

BOOK REVIEW

I fondi comuni d'investimento. Edited by Pier Giusto Jaeger and Paolo Casella. Milano: Giuffrè, 1984. Pp. xi, 502. Lit. 30,000.

Reviewed by Oscar PODDA *

In the aftermath of the 1981 stock exchange decline, the Italian Parliament passed the Legge 18 marzo 1983 n. 77, "Istituzione e disciplina dei fondi comuni d'investimento mobiliare" [1] [the Act], a law of considerable importance to the capital market. Although its title literally translates as "Institution and regulation of common funds of investment in securities" [2], the Act goes far beyond the regulation of Italian mutual funds [3]. The legislation reorders fundamental norms in the field of securities regulation and broadens the range of control exerted by the Commissione Nazionale per le Società e la Borsa [CONSOB], the commission watching over the stock market.

Since Italy, as a civil law country, does not recognize the concept of trust [4], it was virtually impossible under existing law to create workable parallels to unit investment trusts or open-end investment companies. Legislation was necessary to provide an adequate private law framework, corresponding tax treatment, and adequate forms of governmental control.

Mutual funds offer small investors [5] the opportunity for a diversified portfolio of pooled securities, managed professionally, that is easy to liquidate. According to proponents of the Act, the *fondi* would also represent both a new source of financing for chronically-undercapitalized Italian industries as well as a stabilizing factor for Italian stock exchanges too often shaken by speculation [6]. The Act has therefore attracted considerable interest among lawyers, economists, and financial operators.

I fondi comuni d'investimento is a collection of papers presented at a seminar sponsored by one of the leading Italian law journals, *Giurisprudenza commerciale*. The book does not offer a detailed exegesis of the complete Act [7]. On the contrary, the essays contained in the book address a handful of specific

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issues. The book, nevertheless, deserves mention for the quality and diversity of the authors – economists, accountants, and specialists of criminal, tax, and corporate law – including the former President of the CONSOB, Professor Guido Rossi. In his introductory paper, Professor Rossi suggests that the enactment of additional CONSOB powers over public securities offerings is one of the most significant features of the Act. Under the Act, offerors are now required to register a prospectus conforming to CONSOB specifications [8].

The general concept of security – *valore mobiliare* – is itself a substantially new concept in Italian law [9]. Prior Italian securities law did not regulate *titoli atipici* – securities other than traditional equity shares and bonds. In recent years, *titoli atipici* have grown in importance in the financial market.

The novelty of the Act's subject-matter, enacted as legislation, has given rise to a number of interpretive problems. A preliminary issue, typical for civilian lawyers, involves the legal nature of the *fondi*. For example, alternative characterizations of the *fondi* are (1) co-ownership by the subscribers, (2) "separate" property of the *società di gestione*, or (3) a sort of "autonomous" entity without any "owner" [10]. Nevertheless, it is unlikely that issues of legal classification will present major problems for practitioners absorbed by less theoretical technicalities [11].

Additional issues treated within the book include: the purchases of securities by the managing company in violation of statutory limits that require diversification of the portfolio in order to avoid transformation of the fund into a holding company [12]; the configuration of duties and liabilities of the depository bank [13]; and the impact of the new Act on the issuance of life insurance policies [14].

Given the interdisciplinary focus of the seminar, the accounting [15], tax [16], and criminal [17] law aspects of the *fondi comuni d'investimento* receive extensive coverage. The volume also contains a useful appendix of, inter alia, the text of the Act, relevant regulations, and the report of the Senate Commission for Treasury and Revenue. Minimal attention, however, is given to the impact of the newly-created *fondi* upon international finance and, more particularly, to the problem of *fondi* investment in foreign securities. Indeed, the Italian Government has recognized the importance of these issues. The recent reform of Italian currency regulations [18] exempts *fondi* purchases of foreign stocks and bonds from the requirement of proportionate no-interest deposits at the Bank of Italy [19].

Enactment of the *fondi comuni d'investimento* was the result of over twenty years of debate [20]. When the Act was finally promulgated, several commentators [21] questioned whether the *fondi* were capable of becoming a prominent investment instrument: there was concern as to what effect the *fondi* would have on the Italian capital market. Moreover, it was feared that taxation and the well-known limits of the Italian stock exchange would diminish the effectiveness of the *fondi*. At the time the book was prepared, Professor Jaeger

noted in his foreword that the *fondi* were set to face their first “market test.” Two years after the enactment of the Act, the response of the market seems positive and the *fondi* continue to arouse the interest of investors as well as lawyers.

Notes

- [1] Gazz. Uff. 28 Marzo 1983 n. 85.
- [2] The Italian *fondi* correspond to the American mutual funds, to the French *fonds communs de placement*, and to the Swiss *Anlagefonds*. See generally Pietra, *La disciplina giuridica dei fondi d'investimento mobiliare in alcuni paesi europei*, 1983 Banca, borsa e titoli di credito 534. *Fondi comuni d'investimento* do not differ very much from those of other European countries. The *società di gestione* (managing company) promotes the operation, raises capital through public subscription, and invests it in securities, thereby separating the *fondo comune* from the property of the company and of the subscribers. These subscribers obtain "certificates" representing their share of the common fund. All the operations of purchase and sale of securities are carried out by a bank (*banca depositaria*), which also physically hosts the "common fund." Under the Act, *fondi* are open-end mutual funds. Control and regulatory powers are granted to the Department of Treasury, to the Bank of Italy, and to the CONSOB.
- [3] Foreign investment companies have long been allowed to place their certificates in Italy, but only after governmental authorization and subject to certain restrictions. For further discussion, see Pivato, *I "fondi comuni d'investimento mobiliare aperti" in Italia*, 1983 Rivista delle società [Riv. soc.] 240.
- [4] Some analogies can be found in the concepts of *negozio fiduciario* (fiduciary contract) and *società fiduciaria* (fiduciary company), derived from the Roman idea of *fiducia*. For an overview, see Trimarchi, *Negozio fiduciario*, in *Enciclopedia del Diritto* (1978). See also U. Carnivali, *Intestazione fiduciaria*, in *Dizionario del diritto privato - Diritto civile* (1981).
- [5] Business corporations, with the exception of life insurance companies, are not allowed to invest in mutual fund certificates. Art. 3 of the Act.
- [6] See e.g., *I fondi comuni d'investimento* 393 (1984) (comment on the Act by the Senate Commission for Treasury and Revenue).
- [7] For a thorough examination of the statute, see Bompani, *I fondi comuni mobiliari* (1983). See also *Le nuove leggi civili commentate* 380 (A. Alberti ed. 1984).
- [8] Art. 12 of the Act, modifying Art. 18, 1.7 giugno 1974 n.216 (Gazz. Uff. 8 giugno 1974 n.149). This amendment resembles securities regulation in other Western countries. See, e.g., Art. 6 *ordonnance* n.67-833 du 28 Sept. 1967 (1967 J.O.9589) (French regulation of the *note d'information*, the prospectus filing); 15 U.S.C. § 77e(1976).
- [9] Actually, the expression *valore mobiliare* had already been used in banking law, arts. 2 and 45 *legge bancaria*, r.d.l. 12 marzo 1936 n. 375 (Gazz. Uff. 16 marzo 1936 n.63), but with limited impact upon regulation of the capital market. For further discussion concerning the issuance of *valori mobiliari*, see Roppo, *Offerta al pubblico di valori mobiliari*, 1983 *Giurisprudenza Italiana* pt. IV, at 201; Fenghi, *Emissione di valori mobiliari e diritto all informazione*, 1983 Riv. soc. 478; Bussoletti, *Prime note di commento degli articoli 11 e 12 legge 23 marzo 1983 n. 77*, 1983 Riv. soc. 450.
- [10] The issue is discussed in Prof. Renzo Costi's paper, *I fondi comuni d'investimento* 119.
- [11] For the practitioner, a preliminary problem is whether the managing company has to file the prospectus, *supra* note 8, when it issues the "certificates." See Art. 18-quarter 1.7 giugno 1974 n. 216, introduced by Art. 12 of the Act. A negative answer is provided by Prof. Renzo Costi and by Prof. Berardino Libonati in their papers. *I fondi comuni d'investimento* 99, 125. Prof. Rossi, on the contrary, thinks that only the "placement" of certificates among the public by entities other than the managing company is exempted from the prospectus requirement. *Id.* at 15. Thus, the prospectus requirement would apply in the case of first "issuance" of certificates. The same opinion is expressed in Marchetti, *In tema di controlli sui fondi comuni*, 1983 Riv. soc. 504.

- [12] The statute limits the quantity of shares of a single corporation which can be owned by the *fondo* in relation both to the capital of the corporation and to the capital of the *fondo* itself. See *I fondi comuni d'investimento* 104. (According to Professor Costi, contracts in violation of these rules would have binding force only upon the managing company but not upon the fund.)
- [13] The key issue, under Art. 6 of the Act, is the form of control which the bank, as the statutory "agent" of the managing company, has to exert on the contracts concluded by the latter. On this issue, see the paper by Professor Libonati, *I fondi comuni d'investimento* 121.
- [14] Briefly stated, the problem is whether life insurance policies can be considered "securities" for the purposes of artt. 11 and 12 of the Act. *I fondi comuni d'investimento* 143. (Notwithstanding recognition of the financial intermediation functions of insurance companies, Professor Gaetano Castellano concludes that life insurance policies are not "securities.")
- [15] See *I fondi comuni d'investimento* 53 (paper by Professor Flavio Dezzani).
- [16] At least one tax provision is noteworthy. Capital gains are not assessed against the mutual fund. Instead, a 0.25% tax is due on the entire *value* of the fund. The rate is reduced to 0.10% if over 55% of the fund is invested in shares (or convertible bonds) of domestic industrial corporations. Art. 9 of the Act. For a general discussion of the tax issues, see the papers by Professor Gaspare Falsitta and Professor Furio Bosello, *I fondi comuni d'investimento* 165, 195.
- [17] See *I fondi comuni d'investimento* 213, 265, 285 (papers by Professors Franco Bricola, Alberto Crespi, and Nicola Mazzacuva).
- [18] D.m. 30 novembre 1984, modifying d.m. 12 marzo 1981 "Norme concernenti i regolamenti valutari e i rapporti finanziari con l'estero."
- [19] Italian residents must deposit a sum equal to 40% of the investment in foreign securities. Art. 15 d.m. 12 marzo 1981. Art. 17 of the same decree now allows the *fondi* to invest up to 10% of their capital in foreign securities without meeting the deposit requirement.
- [20] The first bill on this subject was presented to the Parliament in 1963.
- [21] See, e.g., *I fondi comuni d'investimento* 35 (paper by Professor Francesco Cesarini).