriaFile/977.pdf>.

<sup>49</sup> See Del Prete & Smacchi, *supra*, note 17.

for the plan from 200 to 250.<sup>50</sup> Current quantitative requirements related to the number of employees and the volume of revenues and assets, should not be replaced by qualitative parameters related to the strategic relevance of the corporation within the framework of the national economic system. In this light, the regulation is designed to comply with the EU system and, in particular, with the provisions on competition and state aid.

State aid, pursuant to the meaning of Article 107 (1) of the Treaty for the Functioning of the European Union, is meant to favor certain businesses or certain industries. This framework risks distorting or threatening EU competition while also affecting trade between Member States.<sup>51</sup> As a result, restructuring plans may fall under the restrictions of state aid regulations, as far as it would allow a selective advantage to certain corporations or economic sectors to remain profitable in the market, solely based on a discretionary provision.<sup>52</sup>

The current reform is tailored to adjust Italian restructuring regulation to comply with the the EU framework on competition law. In order to maintain a balanced economic and social framework in the domestic system, and in compliance with the EU system, only cases of relevant downward economic effects of corporate crisis may public intervention be initiated.

This means that the corporation entrusts the government with the authority of corporate management. As an impartial actor, the government is tasked with returning a solid and reliable business

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<sup>50</sup> Commission Recommendation of 6 May 2003, U.N. Doc. 2003/361/EC (May 6, 2003) (recommending that a medium company has less than 250 employees, with an annual turnover that does not exceed 50 million euros and a total annual budget that does not exceed 43 million euros).

<sup>51</sup> See Nikolaos E. Farantouris, *EU Competition Policy on State Aid for Rescuing and Restructuring Companies*, in *THE REFORM OF EC COMPETITION LAW: NEW CHALLENGES* (Ioannis Lianos & Ioannis Kokkoris eds., 2010) (analyzing EU competition standards in light of restructuring legal framework in the common market).

<sup>52</sup> See Case C-295/97, *Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA v. International Factors Italia SpA*, 1999 E.C.R. I-03735; see also Case C-200-97, *Ecotrade Srl v. Altiforni e Ferriere di Servola SpA*, 1998 E.C.R. I-7907.

entity back to the market, cleansed from previous irresponsibility. On the other hand, it also creates a sound administrative and legal environment to allow FDI to enter and thrive in the domestic system.

Rather than having a system based on *ad hoc* laws to provide urgent solutions to individual cases, the Italian parliament is seeking to establish an organic legal and administrative framework for restructuring plans. With an *ex ante* regulation that is in compliance with EU competition standards, it will provide an effective and updated tool to address large corporate crises in the future.

Given the persistence of the financial crisis, Italian policymakers are essential to prevent large corporate crises from having a collateral impact on Italian society. These reforms seek to establish a faster approach to make the current restructuring plan procedures more transparent and less onerous for the corporations.

## CONCLUSION

Since most of the economies affected by the global financial crisis are struggling in restarting growth, structural and institutional reforms are key for the achievement of macroeconomic stability. Restructuring plans have been enacted in economies facing crisis in order to encourage and protect foreign investments. Some countries, like Italy and the U.S., have adopted revised foreign investment laws that offer investors essential guarantees and protections. Based on a program that not only guarantees business continuity, but also safeguards employment rates, restructuring plans aim at returning corporations in crisis to profitability for domestic economic stability. These plans provide foreign investors with a just and equal legal regime, as well as continuous protection. Moreover, restructuring plans are tailored to transform a previously struggling economic entity into a solid, reliable, and safe entity cleansed from its previous debts. Consequently, efforts to improve legislation on foreign investments and current restructuring plans are oriented toward the creation of a legal regime that is consistent with international standards on competition and transparency.