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Simon Deakin, David Gindis and Geoffrey M. Hodgson

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Simon Deakin
Centre for Business Research, University of Cambridge
s.deakin@cbr.cam.ac.uk

David Gindis
Hertfordshire Business School, University of Hertfordshire
d.gindis@herts.ac.uk

Geoffrey M. Hodgson
Institute of International Management, Loughborough University London
G.Hodgson2@lboro.ac.uk

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Abstract

In his recent book on *Property, Power and Politics,* Jean-Philippe Robé makes a strong case for the need to understand the legal foundations of modern capitalism. He also insists that it is important to distinguish between firms and corporations. We agree. But Robé criticizes our definition of firms in terms of legally recognized capacities on the grounds that it does not take the distinction seriously enough. He argues that firms are not legally recognized as such, as the law only knows corporations. This argument, which is capable of different interpretations, leads to the bizarre result that corporations are not firms. Using etymological and other evidence, we show that firms are treated as legally constituted business entities in both common parlance and legal discourse. The way the law defines firms and corporations, while the product of a discourse which is in many ways distinct from everyday language, has such profound implications for the way firms operate in practice that no institutional theory of the firm worthy of the name can afford to ignore it.

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1. Introduction

In his interesting and forceful book on *Property, Power and Politics,* Jean-Philippe Robé (2020) argues that a broadly institutionalist theory of law and the economy is needed for an understanding of the structure and dynamics of power in the modern world. We are very sympathetic to this argument, having previously argued that in modern economies the law plays a vital role (Deakin, 2012a, 2012b; Deakin et al., 2017; Gindis, 2009, 2016; Hodgson, 2002, 2015a). At the same time, we note that Robé criticizes our definition of the firm as an individual or organization with the legally recognized capacity to produce goods or services for sale (Deakin et al., 2017). In this paper we defend our definition as a useful, and arguably essential, step in advancing an institutional understanding of law's role in constituting the firm.

Robé has for some years now attacked the practice of treating *firm* and *corporation* as synonymous and maintained that there is a vital need to differentiate the two (Robé, 2011, 2020). The firm, from his perspective, is an organized economic activity, not to be confused with the corporation, which is the legal instrument used to structure that activity, particularly by firms of a certain size. Robé chastises others, including the present writers, for failing to adhere religiously to this distinction. We agree that the two terms do not have the same meaning and are often conflated or confused. We also agree that, at least as a first approximation, a *firm* is an economic phenomenon and the *corporation* a legal form.

Since we do not claim that *firm* and *corporation* are the same thing, Robé must disagree with the way we differentiate the two terms. Our definition draws attention to the fundamental connections between the economic and legal aspects of firms. It emphasizes the legal features of firms that are overlooked in the various narratives in the theory of the firm (see the contributions collected in Langlois et al., 2002). Robé goes down a different path. He defines the firm as an organized economic activity which cannot be reduced to the legal notion of the corporation, and argues that while the law recognises, indeed creates, the category of the *corporation*, it does not recognise the *firm*. He furthermore claims that our definition fails to account for both the sole proprietorship and the multinational enterprise, and implies that employees cannot be part of the firm in the sense that we have defined it. We respond to each of these objections here.

In the process, we show that Robé's definition of the firm as an activity, albeit an organized one, raises problems of its own. There are also difficulties with his narrowly legalistic view of the corporation. An important implication of his position is that by insisting that firms are not corporations, Robé implies that corporations are not firms. This is an unwarranted departure from a commonplace taxonomy used by social scientists and business practitioners, according to which (business) corporations are types of (business) firms.

2. The problem of definition in a multidisciplinary context

Part of the issue at hand has to do with the crossing of disciplinary boundaries. It is not surprising that lawyers and economists attach slightly different meaning to key terms. Institutional economists wishing to understand the role the law plays in framing, guiding and impelling much economic activity should learn from law and import some legal ideas and meanings into economics, where they are useful (Cole and Grossman, 2002; Hodgson, 2015b). Take the term *corporation.* Economists and other social scientists have much to learn from lawyers here. The notions of legal incorporation and legal personality have important economic, social and political effects, as Robé demonstrates.

But just as there is a danger that economics, as a discipline, ignores legal phenomena or downplays legal understandings, there is a danger that law, as a discipline, takes too narrow a focus and remains blind to some aspects of socio-economic existence. Although Robé does not look at everything in terms of legal categories alone, he thinks that a strictly legalistic definition of the corporation avoids the confusion between *firm* and *corporation*. Our position is that the term *corporation* is not the sole property of lawyers (Deakin, 2019). Indeed, given that it also appears in different guises according to legal context, the term *corporation* is not even the exclusive property of corporate law (Deakin, 2012a, 2012b). But the key point we wish to emphasize here is that there is more besides legal rules and procedures to business corporations. In a social science context, given the political, economic, ethical and cultural aspects involved, we cannot understand them solely in legal terms.

The term *firm* is likewise not the sole property of economists, but the problems the term raises are different. While it is the focus of an extensive literature in economics, there is a lamentable absence of consensus regarding the definition of the firm (Gindis, 2016; Hodgson, 2019). We must therefore consider additional sources. The term's usage in law is somewhat marginal. The English practice of calling certain partnerships 'firms' has died out. But the absence of a technical definition of *firm* in law does not imply that the law is blind to the firm or that it plays no part in facilitating the firm's existence.

When the European legal mind thinks of the *enterprise* as an economic entity which brings together human, physical and intellectual assets in a 'going concern', this idea is expressed by the notion of the *undertaking*, and the further idea of the *establishment* gives some sense of the enterprise as a geographical space or set of locations (Deakin, 2003). In practice, these notions exist to give effect to certain regulatory purposes connected to labour and competition law (if those bodies of law did not exist in something like their current form, there would be no need for such terms).

This is a reminder that legal concepts do not exist to describe the world, but to order it. That the *corporation* and not the *enterprise* is the principal legal concept used to order the business firm in some jurisdictions, particularly those of Anglo-American common law, is a sign of the priority which corporate law tends to give to financial interests over productive ones. At the same time, it should be noted that corporate law is not the whole of the law governing business firms, and that labour law and tort law see the enterprise somewhat differently, as 'a mechanism for absorbing, controlling and spreading social and economic risks' (Deakin, 2003, 112). This underscores the fact that while the *firm* is not described by a legal category, law does not ignore its socio-economic or legal impact.

Although it is instructive to consider various legal discourses on the firm which have existed over time and can be currently observed, no dominant conception of the firm emerges. Other disciplines and discourses can and should be called in aid. We should do well to appreciate how the term is used in business studies and other social sciences, and we must also consider how the term is used more broadly in society.

When there is need to draw from multiple disciplines in defining a term and understanding the phenomenon to which it refers, it is very important to note the different meanings which a term may have in different disciplinary domains, and to seek to identify any common or functionally equivalent elements of those meanings. We should in particular avoid a counsel of perfection that insists that exact meanings in one discipline must always apply without modification to another (Deakin, 2019). When lawyers engage in conversation with (other) social scientists, they should resist the temptation to say that theirs are the correct or definitive definitions; but the observation cuts both ways. Being able to agree on definitions, including their differences as well as any common elements across multiple disciplines, is important because, in the final analysis, science is an institutionalized social process: researchers must come to some workable agreement about the objects of their investigation, so that they can establish a division of labour for their shared enquiry (Polanyi, 1962).

Taxonomies matter critically for the social sciences and for the implementation of their insights in applied disciplines such as law and management. Taxonomic definitions are tools to differentiate one class of real-world phenomena from another. There is no easy formula for creating or adjudicating over such definitions. They are subject to ongoing conversation and revision. But while there is no tidy end point, there are some basic rules and guidelines (Hodgson, 2019). The first (advisory rather than compulsory) rule in the construction of taxonomic definitions is that they should where possible be close everyday meanings (Robinson, 1950). Scholars from Aristotle to Carl Menger and Alfred Marshall proffered this advice (Hodgson, 2019).[1] Because language is social and interpersonal, individuals cannot change meanings at will. Words have more power over individuals than individuals have power over the meanings of words. Consequently, it is important to be careful in positing atypical or

counter-intuitive definitions – they can create confusion and obstruct academic progress.

3. Everyday meanings of *firm* and *corporation*

With these guidelines in mind, let us briefly examine the etymology and modern usage of the word *firm.* The *Chambers Dictionary of Etymology* notes the origin of the meaning of *firm* as a 'business concern', recording its emergence in English in 1744 to refer to 'a company … borrowed from German *Firma* a business or name of business, originally signature, from Italian *firma* signature, from *firmare* to sign' (Barnhart, 1988, 384-5).

A narrower meaning of a firm as a 'partnership' has a special colloquial application to legal or medical partnerships, as in the film *The Firm,* starring Tom Cruise. But dictionaries typically carry a broader meaning as well. The *Merriam-Webster Online Dictionary* notes a narrower meaning in terms of a 'partnership' and a broader meaning as 'a business unit or enterprise' (Merriam-Webster, 2021). Accordingly, the online *Collins Dictionary* regards the firm as meaning 'a business partnership' or 'any business enterprise' (Collins, 2021). The online *Cambridge Dictionary* sees a firm as 'a company or business' (Cambridge University Press, 2021).[2]

As Robé (2020: 13) notes, the term *company* is also sometimes used as a synonym of *corporation*. English 'company law', for example, is functionally equivalent to US 'corporate law'. American lawyers operating in the UK would not be misunderstood if they were to say *corporation* instead of *company*. But while they are sometimes used interchangeably, the two terms come from different sources and sometimes (in other contexts) have different meanings. In addition, the meaning of *company* in English law has shifted.

The term *company* has not always been associated with incorporation if that is taken to mean a legal act involving the creation of a new juridical person. It was the term used to describe the trading entities which emerged in Florence and Genoa in the 12th century, when several individuals – typically from one family –agglomerated their capital by establishing a partnership with unlimited and joint liability (Greif, 1996; Harris, 2020). The notion of *corporation* comes from a different source. It was originally applied to medieval entities such as towns, monasteries, guilds, charities and universities, long before it became widely established in a business context.

Before accessible procedures for legal incorporation were introduced in the UK in the 19th century, most business firms lacked legal personality and were organized using a legal form that was a hybrid of the partnership and the trust (Stern, 2017). Although it was founded upon the partnership principle of trading on a joint account, the joint stock company was distinguished from the ordinary partnership on the basis of its

economic, rather than its legal, characteristics (Ireland, 1999). Later, particularly after the spread of general incorporation laws allowed companies to transform into corporations, these two terms moved closer in meaning, and were then used quasi-interchangeably among Anglophone lawyers. But ambiguities and differences still persist.

Although *company* and *corporation* can be used as synonyms in the legal context, there is also an everyday association in the English language between *company* and *firm.* There are two rival terminological associations – *company* and *firm*, and *company* and *corporation* – which pull the term *company* in different directions and establish a conceptual link between *firm* and *corporation.*

Robé is right to observe that these words are sometimes used interchangeably. When little of substance turns on the matter, this practice is justifiable. But it is significant that when *firm* is invested with discipline-specific meanings, the particular aspects that are highlighted often remain anchored in the ordinary language meaning of the term. As Fritz Machlup (1967: 26-8) famously noted, in management, accounting, law and statistics, the firm can be defined in many different ways: as 'cooperative system with authoritative coordination', 'decision- making system for typical business operations', 'collection of assets and liabilities', 'juridical person with property, claims, and obligations', and 'business organization under a single management or a self-employed person with one or more employees or with an established place of business.' Distinct as these definitions are, they are all linked to the ordinary language understanding of the firm as an identifiable business unit.

Various definitions to be found in the theory of the firm literature also remain anchored in the ordinary meaning of *firm*. Ronald Coase's (1937, 393) suggestion that a firm is a 'system of relationships which comes into existence when the direction of resources is dependent on the entrepreneur', Oliver Williamson's (1985, 73) analysis of firms as 'unified governance structures', Sanford Grossman and Oliver Hart's (1986, 693) characterization of the firm as a 'single ownership unit', or Bengt Holmstrom and Paul Milgrom's (1994) work on the 'firm as an incentive system', all clearly relate to the idea of a singular business unit.

The intent of such definitions is broadly taxonomic, in the sense that they are formulated in the spirit of Coase's (1937, 389) important assertion that 'the distinguishing mark of the firm is the supersession of the price mechanism'. This distinguishes markets from both all economic forms of the firm (including entrepreneurial, managerial or cooperative firms) and all legal forms of the firm (including sole proprietorships, partnerships, companies and business corporations). All of these can be placed within the same taxonomic class.

4. Differentiating *firm* and *corporation*

For Robé (2020, 195), *firm* and *corporation* are 'radically different notions': 'A firm is an *organization* performing an economic activity. A corporation is a type of *legal person* – most firms of some significance being organized using business corporations.' Elsewhere, Robé (2020, 210) defines the firm in slightly different terms as an 'organized economic activity' (see also Robé, 2011, 3). The two definitions may seem fairly similar, and Robé seems to use them interchangeably, but they are not identical. The first treats the firm as an organization, the second as an activity. Regardless, Robé (2020, 196 n.) clarifies that he is working primarily with the latter concept.

Treating the firm as an activity, albeit an organized one, is unsatisfactory, for at least two reasons. The first is that there is no case, from etymology or common usage, to support this stipulation. It is atypical and therefore violates the common-sense guideline for definitions outlined above. The second reason is that, conceptually, if the firm really is an activity, or always 'performing an economic activity', then it ceases to exist when those activities cease, as would be the case when the firm shuts down overnight or on weekends or holidays. Robé's 'activity' formulations – including variations such as 'the firm is the process of coordinating various resource providers' (Robé, 2020, 199) – are flawed.

Contrary to Robé, our definition of the firm is rooted in the term's ordinary language meaning as a singular business unit. We define 'the term *firm* to apply to individuals or organizations with the legally recognized capacity to produce goods or services for sale' (Deakin et al., 2017, 194). On this definition, the firm does not cease to exist when trading or production temporarily ceases. Importantly, the definition applies to all the economic and legal forms of the firm and it also allows us to distinguish all these kinds of firms from markets.

A definition of the firm as an organized economic activity might conceivably apply to various kinds of firms, but it is difficult to see how it helps distinguish the firm from the market, since markets are arguably organized economic activity. Certainly, Robé's definition of the firm implies that some markets could be firms. While a firm might organize a market (many platform companies currently do this), and some market organizations (such as the London Stock Exchange) are legally incorporated, the two concepts remain distinct, even in this context. Similar difficulties are encountered when considering the other discrete structural alternatives studied in transaction cost economics, including various so-called 'hybrid forms' (Ménard, 2014, 2021). On Robé's definition, relational contracts between firms dissolve into relational contracts between organized economic activities. Defining the firm in terms of distinct legally recognized capacities avoids these conceptual tangles (Deakin et al., 2017; Hodgson, 2002).

These uncomfortable conclusions might be avoided if instead of defining the firm as an activity Robé were to stick to the definition of the firm as the organization performing that activity. This would still allow him to claim that 'firms are structured *using* corporations; they are **not** corporations' (Robé, 2011, p. 7). It is important to note that the second part of this formulation could be read as implying that the categories *firm* and *corporation* are mutually exclusive. If firms are not corporations, then corporations are not firms, they are merely legal instruments used to structure a firm's affairs. The problem here is that if a firm is an organization, and many firms are 'organized' using (legal) corporations, then a (business) corporation is a specific mode of organization, and not just a legal instrument. To confine the term *corporation* to its strictly juridical meaning when everyday discourse and other disciplines are using it in a broader sense is going to create difficulties.

Robé clams that a corporation is a legal instrument used to structure most firms of some significance. We do not disagree. Robé (2020, p. 192) is also undoubtedly right to say that 'business corporations have what is called a "legal personality": they are treated by the legal system as "persons" in a position to own assets, contract and be liable for the torts that are imputed to them'. We believe to have made this point ourselves. A central implication of our definition of *firm*, however, is that 'a *corporation* is a kind of firm' which 'has a structure as designated under corporate law' (Deakin et al., 2017, 194). It follows, as we immediately add, that 'all corporations', so defined, 'are firms, but not all firms are corporations'. Richard Adelstein (2013) and many other scholars working at the intersections of economics and law agree. This contrasts with Robé's argument that firms are *not* corporations. This, therefore, seems to be why Robé (2020, 196 n.) cites us as an example of 'the difficulty of convincing authors that it is fruitful to differentiate the two terms'. But perhaps we are not using the word *differentiate* in the same way.

5. Digging deeper

Robé argues that *firm* and *corporation* are more than just radically different notions – they denote radically different realities. As he puts it: 'the firm … has no existence at law (it is not a "fiction") whereas the corporation is a legal person entitled to operate in the legal system by owning, contracting, suing and being sued; and it is subject to the laws and regulations of the legal system' (Robé, 2012, 8). Firms 'do *not* exist in contemplation of the law as persons; they do *not* have *rights* and, conversely, they *cannot incur liabilities*' (Robé, 2020: 223-224). Indeed: 'The firm … is neither a legal object nor a legal subject. It does not operate in the legal system' (Robé, 2012, 8). From the strictly legalistic point of view, these statements do not seem objectionable. But of course that depends on how *firm* is defined and whether it is legitimate to regard a corporation as a type of firm. In any case, the suggestion that the firm cannot ever be a legal 'object' is contradicted by the use of the term *undertaking* in contemporary labour and competition law.

Robé's language is strikingly similar to Michael Jensen and William Meckling's (1976) influential discussion of the firm, but his argument is actually directed against their definition of 'the private corporation or firm is simply one form of *legal fiction which serves as a nexus for contracting relationships*' (Jensen and Meckling, 1976, 310).[3] For Robé (2011, 2012, 2020), this unwarranted conflation of *firm* and *corporation* invites us to ignore the way that corporate law structures the business firm. Jensen and Meckling, following Friedman (1970), invite us to reduce the firm to a set of contractual relationships, with the focus on those between 'owners' and managers, as if shareholders 'own' the firm or the corporation (Friedman explicitly, and Jensen and Meckling impliedly, conflate these terms when it comes to determining ownership), as well as the assets which are placed under the managers' delegated authority.

This view, which has been instrumental in (mis-)shaping corporate law and the corporate governance debate of the last few decades, is one that Robé, along with others (e.g., Stout, 2012; Ciepley, 2020), seeks to undermine. We are sympathetic to this position and have argued along these lines ourselves (Deakin, 2012a, 2012b; Hodgson, 2015a; Deakin et al., 2017). We agree with Robé that the firm in its totality, including the human beings who work in it, cannot be owned.[4] Nor can the corporation, as a legal person, be owned. In both cases, 'ownership' refers, critically, to a category of claim which the law recognises as such. Just as it is vital not to conflate *firm* and *corporation*, it is vital also not to conflate 'ownership', a legal construction, with physical possession (Honoré, 2013). At this point, economics needs to take account of legal reality: given the material significance of the way in which the legal system supports certain ownership claims, and not others, it is a fundamental error for economics, in so far as it purports to be a science of human behaviour, to assert that shareholders 'own' either the firm, the corporation, or its assets.

What then is the significance for economics, and other social sciences, of legal definitions of the business firm? Those definitions operate on more than one level. For lawyers, they frame the way in which judges and other legal practitioners apply legal rules to resolve disputes, settle claims, and more generally order the way in which business is conducted. For business actors (investors, managers, workers, creditors, and so on), legal rules, which are ultimately enforced by the power of the state, have material consequences. The law affects the value of claims, shapes expectations, and channels behaviour.

This is why we defined the term *firm* in terms of *legally* recognised capacity (Deakin et al 2017, 194). This is not the same thing as saying that the firm as such has legal personality; nor does our definition make the firm 'synonymous with the concept of "legal entity"' (Robé, 2020, 196 n). Whether or not a firm is legally structured as a corporation (which must have legal personality), a partnership (which may or may not have it, depending on circumstances) or some other kind of legal entity, its ability to

function as a productive unit is unavoidably bound up with the way the law works. The law of the business firm (which as we have noted is not confined to corporate or company law) is so deeply imbricated with the operation of firms in the economy that it makes no sense for the economist's conception of the firm to ignore the role of the law; hence our claim that a productive entity which is not 'legally structured' is not 'in economic or other terms, a firm' (Deakin et al, 2017, 198).

Economists need to take note of the fact that even firms that formally lack legal personality need the law to function. What we referred to as the 'legally recognised capacity' can take many forms. In the case of the (unincorporated) general partnership, for example, some or all partners may be empowered (by their partnership agreement) to act and make agreements in the name of the partnership as a whole. This includes agreements with input suppliers as well as agreements with customers. Consequently, rights and liabilities will accrue to the partnership itself, and courts will more often than not recognize this when they are asked to adjudicate disputes with third parties. Furthermore, as Henry Hansmann and others have shown, courts have also long recognized a certain degree of separation between partnership assets and the partners' personal assets, which in liquidation grants firm creditors priority over personal creditors in the division of firm assets (Hansmann and Kraakman, 2000; Hansmann et al., 2006; Gindis, 2020b). The partnership is thus legally recognized as such.

5.1 Sole proprietorships

According to Robé (2020, 196 n), a defect of our use of *firm* to refer to individuals or organizations with the legally recognized capacity to produce goods or services for sale is that 'an individual person can be a "firm".' Robé is making two different points. The first is that while 'a firm can be created by a single individual person', in which case 'an individual legal person contracts with suppliers … and will organize the manufacturing of products or the delivery of services', this does not alter the fact that 'the individual organizing the operation of this economic activity is not "the firm". The organized economic activity is' (Robé, 2020, 199). His second point implicitly targets our suggestion that 'an entrepreneur … become[s] a firm upon the acquisition of a legally-recognized separate legal personality' (Deakin et al., 2017: 197).

Setting aside the flawed activity-based view of the firm, Robé is of course correct that a firm can be created by a single individual. Our definition covers this possibility, so this leaves Robé's second point, which is that our understanding of *firm* leads us to effectively exclude 'the business created by an individual entrepreneur not using a separate legal vehicle to structure his business' (Robé, 2020, 207). For Robé, the existence of sole proprietorships, which are legally indistinguishable from the individuals operating them, shows that there is no necessary link between firms and separate legal personality.

While our definition clearly includes single-person companies, the sole proprietorship may seem to be more problematic for it. In the case of the sole trader, there is often no clear legal boundary between personal and business assets. However, legal capacity is not exactly coterminous with the act of incorporation. Legal systems are capable of endowing certain organisations with the right to hold property, enter into contracts and to sue and be sued, which are the core components of legal capacity, in the absence of incorporation, as in the case of British trade unions (Adams et al, 2021, 724).

Similarly, businesses run by sole traders have an existence in law and so have some of the attributes of legal persons even if they are not companies. The emergent law of business associations was capable of distinguishing between the personal and business assets of merchants long before the widespread availability of incorporation through an act of legal registration (Hansmann et al., 2006). In today's law, the business operated by a sole trader is legally recognised in numerous ways. Trading income will be treated as distinct for tax purposes, and the individual operating the business may be classed as an undertaking for the purposes of competition law, while, conversely, falling outside the scope of labour law protections, such as minimum wage rules (Deakin, 2020). This is the sense in which even the sole proprietor has a legally recognised capacity to act as a business and to be taxed and regulated accordingly. It follows that the business of a sole trader acquires a kind of legal capacity and features of personhood, even in the absence of incorporation.

5.2 Employees

In another attempted rebuttal of our definition, Robé (2020, 196 n) notes that it leads to the 'strange consequence' that 'employees are not part of "firms"'. He does not specify what he means by 'part of', but the criticism seems to be that our definition misrepresents employees as being outside the boundaries of the firm when in reality 'employees are, of course, members of firms'. As Robé (2011, 39-40) puts it, 'in real firms … there are employment contracts'. This objection stems from Robé's claim that we conflate *firm* and *corporation*: if a firm is *just* a legal person, in the sense of being *just* a nexus for contracting relationships, then employees (and other input owners) contract with it as outside parties.[5]

However, nothing in our use of the term *firm* to apply to individuals or organizations with the legally recognized capacity to produce goods and services for sale justifies this interpretation. Our view does not preclude the idea that employees and the organizational structures within which they are placed are important for firms and can therefore be 'part of' firms in some meaningful sense. Perhaps, though, Robé is making a deeper point. In Coasean fashion, he appears to see employment relationships as essential to the organization of economic activity within firms, which is to say that he views employees as essential to the nature and existence of firms.

From this point of view, the firm, as an organized economic activity, comes into existence once the productive activities of employees are organized by an entrepreneur (Robé, 2020, 208), and it may then make sense to classify employees, contrary to other input providers, as members of the firm (Robé, 2011, 41). We understand that this is an important piece of Robé's larger project of reorienting the corporate governance debate away from its quasi- exclusive focus on shareholders and managers. We have no disagreement this project and regard it as important. However, it may be going too far to say that businesses without employees are not firms.

Statistics collected by governments and various other agencies record that most businesses do not in fact have any employees. In the UK, for example, about 76% of the firms making up the business population have no employees (Department of Business, Energy and Industrial Strategy, 2020). Non-employer enterprises similarly account for the bulk of registered firms in many other economies (OECD, 2017). Of course, these non-employing businesses do not constitute more than a small fraction of the total size of the business population if we measure it by output or value. That said, the prevalence of these types of businesses suggests that a definition of *firm* that depends on the presence of employees may be unduly narrow.

It is also possible, of course, for there to be *companies* (as opposed to businesses) which do not have any employees because they do not trade. This includes companies set up solely for the purposes of holding certain assets, for reasons of tax 'efficiency' or arbitrage, among others (Pistor, 2019). These companies are not firms in any real sense of the term, and our definition of the firm as a legally constituted entity set up for the production and sale of goods and services does not require us to treat them as such.

5.3 Multinationals

The major part of Robé's (2020) book, and indeed the primary focus of his work more generally, examines 'firms in the world power system'. According to Robé, this is the setting in which our definition of the firm runs into the biggest problems. As he explains, a disturbing implication of our definition of the firm in terms of legally recognized capacities is that 'there can be no "multinational firms" since a multinational firm is not a "legal entity"' (Robé, 2020, p. 196 n). This again depends on what we mean by *firm*, and whether it is legitimate to regard a corporation as a type of firm. But there an important point here, which is that while most large (and indeed, many small and medium-sized) enterprises are constituted as multi-corporate forms, there is no generally accepted legal concept of the *corporate group* which adequately captures this complex economic and social reality (Deakin, 2003).

Robé is absolutely correct that multinationals, as multi-corporate enterprises, do not have a single (global) legal personality but instead operate through separately incorporated firms in multiple countries. Even in the case of a corporate group or a conglomerate operating within a single country, as Philip Blumberg (1993) pointed out, the breakdown of the straightforward link between a singular economic entity and a singular legal entity poses a challenge to both the theory of the firm and corporate law theory. The problem may be compounded when corporate groups have foreign subsidiaries, but in the context of the present debate, this seems incidental. After all, regardless of the country in which it is incorporated, a national subsidiary of a multinational enterprise may well be operating as a singular firm. Each such a subsidiary would have legally recognized capacities which enable it to produce goods and services for sale.

It follows, we believe, that the existence of corporate groups operating nationally or internationally does not significantly diminish the value of our definition of the firm. Instead of pushing us to revisit the definition of the firm, the reality of corporate groups and multinationals ought to push us in the opposite direction. We need different terms to account for different realities (Hodgson, 2002, 2015; Gindis, 2009). We need to have a definition of *multinational enterprise* alongside a definition of *firm*.

We also need to appreciate that the definition of the former must rest on the definition of the latter. As Reinier Kraakman (2001) argued, the existence of corporate groups, multinational enterprises, networks and other complex economic organizations, including those which Claude Ménard (2021) calls 'hybrid forms', does not displace the importance of legal form to the structuring of business; it reinforces it. Hence to use the multinational enterprise as a counterexample to our definition of the firm misses the mark completely.

6. Concluding remarks

In summary, Robé's (2020) book contains valuable insights and addresses vital issues, but his objections to our proposed use of the term *firm* to apply to individuals or organizations with the legally recognized capacity to produce goods or services for sale are unsuccessful. We agree with Robé that *firm* and *corporation* have different meanings. But we do not believe that they are mutually exclusive categories. We are not convinced that one should refrain from viewing *corporation* as a type of *firm*. Business corporations are incorporated firms.

A good reason to retain this taxonomy is that its use is widespread among social scientists and business practitioners. In addition, it conveys an important analytic message: just as firms are both economic and legal phenomena, corporations are also both economic and legal phenomena. Treating *firm* as a purely economic phenomenon and *corporation* as just a legal term of art is unsatisfactory. Both moves may prevent

us from seeing how economic and legal mechanisms hang together.

Like Robé, we are interested in what Warren Samuels (2007) referred to as the 'legal-economic nexus'. Unlike Robé, we are not prepared to accept the kind of strict separation between economic and legal phenomena that underpins his approach to the firm. In our version of legal institutionalism, economic and legal phenomena do not exist in separate ontological planes or spheres. Law is a part of social reality; it constitutes and constrains, liberates and regulates. No institutional theory of the firm, and no institutional theory of capitalism more generally, is worthy of the name if it overlooks the role of law.

Notes

[1] Marshall (1920) did not follow his own advice when he defined, following most other economists since Adam Smith, the term *capital* in terms of factor inputs, rather than the money-related meaning used in business and accounting, with possible adverse consequences (Hodgson, 2014, 2015a). By contrast, Menger (1888) dissented from this Smithian usage (Braun, 2020).

[2] It is perhaps not surprising that the British royal family is sometimes referred to as 'the firm'.

[3] See Gindis (2020a) on the origins, meaning and influence of Jensen and Meckling's definition of the firm.

[4] Thus the legal notion of *undertaking*, in so far as it denotes a legal object or *res* which can be alienated by one employer to another, does *not* include the employees, who cannot be bought or sold, and hence compulsorily transferred along with the physical and intellectual assets of the firm (Adams et al., 2021, 219-220).

[5] This is why Jensen and Meckling (1976, p. 311) observed that 'it makes little or no sense to try to distinguish those things which are "inside" the firm … from those things that are "outside" of it.'

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