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COMMENT

Firms *versus* corporations: a rebuttal of Simon Deakin, David Gindis, and Geoffrey M. Hodgson

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Abstract

I share the view expressed by Simon Deakin, David Gindis, and Geoffrey Hodgson ('DGH') that social scientists need to consider the constitutive role of law in their disciplines. This is particularly the case for economists working on the theory of the firm and on institutions more generally. Their analyses are often built on assumptions about the legal system which do not correspond to reality. One major issue is the generalized confusion between the concepts of 'corporation' and 'firm'. In day-to-day parlance, the two words are synonyms. But, when the constitutive role of law is considered, the word corporation corresponds to a specific legal device which should be clearly differentiated from a less-specific concept which can be called a 'firm' or an 'enterprise'. The notion of firm usually corresponds to the economic organization of various resources via contracts to produce goods or services. The corporation is a legal institution with peculiar characteristics, including a potentially eternal legal personality, an asset partitioning effect, and several layers of separations of ownership and control. Corporations are often used to legally structure large firms because they are very efficient legal devices to concentrate capital. But, firms are practically and conceptually different from the corporation(s) used to structure them. DGH consider that the understanding of what a firm is should not go against general, day-to-day understanding. In their view, although not all firms are corporations, all corporations are firms. I disagree. Only by clearly explaining that corporations are not firms can lawyers help social scientists consider the constitutive role of the law of corporations in the structuring of our present-day economy.

Keywords: Corporation; law's constitutive role; theory of the firm

1. Introduction

Simon Deakin, David Gindis, and Geoffrey Hodgson ('DGH') have addressed and criticized (Deakin *et al.*, 2021) my characterization of business firms in my latest book, *Property, Power and Politics – Why We Need to Rethink the World Power System* (Robé, 2020).

In first approximation, I consider a firm to be 'an organization performing an economic activity' (Robé, 2020: 31, 195, 199, 293). DGH consider firms to be 'individuals or organizations with the legally recognized capacity to produce goods or services for sale' (Deakin *et al.*, 2021: 869). I disagree with their definition. I think it is misleading, especially for non-lawyers. Although this may not be DGH's intent, this definition gives the impression that firms are legal persons recognized as having the ability to operate in the legal system. Firms, as economic organizations, do not have such ability. And, sadly, DGH's definition defeats the purpose of their overall project to help social scientists, and economists in particular, integrate the 'constitutive role of law' (Deakin *et al.*, 2017). These are the reasons for this rebuttal.

I thank DGH for their time, their interest, their comments, and our lively debate. We have differences on definitional issues. But, this should not hide the essential: we agree that it is necessary for

social scientists to understand legal rules and integrate them in their analyses to guide their own research. We just disagree on what this entails with regard to the differentiation of firms and corporations.

2. Firms are not creatures of the law

In 2017, Simon Deakin, David Gindis, Geoffrey M. Hodgson, Kainan Huang, and Katharina Pistor wrote an important and powerful article on the constitutive role of law (Deakin *et al.*, 2017).

I want to emphasize how much I agree with their general argument that law is a constitutive part of the institutionalized power structure and a major means through which power is exercised. I fully support the assertion that an understanding of legal rules is essential for economists and other social scientists. Similar to the authors of this 2017 article, I share the view that, unfortunately, most institutional economists consider that law is a secondary expression of something else more fundamental.

I do, however, strongly disagree with the authors' treatment of 'Law and the Firm' in section 4 of their article. They treat the firm as an individual or organization with the legally recognized capacity to produce goods or services for sale. This notion is accommodating for social scientists who have a vague understanding of the law. But, it is misleading. Firms have no 'legally recognized capacity to produce goods or services for sale'. Only legal persons have this capacity and firms as economic organizations coordinating resources in the pursuit of an economic activity are not legal persons.

The authors start section 4 of their 2017 article by indicating that firms must be treated as 'creatures of the law' and that recognition of legal forms solves some enduring problems in the theory of the firm (Deakin *et al.*, 2017: 194). Then they write:

> 'We use the term firm to apply to individuals or organizations with the legally recognized capacity to produce goods or services for sale. A corporation is a kind of firm … all corporations are firms but not all firms are corporations'.

This is inaccurate. Firms are not creatures of the law. They are creatures of business practice, which is making use of the law to structure them. Corporations are creatures of the law, and they are used to structure many firms. The recognition of corporations as such effectively solves enduring problems in the theory of the firm. But, in themselves, as legal persons, corporations are not firms.

DGH use several wordings for their definition. Depending on the context, a firm is said to be a 'legally constituted business entity'; 'an individual or organization with the legally recognized capacity to produce goods or services for sale' (Deakin et al., 2021: 865); 'a legally constituted entity set up for the production and sale of goods and services' (Deakin et al., 2021: 872). Taking these various definitions in combination, DGH give the impression that it is the firm which is granted legal personality by the legal system. And in their 2017 article, DGH clearly wrote that 'An entrepreneur or association of resource owners become a firm upon the acquisition of a legally recognized separate legal personality' (Deakin et al., 2017: 197).

In their 2021 article, however, DGH indicate that their definition of the firm does not mean 'that the firm as such has legal personality' (Deakin *et al.*, 2021: 870). This seems to be directly contrary to what they wrote in 2017. And, it now makes this notion of 'legally recognized capacity…' something quite mysterious. In all legal systems, having a 'legally recognized capacity to produce goods or services for sale' implies, at least, having legal personality. Otherwise, there is no legal person in a position to sell the goods or services produced. Legally, only a legal person can sell or buy, i.e. be a party to a sale and purchase agreement. To have legal capacity, enforceable prerogatives, and potential liabilities, one needs to be a legal person. A corporation is a kind of legal person; a firm is not. And, the law is very strict on the attribution of legal capacity. This strictness is necessary to know who has what claims against whom, in what order, and so on. If these definitions of the law were loose, the structuring power of the law would be eroded, and law would lose a good deal of its constitutive role.

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3. Law's confrontation with the firm

In connection with the firm's purported 'legally recognized capacity…', DGH often use the notion of 'entity', or 'unit'. These words do not have a single-specific legal meaning. They are sometimes used in relation to the firm when its organizational reality is not seriously questionable although it is not legally recognized as a legal person. Several branches of the law are confronted with the firm's lack of legal personality and its *de facto* existence as an organization whose activities have economic and legal consequences. They are confronted with what Alain Supiot once called its 'elusive and inescapable' existence (Supiot, 1985: 623). But, these forms of acknowledgement of the firm/enterprise as an effective organization can lead to misunderstandings. These confrontations of the law with the *de facto* existence of the firm never lead to the granting of legal personality to the firm. They do not lead to any 'legally recognized capacity'. Each of these confrontations creates its own perception of the firm to draw legal consequences of its *de facto* existence.

This is the case in *antitrust law*, at the domestic (at least French) and European levels (Arcelin, 2003). Any 'entity' which carries out an economic activity, whether it has legal personality or not, can be qualified as an enterprise within the meaning of antitrust law. But, this 'enterprise' has the peculiarity of accessing legal life (without becoming a legal person) only if it is violating antitrust law. Realistically, investigators seek in the organization of the enterprise which legal operator had the real capacity to determine the commercial strategy suspected of being in violation of antitrust rules. Antitrust law does not stop at the supposed autonomy of legal persons in this area; that would limit its effectiveness too much. A factual analysis is being performed, but it will necessarily lead to the identification of one or more legal person(s) to whom the violation of antitrust law can be attributed. It cannot be attributed to the firm, which does not have legal personality. It owns no assets and could not pay any fine. The firm is thus analyzed in its concrete operation to identify the organization of the violation of antitrust law; but also, to identify the legal person(s) involved and to whom this violation can be *legally* attributed.

Labor law is also confronted to the organizational reality of the firm. It appears, under the form of a so-called 'economic and social unit' (under French law, pursuant to article L. 2322-4 of the Labor Code), which was initially identified by case law to assess the criteria for setting up employees' representative bodies. It is used, in particular, to counter the practice of artificially splitting a business to put it under the control of several legal entities, the intended effect being to remain under the legal thresholds set for the representation of employees. Or the firm can be identified via the concept specific to the law of the transfer of 'undertakings' to ensure a concomitant transfer of employment contracts (Directive 2001/23/CE, and article L. 1224-1 of the French labor Code).

The enterprise also appears in *accounting law* (Biondi *et al*., 2007; Hill, 1987). Here again, there is recourse to the vague notion of 'entity', the objective being to account for the actual financial performances of the firm, and not just of this or that legal person used for its legal structuring.

But, *none* of these remedies for the inexistence of the firm as a legal person gives it legal personality. They do not grant the firm any 'legally recognized capacity to produce goods or services for sale'. They just draw consequences, from their own perspectives (Robé, 1995: 118) (the protection of market competition, the protection of workers, and the appropriate accounting of the firm's operations), of the *de facto* existence of the firm as an organization. I agree with DGH that these branches of the law are not blind to the firm (Deakin *et al*., 2021: 866). But, they do not facilitate its existence. They draw consequences of its *de facto* existence to prevent the avoidance of rules which would otherwise be applicable.

4. Firms and corporations

As DGH indicate, I have argued that firms and corporations are 'totally different concepts' (Robé, 1995, 1999, 2011, 2015). And, contrary to DGH (Deakin *et al*., 2021: 866, 869, 873), I maintain that corporations, in the legal technical sense, are not firms. Of course, in general American language and Globish, the words 'corporation' and 'firm' are used as synonyms. But, in studies directed at

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demonstrating the constitutive role of law, the word 'corporation' must, in my view, be used in its technical sense only. Otherwise, it leads to numerous confusions which can easily be avoided with a more careful use of words. The distinction is important to make because if one works on the theory of the firm, or law and economics (and organization) using the day-to-day language, it can only generate a lot of misunderstandings. This is what happened to economists who did not realize the importance of the distinction. And, DGH's definition does not help clearing the area from the language traps.

As a matter of illustration, looking at the famous 1976 article written by Michael Jensen and William Meckling to which DGH refer, we can clearly see the consequences of the confusion they made. Jensen and Meckling (1976: 310) wrote:

> '…most organizations are simply legal fictions. This includes firms, and even governmental bodies such as cities, states… The private corporation or firm is simply one form of legal fiction which serves as a nexus for contracting relationships…'.

Jensen and Meckling used the general language and treated the words 'firm' and 'corporation' as synonyms. It led them to a series of erroneous conclusions: although a corporation is a 'form of legal fiction' (it has legal personality, i.e. it is treated as a legal person by the legal system), the firm is not a legal fiction. It has no legal personality and cannot operate as such in the legal system. And, neither the firm nor the corporation 'serves as a nexus for contracting relationships'. Clearly, there are contracts used to legally structure the firm. One contracting party to these contracts is the corporation; the others are usually contributors of resources (labor, materials, machines, buildings, utilities, and many other inputs) used to operate the firm or parties interested in the output (distributors or clients). But, neither the corporation nor the firm 'serves as a nexus', which is a totally vague notion hiding more than it reveals. The firm is legally structured around the legal person of the corporation. Most of those involved in the operation of the firms do not have contracts with each other. The contracts are bilateral contracts between the corporation and the resource providers – and the clients. The reduction of the firm to a 'nexus' of contracts ignored the key importance of the corporation as a separate legal person which is central to the firm's legal structuring and cannot be created by contracts only. It needs a legal order granting it 'legal personality'. But, the granting of legal personality does not make of a 'corporation' a 'firm'.

As a matter of illustration, when incorporation was a lengthy process, banks used to create corporations by the dozen to have them immediately available when their clients needed them. In the meantime, they were 'dormant', with no activity, conducting no purchases or sales. These business corporations were not 'incorporated firms' (Deakin *et al.*, 2021: 873). They clearly had a 'legally recognized capacity to produce goods or services for sale'. But, they did not make any use of it. In what sense could they be 'firms'? They were just legal persons created by a service provider, ready to be used for whatever purpose their clients would eventually need them.

Or, to use another example, for tax planning, secured financing, or other reasons, acquisition structures often make use of numerous corporations (Robé, 2011, 2020: 259–268). The shares issued by corporation A (headquartered, say in France) are purchased by a holding corporation B created in France; its shares being owned by a first Luxembourg corporation C whose shares are owned by corporation D (this is called a 'double LuxCo' acquisition structure). For DGH, all these corporations are firms. But, apart from corporation A, they have no other activity than owning shares. And, corporation A is not a firm either; the economic organization built around its legal personality (and, as the case may be, the ones of its subsidiaries) is one.

5. Firms as organizations

Coming now to firms, I describe them in numerous ways. But, looking at the various expressions I use to *describe* (not *define*) them, it is hard not to notice that the key common denominator is the concept of 'organization'. Just taking the descriptions used in the General Introduction of my 2020 book, I

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present a firm as a 'power organization' (Robé, 2020: 8), as an organization 'in which the activities of individuals are organized'. Another description used is 'firms as organizations' (Robé, 2020: 13). I also indicate that 'so-called "market economies" in fact comprise both "markets" and "organizations": business firms' (Robé, 2020: 25). I could continue *ad nauseam*. In my view, the various expressions I use to describe firms are complementary. But, there can be no doubt that I generally describe a firm as an *organization* having an economic activity, the emphasis being always on the notion of *organizing*, *structuring*, *coordinating*, etc.

To make it clear, I consider that the army, a business firm, or a law firm (to take only three examples) are all 'organizations'. An organization is not something static. Its members have an *activity* in common: members of the army prepare for war or wage war, workers in a business firm produce or sell widgets, and lawyers in a law firm provide legal services to the firm's clients. Members of the firm use assets to conduct their activity. These activities are structured, organized, with internal rules, hierarchies, orders. Each of these organizations has an 'organized activity' and, in fact, *is* the organized activity. For the business and law firms of my example, this 'organized activity' is an 'organized economic activity'.

DGH concentrate on only one of the descriptions I use ('organized economic activity'). But, then they redact the key organizational aspect in it to only keep the word 'activity' (Deakin, 2019; Deakin *et al*., 2017: 194n; 2021: 869). I indicated I did not think this was proper in my 2020 book (Robé, 2020: 196n). To no avail. Using their abridged version of my description, DGH keep on considering that my 'definition' cannot stand for two reasons. The first one is that no one has ever defined a firm as an activity; but that includes myself (I always use the expression, 'organized activity' or 'organization'). The second criticism 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' (Deakin *et al*., 2021: 869). But, the fact that a business firm has business hours, that employees are supposed to show-up on time, and leave according to an organized time-schedule is part of the organization. It is required for team work to be organized. And that includes reduced or no activity over the weekend or vacation time. For many firms, remaining open night and day all year long, with employees coming and going as they wish when they want would be chaotic – unorganized. Far from affecting my description of the firm, the fact that the use of time is organized, including when there is free time, by these organizations I call firms (or enterprises) are supporting it. The firm does not disappear in the evening, or on weekend or holidays, and so on. It is still there to determine when the employees must come back. Of course, employees do what they want with their free time. But, the length of their free time is limited by the moment, set by the firm (within the limits of the employment contract and the rules of employment law), when they must come back to work. The firm does not get reorganized every morning from scratch. People know when they must arrive, where they must go, when they must leave, and what they are supposed to do in the meantime. Those who do not respect this have a clear tendency to get fired, i.e. to be expelled from the firm which needs organization to operate. They will quickly experience that the firm has not ceased to exist while they were on weekends or holidays.

6. Dealing with the description of the firm I use

To summarize my description, a firm is an economic organization (an organized economic activity) via which products or services are produced and sold. No legitimate firm can be created and operated without having recourse to the legal system. A firm can be, for example, a small shop. To create it, the entrepreneur can execute a lease with an owner of premises, buy goods from suppliers, and seek to sell them to customers. Many other combinations of property rights and contractual relationships are of course possible. There may be employees or not, since a single entrepreneur can play all the roles in his small firm: buy or produce goods, offer her services, sell them, do the accounting of the operations,

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clean the floor in the evening, and so on. When the operations are up and running, this small organization operates around the legal personality of the individual entrepreneur whose legal personality is being used as the counterparty to the various contracts which serve as the legal instruments via which inputs are contributed to the firm (legally speaking: sold or leased to the entrepreneur) and output is sold to clients. This small organization is often characterized in many States' legal systems as a 'going concern' or something equivalent. The law gives some form of recognition to its existence as an organized business activity which coherence is somewhat maintained, in particular when it is being sold (the famous 'transfer of undertaking' rules under EU law). But, to my knowledge, nowhere is it treated as a separate legal person. It does not have a 'legally recognized capacity to produce goods or services for sale'. It is the entrepreneur who has this legal capacity.

When the firm needs more capital or talent, for example, than a single entrepreneur has or can get by simply hiring more employees, the legal vehicle to structure the firm can be a partnership, combining talent and potentially other resources as well. When massive amounts of capital are needed, that legal vehicle is usually a corporation, issuing shares of stock which are purchased by shareholders on the primary market for shares, thus contributing capital to the corporation. For the largest enterprises, the corporate structure is a group of corporations (each having legal personality) or other kinds of legal entities; and this is particularly the case for multinational enterprises.

As should be clear from these descriptions, the firm as an economic organization can be quite simple or extraordinarily complex, with worldwide operations for so-called 'multinationals'. But, the legal instruments used to structure them are basically the same: property rights, contracts, and legal persons. Corporations are only one of the types of legal persons used to legally structure firms.

7. Multinationals

With their definition that firms have a 'legally recognized capacity to produce goods or services for sale', DGH are unable to address multinational enterprises. They are led to write that multinational firms 'operate through separate incorporated firms' (Deakin et al., 2021: 873) which necessarily means that multinational firms cannot be singular firms but can only be firms made up of firms. This is contrary to their assertion that the firm 'is a singular business unit' (Deakin *et al.*, 2021: 869). A singular business unit can hardly be made of a series of singular business units. Then DGH acknowledge that 'we need to have a definition of multinational enterprise alongside a definition of firm' (Deakin *et al.*, 2021: 873). But, none is suggested. As I have described in detail in a 2011 article, firms do not change of 'nature' when they become international and then global. They keep on doing the same thing (organizing an economic activity). But, now their organizing activity spreads over States' borders. And to spread their activities, they use the classical legal instruments used to legally structure *any* (large) firm: corporate vehicles, property rights, and contracts. On the corporate side, their corporate backbone is a group of corporations. One single firm uses several legal entities to structure itself. The place of incorporation of each subsidiary of the group can be in the world's some 200 States' legal orders. But, the group of corporations is not a legal person as such and the economic exchanges among the subsidiary corporations look like market exchanges to outsiders. They take place among different legal entities, the ones delivering products or services and the others paying a price for them. But these economic exchanges are in fact the outcome of *organized action*, action organized by the firm. They take place among *different* legal persons (each having the 'legally recognized capacity to produce goods or services for sale') but within the *same* firm. Prices paid within firms, among the corporations used to structure them, are not *market prices*. They are *administrative decisions* (Robé, 2020: 249–259). This is a key point to understand globalization. It is much more a globalization of *organized* economic activity than a globalization of *markets*.

In their 2017 article, DGH ask 'are there "internal markets" within firms?' (Deakin et al., 2017: 195). They then take the case of a firm with several 'divisions' with no legal personality and rightly write that 'internal transfers within the firm do not involve the exchange of legal property rights. The objects of "exchange" remain the property of the firm [sic, the corporation]. These exchanges

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are not legally enforceable contracts…'. DGH do not address the more realistic case for large firms of a corporate structure involving a group of corporations, and not only of a single corporation having divisions (also called 'branches'). Exchanges internal to the firm *then* take place among separate legal persons, having contracts and exchanging property rights for a consideration. Doing otherwise would usually be a criminal offence, each subsidiary corporation having its own creditors who should not be defrauded by the movement of assets among commonly controlled legal entities without corresponding payments. But, these exchanges are not 'market exchange', they are coordinated, structured, organized by the firm (Robé, 2020: 241–292).

The difficulty DGH miss, and would lead social scientists to miss, is that the firm is *not* a legal person in the States positive laws but that (in today's world) it cannot exist *without* legal persons. To legally structure a firm, it is necessary to use legal persons (depending on the context: individuals, partnerships, corporations, etc.), which have the 'legally recognized capacity to produce goods or services for sale'. They serve as the 'legal backbone' around which contracts, assets, shares in other companies, etc. can be aggregated to enable the firm to operate its activities. The firm can, therefore, combine the operation of the various resources secured using these legal devices.

This description may be counterintuitive and not in line with everyday meaning and understanding, which confuses firms and corporations. But, that is the way real firms are legally structured in our real economy.

8. Day-to-day language can be an impediment to scientific understanding

In their attack of my description of what a firm is, DGH declare that the first rule 'in the construction of taxonomic definitions is that they should were possible be close [to] everyday meaning' (Deakin *et al.*, 2021: 867). They then apply this rule to me and consider that my 'definition' of the firm is unacceptable because it 'violates the common-sense guideline for definitions outlined above' (Deakin *et al.*, 2021: 869).

There is no doubt that in every-day language, there is great confusion in the use of the words 'company', 'business', 'firm', 'corporation', 'enterprise', and so on. These words are used routinely as synonyms. People also talk about 'multinational enterprises', 'big firms', 'multinational companies', 'big business', 'large corporations', 'transnationals', and so on in an almost undifferentiated manner. This is true in all the languages I know. And it is perfectly fine, unavoidable, and of no great importance. It becomes highly problematic, however, when social scientists and lawyers do not clear this everyday confusion in their reasoned analyses. This is what DGH do when they write that my analysis leads to the 'bizarre result that corporations are not firms' (Deakin *et al.*, 2021: 865). In general language they are; in the effective legal structuring of our economy, they are not. The bizarreness exists only if one is content with 'everyday meaning' and neglects the constitutive role of law. Exactly as most economists generally do. In the real (business) world, corporations are sometimes used to legally structure firms; sometimes not. They are never firms by themselves. Of course, when businesspeople speak to their friends and family, they use the general language and tell them: 'I sold the business' or 'I've put George in charge'. But, when it comes to implementing these decisions, they sign Shares Sale and Purchase Agreements (SPAs); or they get a board meeting for George to be appointed as CEO. With the legal constraints attached to each of these legal acts. And the formalities to be followed are not capriciously set: they protect affected interests. Without abiding by them, no property rights are transferred, and no prerogative will be attributed to George. Those who make it a profession to study the world of business and the economy via the lenses of any social science must integrate this constraining reality business practitioners have no liberty to ignore.

There is another area where general language issues have led to much misunderstanding and analytical errors. In everyday meaning, shareholders are routinely considered to be the owners of firms (or corporations, the public, and most economists making the confusion). This error is widespread, and it affects even the specialized press and scholarly reviews. In reality, shareholders only own shares (Blair and Stout, 1999; Hill 1987; Ireland, 1999; Robé 1995, 1999, 2011)). But, the widespread 'everyday

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meaning' that shareholders own corporations/firms has led economists to develop their so-called 'agency theory', i.e. the twisting of the management of most large firms in the interests of shareholders only to lead managers to create 'shareholder value'. Since shareholders own corporations/firms – the theory goes – managers are their 'agents' and must manage in their 'principal's' interest. Then this interest is declared to be the 'maximization of profits' (or of 'shareholder value'). This has and is still generating massive negative externalities, including global climate disruption (Robé, 2012, 2020: 293–326).

Legally speaking, the whole construction is nonsense. Shareholders own shares, corporate officers and directors are agents of the corporation, and they generally must manage in the corporate interest, which includes the shareholders' interest but not only. The consequences of the confusion generated by economists having developed their theory based on 'everyday meaning' are dramatic (Robé, 2012). Although corporate power should be treated as any other form of *power*, with a duty to consider the various interests affected by the firm's operations, corporate prerogatives are treated as a *property* with no other purpose than the satisfaction of the 'owner'. Our species may not survive this 'mandate' built on a mistake induced by the scientific use of words in their 'everyday meaning' (Robé, 2019).

Strangely, with regard to this definitional issue, DGH take the view that 'at this point, economics need 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 behaviors, to assert that shareholders "own" either the firm, the corporation, or its assets' (Deakin et al., 2021: 870).

DGH agree that with regard to the ownership of firms/corporations/shares, 'it is a fundamental error for economics' to follow 'everyday meaning'. But, when it comes to defining firms and corporations, 'everyday meaning' must prevail. DGH do not find it 'bizarre' that, at law, shareholders do not own firms, corporations, or their assets, although they are considered as having these prerogatives in everyday meaning. But, for some unknown reason, with regard to firms and corporations, DGH consider that economics does not need to take account of this specific legal reality that while the corporation has legal personality and a 'legally recognized capacity to produce goods or services for sale', firms do not have it. Here, the 'constitutive role of the law' is treated as irrelevant.

I respectfully but strongly disagree. To paraphrase DGH, given the material significance of the way in which the legal system supports the allocation of rights, duties, and liabilities to legal persons, it is a fundamental error for economists to make the confusion between the firm and the corporation. This is particularly the case for multinational firms which are organizations whose corporate structure is splintered into numerous legal systems in which the rights, duties, and liabilities of each subsidiary corporation are all different. This offers a world of opportunities for the structuring of multinational firms and the allocation of rights, duties, and liabilities among the various corporations used, precisely because firms have no legal unity, as I have shown at length in 'Property, Power and Politics' (Robé, 2020). The outside world, including States, contracting parties, or third parties can only interact, insist on law abidance, contracts fulfillment and damages correction with one or part of the legal persons used to structure the firm. They cannot do it with the firm as such. This is one of the key issues of our time, to which economists, political scientists, and lawyers must adapt.

9. Conclusion

As DGH write, 'there is a lamentable absence of consensus regarding the definition of the firm' (Deakin *et al.*, 2021: 866). I fully agree. In my view, not much progress has been made over the last 30 years in the theory of the firm because of language issues. What is generally called shareholders' agents are agents of the corporation; what is called principals are not principals; what is called a corporation is often a firm; and vice-versa, and so on. To put some order into all this, we must start from solid ground. I do think that when key words used in the social sciences addressing firms have a vague meaning in general language and a *specific legal meaning* (as is the case for the word *corporation*), it is better to use them in that later sense only. These words strictly correspond to institutional constraints

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business practice must adapt to. We are on solid ground then; we integrate the constitutive role of law and there is little room for disagreement. Most of the contradictions in the existing dominant theory of the firm disappear with this discipline (Robé, 2011). For other words, such as *firm* or *enterprise*, agreement is more difficult. There can be many formulations of what they are because they are extremely diverse in their size, activities, and internal structuring. But, with regard to corporations as specific legal devices, it would be a mistake to overlook their legal characteristics and their peculiar role in the structuring of the largest firms in our economy.

References

Arcelin, L. (2003), *L'entreprise en droit de la concurrence français et communautaire*, Paris: Litec, Bibliothèque de droit de l'entreprise no. 61.

Biondi, Y., A. Canzani and T. Kirat (eds.) (2007), *The Firm as an Entity – Implications for Economics, Accounting and the Law*, Oxon & New York: Routledge.

Blair, M. M. and L. A. Stout (1999), 'A Team Production Theory of Corporate Law', *Virginia Law Review*, **85**(2): 751–806.

Deakin, S. (2019), 'Juridical Ontology and the Theory of the Firm', in F. Gagliardi and D. Gindis (eds), *Institutions and Evolution of Capitalism – Essays in Honour of Geoffrey M. Hodgson*, Cheltenham, UK and Northampton, MA: Edward Elgar Publishing, pp. 127–141.

Deakin, S., D. Gindis and G. M. Hodgson (2021), 'What is a Firm? A Reply to Jean-Philippe Robé', *Journal of Institutional Economics*, **17**(5): 865–875.

Deakin, S., D. Gindis, G. M. Hodgson, K. Huang and K. Pistor (2017), 'Legal Institutionalism: Capitalism and the Constitutive Role of Law', *Journal of Comparative Economics*, **45**(1): 188–200.

Hill, H. P. (1987), *Accounting Principles for the Autonomous Corporate Entity*, New York: Quorum Books.

Ireland, P. (1999), 'Company Law and the Myth of Shareholder Ownership', *The Modern Law Review*, **62**(1): 32–57.

Jensen, M. C. and W. H. Meckling (1976), 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure', *Journal of Financial Economics*, **3**(4): 305–360.

Robé, J.-P. (1995), 'L'entreprise en droit', *Droit et Société*, **29**(1): 117–136.

Robé, J.-P. (1999), *L'entreprise et le Droit*, Paris: Presses Universitaires de France.

Robé, J.-P. (2011), 'The Legal Structure of the Firm', *Accounting, Economics, and Law*, **1**(1): 1–88.

Robé, J.-P. (2012), 'Being Done with Milton Friedman', *Accounting, Economics, and Law*, **2**(2): 1–31.

Robé, J.-P. (2015), *Le Temps du Monde de l'Entreprise – Globalisation et Mutation du Système Juridique*, Paris: Dalloz.

Robé, J.-P. (2019), 'The Shareholder Value Mess (and How to Clean It Up)', *Accounting, Economics, and Law: A Convivium*, **10**(3): 1–27.

Robé, J.-P. (2020), *Property, Power and Politics – Why We Need to Rethink the World Power System*, Bristol: Bristol University Press.

Supiot, A. (1985), 'Groupes de Sociétés et Paradigme de l'Entreprise', *Revue Trimestrielle de Droit Commercial et de Droit Economique*, **38**(3): 621.

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