# European Company Laws

A Comparative Approach

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# Preface

A conviction of the need to study comparative law, and the benefits to be derived from it, came to us as company lawyers largely as a result of trying to understand our own system, and the influences that are currently affecting it. Once convinced of the need, we found that there were very few books which offered much constructive guidance on the subject as a whole. Those that did exist, mostly took a very technical and rather narrow view, concentrating on the texts of the laws regulating companies in various countries. We have realized, through teaching comparative European company law at postgraduate level for a number of years, that it is simply not enough to look at the detailed provisions of the law without at the same time understanding the rather deeper currents within the different legal systems. An appreciation of the differing concepts which go to make up the distinctive ethos of a particular system is a very necessary part of understanding the way in which that system works at a practical level, and how it might react to change or to new initiatives.

This need is not just something which affects the academic lawyer. Renato Mazzolini in his book *European Transnational Concentrations* (McGraw Hill, Maidenhead, 1974) found in a series of interviews with leading company executives throughout the European Community that they felt strongly that there were inadequate sources of information on the 'judicial environment'. He says, (at p.42), 'In comparing the treatment each system gives to a particular issue, it is not enough to compare regulations on that issue from country to country. It is also necessary to analyse the fundamental differences in the philosophy of each legal system in order to understand the spirit of a given law'.

This project was conceived as an effort to meet this sort of need, and to provide guidance for lawyers and business people on the nature of company laws in systems other than their own. The whole field is a vast one, and cannot be adequately covered within a single volume. Hence we hope that this will be the first in a series of works aimed at providing a vehicle for the promotion of the discipline of comparative company law, and a way of collecting the works of researchers in this field and making them more easily available. The priority which we set ourselves was that of securing the participation of some of the most distinguished comparative company lawyers in Europe. These experts were invited to select topics of major current importance in the field of comparative company law. It is this overriding criterion which determined the choice of topics. Since this book is the pilot of a series, it was our view that the considerations which we have outlined overrode any immediate advantages to be gleaned from selecting a particular theme and seeking to constrain eminent and heavily committed authors to produce a contribution on it. In the result, many of the contributions develop various aspects of the most crucial debate currently exercising the minds of company lawyers everywhere. This, of course, is the debate about the nature of the company, the enterprise and the evolution of a law of the enterprise.

Robert Drury and Peter G. Xuereb
March 1990

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# 1 Introduction

ROBERT DRURY AND PETER XUEREB

## COMPARATIVE COMPANY LAW

The idea that no one nation has a monopoly of wisdom applies just as strongly to law as it does to any other field of human endeavour. It is one of the motives that have sent lawyers over the years in search of the ways of other jurisdictions, and has provided the foundations of a discipline of comparative law.

Before beginning to examine the nature and techniques of comparative company law, it might be useful to start with a working definition of comparative law itself. One that is broad enough, and apposite, is the definition given by Zweigert and Kötz[1] to the effect that

> comparative law is the comparision of the spirit or style of different legal systems, or of comparable legal institutions or of the solutions of comparable legal problems in different systems.

Comparative lawyers may work on the grand scale, and by adopting a macro-comparative approach, concentrating on the spirit and style of different systems, classify them in a range of 'legal families'.[2] Alternatively, they may prefer to take a micro-comparative stance, and investigate the ways in which different systems deal with a particular legal institution or a particular legal problem. Both approaches have a part to play, but in the realms of comparative law as an 'applied science', it is the latter approach that is more likely to yield external practical benefits. It is this latter micro-comparative approach that has been adopted by company lawyers wishing to expand their horizons and gain access to the advantages that a comparative methodology can bring.

The benefits that can be derived from a comparative study of the laws of other systems are many, but the pre-eminent ones, particularly for company lawyers, are the following. Such a study hones students' critical faculties to the sharper edge needed to understand their own system with greater and more creative insight. As Professor Jolowicz has said:[3]

> Comparative legal study does, however, provide a tool for lawyers to discover some of the things they take for granted. They can come to see that other legal systems are explicable only on the hypothesis that what those systems take for granted is not always what we take for granted. By discovering what are the foreigner's assumptions we can work backwards and see what are our own.

When we see the ways in which other countries deal with the problems that confront us in our own system, we can begin to lose our parochial perspective. Then we can turn on our own system the techniques of appraisal that we have developed in order to understand other people's systems. This exercise is very revealing of the function of the rules in our own system, functions that we have, in Jolowicz's words 'taken for granted'. Once we realize that these assumptions do not have to be made, and that such matters do not have to be taken for granted, the blinkers can be removed, and the opportunity arises to partake of the second benefit of comparative study. This is that it provides access to a range of different solutions to a given problem or within a given area, and hence in the hands of a good critical scholar it can guide a potential legislator towards the 'better solution' to the particular problem that is being confronted. Indeed, the mere existence of this 'gene pool' of solutions can prompt the legislators to initiate the task of seeking to improve the solution that is current in their own particular system.

Comparative law has over the years developed its own methodology and it is the application of this which brings about some of the benefits mentioned above. To quote Zweigert and Kötz once again,[4]

> The basic methodological principle of all comparative law is that of *functionality*. From this basic principle stem all the other rules which determine the choice of laws to compare, the scope of the undertaking, the creation of a system of comparative law, and so on. Incomparables cannot be usefully compared, and in law the only things which are comparable are those which fulfil the same function.

In seeking to apply this principle, it is helpful to use a simple 'rule of thumb'. This is that legal systems generally face the same type of legal problems, and though they may have very different ways of solving them, the results at the end of the day are more likely than not to be similar. This rule is more likely to be successfully applied, and to produce results, when the systems compared are those of societies which share a broadly similar cultural and social heritage, and which are at a broadly similar stage of development.

In order to identify rules or mechanisms which fulfil the same function, it is necessary to approach each system with an open mind, and to use considerable imagination coupled with common sense. If, for example, one is looking for rules which fulfil the same function as those which require a minimum capital for a company on its incorporation, it is necessary to articulate the creditor guarantee function of the minimum capital rules. Then it becomes possible to perceive that this function can be performed by a requirement of disclosure of the actual capital position of a company at any given time, allowing a prudent creditor to take steps to protect himself.

The basic principle of functionality can be employed to determine the scope of the enquiry, and the systems that can be profitably compared. This is true whether the researcher is seeking to compare different legal institutions, or whether the goal is to ascertain the solutions that different systems have adopted to what is a common problem. The choice of which of the various techniques of comparison to adopt in any particular instance will depend greatly upon the nature of the topic at issue. One method of making a useful comparison between different systems would be to study the way in which two or three representative jurisdictions deal with a fairly major topic, for example the classification of business organizations or the rights of shareholders. Another equally relevant method would be to survey and contrast the ways in which a larger number of jurisdictions, say six or more, deal with a smaller and fairly specific topic such as the nullity of companies.

Another aspect of comparative technique that is relevant here is the process of selecting jurisdictions which are appropriate to the point that one is trying to make. It is not terribly informative to compare jurisdictions which are basically similar unless one is trying to make a fairly specific point. For example, France, Italy, Belgium, Luxembourg and to a certain extent Greece and Spain all have a basically similar system of company law, that is French derived. The object of a comparison of these systems could well be to highlight the pragmatic, cultural, social or other factors that have led individual countries to depart from the 'norm'. Alternatively, if one looks at the ways in which widely-differing systems, for example the British (representing the common law tradition) the French and the German (representing different civil law traditions), all deal with a particular problem or a set of related problems, one can appreciate how outside factors such as the nature of the problem itself, or the requirements of the European Community have brought about the adoption of similar solutions, or how different methods of solving the problem, stemming from the different concepts underlying each system, attain the same functional objective.

Having produced the basic information on the various systems that have been selected according to the foregoing criteria, it is then necessary to begin the task of making a comparative analysis and evaluation. If this is not done, then, as Zweigert and Kötz say,[5] 'comparative law will deserve Binder's sour description of "piling up blocks of stone that no one will build with"'. In order

to do this it is necessary to produce a framework for the analysis. This must be such as to use a canvass that is wide enough to accommodate, in the appropriate context, all of the different perspectives that have been revealed by the research. It will often necessitate the development of broad and flexible concepts which are to be used as the analytical tools. These will be concepts which transcend individual legal systems and backgrounds, and again will frequently relate to the idea of functionality, and to the actual problem under investigation.

It is evident from the wealth of published material that the comparative techniques described above can be applied to many fields of law. However, the assumption which underpins this work is that company law, as a branch of legal discipline, is particularly well suited both to the application of the comparative approach, and to the production of useful and highly-practical results from the analysis that has been done. This is because the company is called upon to fulfil a similar function in most legal systems. The very existence of the corporate form as a commercial entity already says quite a lot about the nature of the system that is involved. The process of selecting systems which utilize the commercial company as a form of business organization is generally not difficult, because such companies will have a fairly high profile role in the system. Making such a selection ensures the parallellism of function that is the cornerstone of comparative research. If the system in question knows the use of the commercial company, it will usually attribute a corporate personality to it. If so, then this leads on to the heartland of company law, that is a study of the ways in which the system in question has framed its rules so that the corporate person may integrate its activities with the rest of society. This will include questions of both the external and internal dynamics of the organization, and thus cover relationships within the company and between the company and the outside world. Once one postulates the existence of a company, then these problems arise to be dealt with in the vast majority of legal systems. In comparing the ways in which the different systems solve these problems, one can learn much about the nature of the problem, and about the nature of the system that has thrown up a particular solution.

In carrying out research in this area, the wide range of influences that have been brought to bear on company law becomes apparent. In some countries, the subject is classified as a compartment of commercial law. Thus it is a natural and logical step to apply to company law, concepts such as the security of transactions, which in other systems are normally associated with the law of sale. In other jurisdictions, company law is dealt with as part of 'business law', and hence it becomes closely associated with, and influenced by, labour law and revenue law. In many countries it is easy to see that these last factors, linked with areas such as securities regulation, have led jurists to question the label of company law itself. As Jean Paillusseau has demonstrated in his contribution to this work (Chapter 2), it may be better and more accurate to describe the discipline as 'enterprise law' rather than as just company law, which may have too limiting a connotation to encompass all of the developments in this field.

## THE IMPORTANCE OF THE EUROPEAN CONTEXT

As stated above, it is a prerequisite of the micro-comparative approach that the systems which are to be subject to the comparison must be naturally or functionally comparable. Given this requirement, it can be expected that work in the field of company law which deals with the situation in Europe can be particularly productive of results. For a start, all of the countries under investigation have a developed economy which relies to a large extent upon the company as a major vehicle for the furtherance of commerce. Thus we can expect to find that the problems which exist in relation to the use of the corporate form, will be the same or similar in every country investigated.

A study of the company laws of Europe will include those of the parent systems of most of the company law systems found in the world today. René David and John Brierley hold that there are three major contemporary legal families which occupy an uncontested place of prominence in the world.[6] These are the Romano-Germanic family, the Common Law family and the family of Socialist law. Of these, it is the first two which have played a dominant part in the development of the discipline of company law. Socialist law, by its very nature, has not in the past been a fertile ground in which company law could thrive, and indeed the whole category of commercial law has disappeared from the Soviet classification.[7] The European representatives of the Romano-Germanic and Common Law families include in their number the type of 'mature' legal system that was extensively imitated or adopted by others in the world. These were also the home legal systems of the major colonizing powers, through whose influence typically European structures and institutions spread over the globe, structures and institutions which were often retained after decolonization. One can therefore say, with considerable justification, that a study of the company law systems operating within Europe is a study of systems representative of nearly all of those operating throughout the world. This is far from saying that Europe has a monopoly of creative ideas. This is patently not the case, and the wealth of creative ideas flowing from both the new and the developing worlds is at times astonishing in its fecundity. All that is asserted is that Europe contains within a narrow geographical compass a greater concentration of 'significant' legal systems than can be found elsewhere.

Europe is important for other reasons also. The institutions of the European Community has brought a new dimension to the field of company law. The Community has begun a programme for the harmonization of its company laws which is intended, in the words of art. 54 3(g) of the Treaty of Rome, to co-ordinate, 'to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies and firms...with a view to making such safeguards equivalent throughout the Community'. This is a bold experiment, and its outcome will be eagerly scrutinized by other organizations in the world which have declared similar

objectives, for example CARICOM. This is not a programme for the mandatory unification of law, but a gradual approximation of the laws of the different States mainly by means of Directives. The role of the Directive is crucial to an understanding of the approach. Under the terms of art. 189 of the Treaty, 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'. Hence each Member State can implement each Directive in a way that is compatible with its own company law and in a way that is characteristic of its own individual system. All that is required is that the end result shall be equivalent throughout the Community.

Where any group of nations is actively seeking to reform their laws together, in order to achieve a joint objective, there is tremendous scope for the operation and positive deployment of comparative law. The skills of the comparativist are at a premium, both in discovering and comparing the laws of the different systems and, more particularly, in evaluating the results of the analytical comparison. The Community *par excellence* is a legislator looking for the 'best solution' to a particular problem or range of problems. This is precisely what the comparativist can help to provide. The existence of this harmonization programme is a major ground for the importance of comparative European company law at the present time. This discipline does not just have an academic importance, but is at large and working to create a new environment for companies at an international level.

The completion of the internal market of the European Community (EC) by 1992 is another reason for the importance of comparative European company law at this time. With the removal of the internal barriers to trade, business people in all countries are going to be faced ever more frequently with contacts of all sorts from companies and firms emanating from different jurisdictions. In order to understand the internal and external mechanics of such companies so that they can pass on the benefit of this wisdom to their clients, professional lawyers are going to need access both to the detailed laws relating to such entities, and to works of comparative law in order to help explain how the 'foreign' law works, both in relation to the rest of that system, and also in relation to known reference points within their own system.

There are other EC initiatives, such as those within the Community action programme for small- and medium-sized businesses, which will have the effect of putting companies and firms in closer cross-border contact than ever before. The Commission's Business Cooperation Centre, created in 1973, is actively developing projects of co-operation between firms in different Member States. It has created a computerized system known as the Business Cooperation Network, based on a network of business consultants in all of the Member States, in order to enable firms and others to identify likely or interested partners with a view to co-operation. All of these factors will mean greater contact than ever before between companies and firms from different legal backgrounds, with the corresponding need for greater understanding of the

legal matrix within which each can operate. This need can be fulfilled by an increased promulgation of comparative European company law in works of the kind represented by this volume.

## THE CONCEPTUAL APPROACH

As a project this initiative was designed to produce the first in a series of compilations of essays from a number of distinguished comparative company lawyers in order to begin to remedy what was felt to be a serious gap in the available literature. There are several books which deal in general terms with the subject of European company law, but deal with it very much from a descriptive perspective, giving details, system by system, of different company laws in Europe. However, useful as such works undoubtedly are for certain purposes, the mere juxtaposition of the texts or synopses of different laws does not necessarily throw light on the question of how they actually solve a particular problem. More information is needed, and also an analytical framework which probes more deeply into the operation of the rules within a given system. Then a comparison needs to be made to indicate or highlight the functional differences or similarities between the various systems. This has often been done merely at the level of the actual detailed provisions of the texts of the law involved. However, operating at what can be described with some justification as a superficial level can be unsatisfactory. While stating what the different laws are, it may fail to explain why they are in that form, and why that form or approach is crucial for that system. It is the theme of this work that a deeper investigation is required. It is only by an investigation which takes into account the underlying concepts, policy considerations and assumptions of each system, that the real nature and the relative importance of particular matters within each system can be more perceptively understood. Further, an investigation into the 'forces of change' which operate in various systems can guide us in perceiving the channels through which future development can occur, and even in forecasting the outcome of such developments.

Essentially this project was designed to originate a work of comparative law which took as its subject matter the conceptual bases underpinning company law in certain European legal systems. This would go further than purely descriptive works by providing a means of understanding the structure or internal coherence of individual systems and of explaining, for example, why one country adopts one method of dealing with a particular problem, while the neighbouring country adopts a very different method.

A specific example may help to explain this more clearly. In France, the law facilitates the simple adoption of contracts made for the benefit of a company before its formal incorporation ('pre-incorporation contracts'). In stark contrast, English law, despite having been given both opportunity and encouragement to amend its provisions by the First Company Law Harmonisation Directive, resolutely refuses to permit such pre-incorporation contracts to be either

adopted or ratified. To understand the difference between these legal rules, and its impact on the harmonization process, it is necessary to look further than the details of the specific rules themselves and to investigate the relevant concepts that lie behind the approach taken by each system.

Under French law, a contractual relationship exists between those persons intending to form a company, even before that company is formally brought into existence by means of registration etc. This contractual relationship is know as the *contrat de société* and is in French law the foundation of an inchoate company. Thus the actions of that inchoate company are in conceptual terms easy to relate to the actions of the same entity after it has been formally incorporated and endowed with legal personality. Hence if these actions take the form of pre-incorporation contracts there is no conceptual or indeed legal barrier to their adoption by the registered company.

Under English law, on the other hand, there is no such contractual relationship in existence between the founders of a company; the only legal nexus arises after formation, that is once the registration procedure is complete. The actions of the founders are merely those of individuals, and are not related to the company once formed. Thus for English law to link any pre-incorporation actions of the founders with those of the newly-registered company would require a complete departure from the basis and traditions of the system. This explains, in part at least, why any change in this part of English law, as a step perhaps towards European Community harmonization, would be difficult to achieve, and may possibly only come about after a specific mandate in the form of a Directive.

This is just a very brief example of the way in which an investigation of the underlying concepts can help to explain the differences between the various systems. It is in this emphasis on the underlying concepts and the basic premises which are perhaps not articulated in the legislation, that this project hopes to cover new ground. It is obviously not possible in this introductory chapter either to state or even to refer to all of the concepts that are involved in company or enterprise law in Europe. However it might be useful if one or two of the major concepts were articulated at this point to give the reader some indication of the approach of this book.

## The company as a contract, institution or structure for the enterprise

The debate over the nature of the company pervades and informs many aspects of the detailed operation of the laws of many countries within Europe. It is not only the theoretical concept that is current at the present day that is of interest to the comparative lawyer. In addition, some knowledge of the theories that were current at the time of the drafting of the current legislation can be a most valuable adjunct to the comparativist seeking explanations for the different approaches adopted in otherwise closely-related countries. For example, as Jean Paillusseau's contribution shows (Chapter 2), France has now moved on

from the concept of regarding the public and the private company as entities having a contractual nature. However, many provisions which remain part of the current law were drafted on the assumption that the contractual concept applied.[8] Belgium has certainly been influenced by the contract theory, but its Dutch neighbour abandoned the concept in the 1930s in favour of the theory which regards the company as an institution rather than as a contract, with all of the latter's personal overtones. As a reflection of this, Belgian law until very recently only referred to the formation document of a company as the company contract, while Dutch law refers to a multipartite legal act. The practical repercussions that can flow from this adherence to different theoretical concepts can be great. As it takes two to make a contract, before 1984 Belgian law would not admit the possibility of a company actually existing where transfers of shares or other circumstances resulted in there being only one shareholder. Today it requires the situation to be rectified within 12 months.[9] Belgian law further insists that the actual founder shareholders are not 'men of straw'. The Netherlands recognized the 'one-man company' in a Supreme Court decision of 14 October 1932, where the founders had agreed before the incorporation to transfer their shares to the principal shareholder immediately after the company was formed. These differing perspectives and underlying concepts have strongly coloured the attitudes of the different Member States in the discussions leading to the proposal to introduce the 'one-man company' in the draft Twelfth Directive. The effect of the underlying concepts on the harmonization programme can be clearly seen.

**The company as a legal entity**

In the European Community and its neighbours, the concept of corporate personality is attributed to public and private companies without exception. The concept is thus a highly-important one, which is central to our understanding of companies in general. However, all of these countries do not necessarily mean the same thing by this concept. In some countries, for example France and Scotland, corporate personality is extended to commercial and even civil partnerships, while in others such as Germany and England it is firmly limited to companies. There has been an extensive debate, not just among company lawyers, but among jurists generally, over the nature of this curious legal personality, and its source or origin. Group-will theories have been contrasted with concession theories which regard personality as lying in the gift of the State. The different ways of reacting to this debate have had their effect on company law. When this debate is linked to that in the previous section, some of the elementary rules of company law are put into perspective. The effect of the registration of the company is a case in point. If a jurisdiction has been profoundly influenced by the view that corporate personality derives from the group-will expressing a common purpose, this may well explain why the company is perceived to have been incorporated once the formation document