Corporate privacy is an oxymoron. 

Individuals have a right to privacy, which the Supreme Court has recognized at least since Griswold v. Connecticut (1965). Warren and Brandeis’ famous defense of the right to privacy (1890) clearly applied only to individuals, because only individuals have the kind of feelings that are affected by invasions of privacy:

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone" . . . Of the desirability -- indeed of the necessity -- of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. . . . It is our purpose to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is.1

Corporations are legal entities, and the concept of privacy does not apply to them.2 As the Supreme Court held in 1906:

---

1 Irwin I. Cohn Professor of Law, the University of Michigan Law School
3 California Bankers Ass’n v. Shultz, 416 U.S. 21, 65-66 (1974) (“While they may and should have protection from unlawful demands made in the name of public investigation, corporations can claim no
Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State. The individual may stand upon his constitutional rights as a citizen. . . Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. . . . It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose . . . 3

Thus, any objection to making corporate tax returns public cannot rest on the right to privacy. In fact, corporate returns were made public in 1909, 4 and while this provision was soon repealed, the argument in favor of repeal was not based on privacy but on confidentiality: Disclosure of corporate tax returns, it was said, could give competitors access to confidential information and put the corporation at a competitive disadvantage. 5

The same arguments from confidentiality were made in favor of preventing the publication of advance pricing agreements (APAs), even in redacted form. Thus, in my opinion the question whether the results of country by country reporting (CbC) should be

3 Hale v. Henkel, 201 U.S. 43, 74-75 (1906).
made public has nothing to do with privacy. Instead, the answer depends on the following questions:

1. Does CbC reporting include information that could reasonably be regarded as confidential, in that revealing it will lead competitors to discover future business plans (like the APAs)?

2. Do these costs overcome the advantage of making CbC reports public, which is to increase pressure on companies to align their reported profits with the location in which they pay taxes?

3. For US-based multinationals, some of the information included in CbC reporting is already public (e.g., profits reported by subsidiaries in tax havens). Would making CbC reports public change significantly the information that is already publicly available? 6

4. Last, but not least, does public CbC tax reporting really harm firm competitiveness? According to Cockfield and MacArthur, empirical evidence on this issue is mixed.7

---

6 Recently, Robert Stack, deputy assistant secretary at the U.S. Treasury, said that the U.S. will not share country-by-country report (CbCR) information with foreign authorities who choose to make the reports public; for a comment see Joelle Jefferis, Stack says US will withdraw CbC information if made public, INTERNATIONAL TAX REVIEW, at 13 (April 2016), http://www.internationaltaxreview.com/Article/3541626/Stack-says-US-will-withdraw-CbC-information-if-made-public.html.

7 See Cockfield and MacArthur, supra note 2 at 632.
I. BACKGROUND

Professor Avi-Yonah chides at the outset of his thought-provoking essay that “[c]orporate privacy is an oxymoron.”

Relying on the legendary article widely credited with establishing privacy law as a separate chapter of jurisprudence — Warren and Brandeis, “The Right To Privacy,” — Professor Avi-Yonah postulates that a right to privacy applies “only to individuals, because only individuals have the kind of feelings that are affected by invasions of privacy.” Then, citing Hale v. Henkel — perhaps the most cited case in Supreme Court history — Professor Avi-Yonah asserts that “[c]orporations are legal entities, and the concept of privacy does not apply to them.” He thus concludes that “any objection to making corporate tax returns public cannot rest on the right of privacy.”

II. CORPORATE PRIVACY RIGHTS

While Hale v. Henkel established that a corporation does not have the constitutional right to refuse to submit its books and papers for examination by the U.S. Government, the Court nonetheless there stated that a “corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body, it waives no constitutional immunities appropriate to such body.”

* Lecturer in Law, Columbia University Law School. The author wishes to thank his Columbia Law School colleague, Professor Michael Graetz, who read an early version of this essay and made insightful suggestions. The author, of course, remains responsible for any errors.

2 Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 5 Harv. L. Rev. 1 (1890)
3 Avi-Yonah, supra note 1.
6 Avi-Yonah, supra note 1.
7 Id.
8 Hale, supra note 4, at 76.
The Supreme Court also recognized corporate privacy rights in *G.M. Leasing Corp. v. United States*, where the Court noted that it cannot “be claimed that corporations are without some Fourth Amendment rights . . . The seizure of G.M.’s books and records . . . involves nothing more than the normal enforcement of the tax laws, and we find no justification for treating petitioner differently in these circumstances simply because it is a corporation.” Even more tellingly, Justice Blackmun observed in *G.M. Leasing* that the Government lawyers “argue that there is a broad exception to the Fourth Amendment that allows warrantless intrusions into privacy in the furtherance of enforcement of the tax laws. We recognize that the ‘Power to lay and collect Taxes’ is a specifically enunciated power of the Federal Government[,] but it is not appropriate] to effect a warrantless seizure of property, even that owned by a corporation.”

Similarly, in *Dow Chemical Co. v. United States*, the Supreme Court held that Dow “plainly has a reasonable, legitimate, and objective expectation of privacy . . . and it is equally clear that expectation is one society is prepared to observe.”

Indeed, Columbia Law School’s esteemed Professor Alan Westin, in his landmark book on privacy, cogently reasoned that, “[j]ust as with individuals . . . organizations need the right to decide when and to what extent their acts and decisions should be made public . . . [P]rivacy is a necessary element for the protection of organizational autonomy, gathering of information and advice, preparations of positions, internal decision making, inter-organizational negotiations, and timing of disclosure. Privacy is thus not a luxury for organizational life; it is a vital lubricant of the organizational system in free societies.”

Thus, it is by now firmly established in the United States that corporations enjoy substantial, though not unlimited, privacy rights. As recently observed by a legal scholar, “it is a tautology to predicate a corporation’s rights based on the extent to which a corporation is a person, because legal personhood is a construct defined by the rights it commands, and one that shifts meanings based on context. Simply put, it is quite possible — and preferable as a legal matter — to accept that ‘corporate personhood’ signifies that a corporation is an entity capable of bearing rights, including constitutional rights, without asserting that a corporation is a natural person entitled to a full suite of constitutional rights.”

III. ANALYTICAL FRAMEWORK — PROPER BALANCE

Following in the wake of Ms. Robinson’s prescient observations, the weight of U.S. Supreme Court precedent and Professor Westin’s deep insights, the question of whether the results of country-by-country tax reporting (CbC) should be made public — whether in the United States, within the EU or by other Governments — must be answered based on context, recognizing that corporations do indeed have privacy rights that deserve protection as a “vital lubricant of the organizational system in free societies.” In particular, the debate spurred by Professor Avi-Yonah is not whether Governments themselves are rightly entitled to CbC information, which they most certainly are, but whether Governments should either release it, or force such tax return information to be released, to the general public.

---

10 Id. at 354.
14 WESTIN, supra note 12, at 51.
The key question is whether, on balance, any societal benefits of having the general public know about a corporation’s private information outweigh the benefits of limiting such information to Governments and respecting the privacy rights of the corporation itself.

IV. ENSURE TAX COMPLIANCE

A major proponent of public disclosure of sensitive tax return information, the Tax Justice Network, has observed that public CbC data “would shed light on many of [the multinational business community’s] international tax shenanigans.”15 Similarly, the related website, “tackletaxhavens.com,” has argued that public CbC reporting would enable “citizens and authorities [to] see what the corporations are doing in their own countries. With this single accounting measure countries, rich and poor, will be able to call [companies] to account at last.”16

These proponents of public CbC reporting, like Professor Avi-Yonah, gloss over the critical aspect that Governmental tax authorities will already have all of the CbC information, and indeed much more, filed directly with them by the companies. The clear societal interest of ensuring compliance with each sovereign’s tax laws is thus already fully protected through the existing OECD-encouraged CbC filing requirements, recently enacted in more than 30 countries including the United States, India, the U.K., France, Switzerland, China, Canada, Mexico, and Germany.17 All of these nations envision data exchanges among the Governments’ own tax authorities, but all at the same time fully protect corporate privacy rights. Thus, the strong Governmental interest in enforcing compliance with applicable tax laws is safeguarded through mandatory CbC reporting, just as countries have long required comprehensive income tax returns to be filed. This Governmental interest clearly outweighs the privacy interest of corporations.

V. PUBLIC RIGHT TO KNOW

Having agreed that Governments have the right to corporations’ CbC and other tax return information, the question remains whether the general public’s right to know outweighs the legitimate and well-established privacy rights of corporations to keep such data private.

Like the right to privacy, the public’s right to know has long been recognized as essential to the sound functioning of government. As James Madison remarked, “[k]nowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.”18 Moreover, the very same Louis Brandeis who wrote “The Right to Privacy” also famously observed that “[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman … Publicity is justly commended as a remedy for social and industrial diseases.”19

President Madison and Justice Brandeis, however, were both focused on the public’s right to know what the Government does and why, not what private parties do and why. The

---

18 JAMES MADISON, Letter to W. T. Barry (1822).
19 LOUIS D. BRANDIES, OTHER PEOPLE’S MONEY 62 (1933).
public’s right to know information kept confidential by other private parties, including corporations, is necessarily quite limited in a free society.

VI. STRIKING THE BALANCE — CORPORATE PRIVACY RIGHTS V. PUBLIC RIGHT TO KNOW

Once the Government knows a company’s CbC data from private filings, there is no societal interest in making such data public that outweighs the company’s right to privacy of that data. In fact, there are many reasons that the company’s right to protect its data privacy outweighs the public’s right to know such private information:

- **Fair Competition.** As would be the case with other confidential and proprietary information, giving a company’s competitors access to its CbC data would distort competition and provide unwarranted insight into its business strategies. Before describing examples of the competitive distortions, it is important to review the nature of CbC data: (i) nature of the activities within the country; (ii) number of employees; (iii) the related and unrelated revenue; (iv) profits; (v) taxes; and (vii) accumulated earnings. Each of these pieces of information is of the type normally treated by corporations as private in virtually all circumstances.

As an example, most multinational companies seek to gain the lowest possible costs in their supply chains, with competitive advantages often gained through locational savings. If a company discovered a low-cost opportunity in, say, Malaysia, Ireland, Kenya, China or Hungary, its competitors shouldn’t be able to “reverse engineer” its cost advantages through CbC reports. There can be no doubt, for example, that Samsung would gain valuable insights if it were able to discover through CbC reports the extent of Apple’s manufacturing and engineering operations in China and other low-cost supply locales, and an estimate of Apple’s cost advantage. Similarly, if Citigroup discovered that it could locate a low-cost call center in China to serve customers in other Asian countries, it would be unfair for it to have to telegraph its discovery to HSBC through CbC reports. In each of these cases, the extent of a corporation’s activities and profitability in a country would be valuable for its competitors to learn and prepare to attack.

As another example, a firm’s new-business strategies could be derived through public CbC reports. If a company were in its start-up phase in a new market, CbC reports would give its competitors early notice of the extent of its presence and early success. Consider just how valuable it would be for Uber’s competitors to know its CbC revenue and profitability to help formulate their competitive responses in each new country to which Uber expands.

As a third example, almost all manufacturing companies face key decisions on where to locate R&D facilities. If a U.S.-based global company decides to locate its R&D centers in, say, India, Brazil, Ireland and Italy, rather than in the U.S., its competitors would gain important advantages if they could discover the company’s footprint and an estimate of the R&D value-add through CbC reports.

It is also unreasonable, as a fourth and final example, to require a company to disclose its legitimate tax planning or the results of its tax negotiations with a sovereign Government to its competitors. Even in the latter, perhaps more difficult case, the disclosure of such information should be made only by the Government itself if it is thought justified by the local public’s competing right to know what its Government did and why.
Public Debate. Exposing CbC data to the public would not lead to a more thoughtful public discussion of corporate tax policies because CbC data is neither complete nor tied to any particular country’s tax laws. Disclosing such data to the public would not enhance the political process. Moreover, if needed, legislators generally have access to private information possessed by the Government’s tax authority.

Enforcement. Releasing CbC data to the public is not needed to enhance tax authorities’ ability to assess the legal amount of tax due, since the tax authorities will already have both the data and the ability to obtain more data pursuant to Government-to-Government tax information exchange. Indeed, the release of such data publicly could undermine the tax authorities by allowing the public to question their competence based on incomplete information. If encouraging private citizens to explore potential understatements of tax by other private parties were a legitimate exercise of Governmental authority, it would require that other financial information be released to the public, perhaps including tax returns. Privacy rights, however, should bar any such action.

Reputation. Releasing CbC data to the public without its full context would expose both companies and tax authorities to hyperbolic political attacks and inappropriate harm to corporate reputations and value.

VII. “UNANSWERED QUESTIONS”

While the foregoing framework demonstrates that public release of CbC data has, contrary to Professor Avi-Yonan’s opinion, much to do with the legitimate privacy rights of corporations, the answers to his final four questions also show why CbC data should not be made public:

1. “Does CbC reporting include information that could reasonably be regarded as confidential, in that revealing it will lead competitors to discover future business plans (like the APAs)?”

As described at greater length above, the locations of a company’s operations, the number of employees, a description of its activities and the associated financial data are certainly confidential. The extent and nature of a corporation's activities and profitability in a country would be quite valuable for its competitors to learn and thus prepare more easily a competitive response.

2. “Do these costs overcome the advantage of making CbC reports public, which is to increase pressure on companies to align their reported profits with the location in which they pay taxes?”

Professor Avi-Yonah assumes that it is an advantage to pressure Governments to increase the tax burden on corporations operating locally. There is nothing inherently advantageous about higher taxes, particularly if they result in less business activity in a country or a lower standard of living for the country’s citizens.

3. “For US-based multinationals, some of the information included in CbC reporting is already public (e.g., profits reported by subsidiaries in tax

---

20 Avi-Yonah, supra note 1, at 3.
21 Id.
havens). Would making CbC reports public change significantly the
information that is already publicly available?"\textsuperscript{22}

There are two answers to this question. First, if public CbC reporting applied only
to U.S. multinational corporations, they would be at an even greater competitive
disadvantage vis-a-vis their non-U.S. competitors. Second, the E.U.’s proposed public
CbC reporting most certainly exceeds any currently reported public information required
by U.S. corporations.

4. “Last, but not least, does public CbC tax reporting really harm firm
competitiveness? According to Cockfield and MacArthur, empirical
evidence on this issue is mixed.”\textsuperscript{23}

Even if the empirical evidence were indeed mixed, there would still be substantial
evidence that public release of private corporate data would harm competition. Indeed,
even without a noted economist’s rigorous empirical imprimatur, it seems self evident that
Uber’s fledgling competitors in, say, Denmark would benefit immeasurably from knowing
Uber’s headcount, revenue and profitability there and that Samsung would benefit from
knowing more about Apple’s operations in China. In contrast, there is no empirical
evidence that requiring such public reporting provides any societal benefits. Rather, such
public reporting primarily seems simply to enable misleading and potentially confusing
journalism and inflammatory political rhetoric.

VIII. RECENT DEVELOPMENTS

Notwithstanding the arguments against it, including those cited in Professor Avi-
Yonah’s footnote 4 by Secretary Stack, the European Commission broke with the United
States Treasury Department and released a draft directive on April 12, 2016, proposing
public CbC reporting by large companies operating in the European Union. If approved
by a simple majority in the E.U. Parliament and a so-called “qualified majority” in the E.U.
Council, the draft directive will enter into force.

IX. CONCLUSION

The E.U. should abandon its effort to enact legislation to require public CbC
reporting and should join the United States in refusing to move in such a direction. By
continuing on its current path, the E.U. would erode the vital lubricant of privacy needed
to allow the smooth functioning of the private enterprise system in its free societies.
Rather, the E.U. should work with the U.S. and all Governments to refine their brand-new
requirements for the private filing of CbC data. The legitimate privacy rights of
multinational corporations demand nothing less.

\textsuperscript{22} Id.
\textsuperscript{23} Id.
PUBLIC CBC REPORTING WILL NOT ACHIEVE ITS GOALS

Lowell D. Yoder*
David G. Noren*
Elizabeth Chao**

The European Commission has proposed an EU Directive that would require public country-by-country ("CbC") reporting of tax and financial information for multinationals that operate in Europe and have turnover in excess of €750 million. Both multinationals and governments have opposed the measure, arguing that it will unduly burden corporations and offer competitors access to companies' confidential strategic decisions and cost structures.¹ Others have explained well why it is critical to the global economy for certain corporate information to be protected as confidential (that is, available to tax administrators on a confidential basis), quite apart from any “privacy” type considerations of the kind that may apply to individuals.² An additional and even more fundamental reason that the European Commission’s proposal to require public CbC reporting is flawed is that the proposal would fail even to advance its own goals.

The stated purpose of the public CbC reporting proposal is to (1) incentivize multinational enterprises (“MNEs”) to align more closely where they pay taxes with where profit-generating activities occur and (2) facilitate an informed democratic debate on corporate tax policy.³ Public CbC reporting would do neither.

Public CbC reporting would not bring about any new sea change in terms of companies aligning their profit-generating activities with the places they pay taxes. For one thing, that sea change is already well underway, due to the various substantive tax policy actions agreed to as part of the OECD’s BEPS project. Corporate structures evolve for myriad business, legal, and regulatory reasons beyond tax planning, and MNEs have

¹Partner, McDermott Will & Emery
²Associate, McDermott Will & Emery
devoted significant resources to setting up their global business operations to comply with existing tax laws—after reevaluating structures in light of BEPS and making adjustments deemed necessary as a result of BEPS, MNEs are unlikely to revisit these structures yet again and intentionally choose to increase their tax liabilities further as a result of these public reports. A corporation’s incentive to raise its corporate tax rates would be especially low if tax rates were approximately consistent throughout its industry, and the corporation’s structure passes muster under BEPS principles.

Public CbC reporting could even spur a race to the bottom, as companies face increased shareholder pressure to lower tax rates in response to a perception among public investors that a company’s competitors may be paying less. In this way, public CbC reporting could aggravate, rather than ameliorate, the supposed corporate tax avoidance problem that the European Commission believes it is addressing. Not all public activism in this area will have the best interests of high-tax countries’ fiscs at heart.

A more effective measure of pressuring companies to align their profit-generating activities with the places they pay taxes is to make CbC reports available to government tax authorities, rather than the public, which of course is already part of the OECD’s BEPS reforms. The reports, alongside the massive amounts of information that governments always have had at their disposal in auditing corporate taxpayers, will assist governments in enforcing their own tax laws by providing information to the actors (government tax agencies) who are in the best position to act on it by modifying their audit and enforcement practices.

Public CbC reporting is also unlikely to improve public discourse around tax issues. The European Commission advertises that, as a result of its public CbC reporting proposal, “[t]he public will be able to know what is paid within each Member State and will be able to evaluate whether significant profits have been shifted outside the EU.” The public would not be able to discern from the seven basic numbers that the European Commission proposal requires MNEs to divulge—which, rightly, do not include tax-relevant but proprietary information such as where intellectual property is owned—whether or not there has been an inappropriate shifting of profits under the applicable tax laws. These numbers could easily be misinterpreted in the absence of other information and legal context necessary to the determination of whether relevant laws have been complied with (again, determinations that are properly made by the expert agencies tasked with the administration of tax laws). Misinformed, “crowdsourced” involvement in administering the corporate tax laws could even increase local country enforcement costs, as countries are forced to expend resources responding to misguided public requests. This is not to say that corporate tax should be entirely “left to the experts” and operate completely apart from any public oversight, and indeed it does not so operate today. Legislative bodies around the world—elected by their publics—have carried out very detailed and high-profile corporate tax investigations as part of their oversight of the tax

---


administrative process, and the press has long carried out its own investigations bringing tax policy issues to light.

In sum, unlike SEC filings, where the government requires public disclosure of corporate financial information because it is necessary to protect the investing public, there is no clear reason that the public, as opposed to governments, should have access to corporations’ country-by-country tax and financial information. Though the European Commission has articulated two purposes for its public CbC proposal, there is no indication that the proposal would fulfill either of those purposes, and there is plenty of reason to fear that the proposal would create unintended harm.
AN INVESTOR’S CASE FOR CBC TRANSPARENCY

Morris Pearl*

The question posed in this prompt is not of legality - the government already gets country-by-country tax disclosure as part of a company’s tax returns1 - but of policy. Do we (we the people, acting through our elected representatives) want country-by-country tax information to be made available to the general public?

In prior work, I have concluded that with regards to public companies, investors (owners) of companies and anyone researching those companies for investment opportunities have reasonable need for that information.2 There is significant risk (both reputational and operational) to companies that avoid paying taxes in jurisdictions wherein they have significant activities.

Two examples come immediately to mind:

- The poster child example is when members of the UK parliament called for a boycott on Starbucks in 2012.3 Starbucks had avoided paying taxes in the UK, risking severe backlash from parliament. The resulting very public campaign against the corporation caused a huge reputational hit that also affected shareholder value. Starbucks investors probably would have liked to have known beforehand that Starbucks was avoiding taxes so that they could be aware of the associated risks.

- More recently, the Republic of Ireland has faced vocal opposition to its decision to grant Apple a very low tax rate.4 As a result of the near-zero tax arrangement, Apple stands to be embroiled for years in lawsuits relating to a ruling by Europe’s antitrust enforcer that Apple pay Ireland $14.5 billion in back taxes.5 Public opinion in Ireland seems to be opposed to the special agreement between Apple and the Irish government. After the European Commission stated that Ireland was unfairly subsidizing Apple, implying that the subsidy was anti-competitive, some Irish citizens claimed that the subsidy was additionally unfair to all other taxpayers in Ireland.

---

*Chair, the Patriotic Millionaires

1 See Country-by-Country Reporting, 81 FR 42482 (Final regulations from the IRS and Treasury Department requiring country-by-country reporting by certain large multinational corporations).


5 Id.
I have made and still make this argument because I am trying to say not that the SEC could require disclosure, but that the SEC must require that disclosure. In the United States, at least, many large multinational companies are public companies. Therefore, a rule that applies to all public companies would supply the benefits of a level playing field.

I turn to address the question of the authority of the people (acting through their elected representatives) to compel such disclosure. My response is as follows:

1. All corporations are artificial constructs, created by the state, subject to regulation by the state, and allowed to conduct business and to exist at the pleasure of the state. One could argue that this regulation lies properly at the state level and not the federal level. However, corporations are subject to federal income tax, and can be and are required to furnish all manners of information to the federal government. The federal government can use the information for whatever purposes designated by governing statutes.

2. Public companies are extensively regulated by the federal government (as issuing securities trading on exchanges falls clearly within interstate commerce). The federal government has unequivocal authority to regulate public companies. These companies already have to make public information about everything from mine safety to the compensation of senior executives. There is no rational argument that information about foreign taxes is somehow more special.

3. Companies can, of course, contractually agree to make the data public. The government deals with many companies (government contractors) and uses contracts with many provisions for myriad purposes. In fact, the government imposes all kinds of requirements in public contracts - disclosure of foreign tax payments would not be a revolutionary concept.

Why do the people want such disclosure?

People want such disclosure so that they can be confident that tax rules are being applied fairly. They want to know that companies are not shifting profits that are intuitively being earned in one jurisdiction to another (lower tax) jurisdiction by transactions that have more form than substance. There have been many examples of companies that sell things (smart phones, coffee, etc.) in one jurisdiction and pay money to affiliates in another jurisdiction through fees associated with using intellectual property or some similar method. The common thread, which most people intuitively see as abusive, is that first some asset that can be easily moved by the stroke of a pen is deposited in an affiliate in a low tax jurisdiction. The affiliate in the high tax jurisdiction, then, incurs expenses for the use of that asset. When the ultimate sale is made in the high tax jurisdiction, people discern that the profit is “earned” there and that the company, which claims the profit is actually made elsewhere due to these inter-company payments, is abusing international tax law.

There is a real risk that investors should know about when companies can easily move from one jurisdiction to the next with the click of a mouse and do not pay taxes in

---

6 See Hale v. Henkel, 201 U.S. 43, 74 (1906) (“[T]he corporation is a creature of the State . . . It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter.”).

7 See, e.g., Country-by-Country Reporting, supra note 1.

8 U.S. Const. art. I § 8, cl 3; see generally, United States v. Darby, 312 U.S. 100 (1941).


countries where they have activities. For example, earlier this year French tax authorities raided the Paris offices of Google and Spanish tax authorities did the same in Madrid. Both countries are calling for billions in back taxes. And the problem is hardly unique to Google - companies from Airbnb to Uber are facing similar issues within the European Union.

The competitiveness of a firm relies on the health, strength, and growth of the firm - not on tax disclosures. Though disclosing material may influence investors to make decisions one way or another, if every company releases the appropriate disclosures, then every company is equally tasked with an additional consideration when addressing investor decisions.

By exposing to the public the relationship between sales and taxes, we would force government officials to either take action or explain to their voters the benefits of allowing current arrangements to continue.

---


I have been asked to comment on Reuven Avi-Yonah’s prompt from the point of view of an international tax lawyer practising in London.

It would not be appropriate for me to comment on the correct interpretation of US legal provisions or principles so I am approaching this issue from the point of view of “what the law should say” as opposed to what Reuven and the US legal commentators think “the law does say”.

The UK has had plenty of experience over the past five years with tax controversy in the media – and at times the committees in the UK Parliament have appeared to behave like star chambers bullying witnesses and seeming to be more interested in the headlines their sessions will create rather than having a balanced debate.

The trouble with tax in this context is that it is difficult to explain simply in a heated debate – anyone who tries to defend his or her position in such a debate is at risk of verbal abuse as the debate grows increasingly complex. One cannot really have an open and educated debate when one side is only interested in damaging the other’s reputation with cheap points that are easy to make, difficult to answer against the background noise but have no real substance.

In addition, because newspapers are generally only interested in printing bad news, there is a danger of commercial organisations becoming public targets purely for the sake of that and then finding it difficult to get a fair hearing.

Being put in the stocks so that the public can throw rotten vegetables at you is not an appealing prospect and, at the end of the day, it serves no real public purpose.

The question then is whether the public purpose is best served by:

(a) public naming and shaming to ensure that taxpayers comply with what is perceived as the “spirit of the law”; or

(b) having clear legislation backed up by disclosure obligations to tax authorities that enable them to ensure that profits are being taxed where they are truly being generated.

Mixed up in all this, of course, is the often difficult concept of “the public’s right to know”. This was something that featured in recent EU proposals on transparency.

---

* Partner, Slaughter and May
Ironically, all this furore has come at a time when, as a result of the desire to encourage large corporations to behave better by being responsive to their own suggestions and grievances about the tax system coupled with real-time working initiatives by Her Majesty's Revenue and Customs (“HMRC”), corporate tax peace has broken out in the UK. Few large multi-nationals based in the UK would consider doing anything close to being labelled as aggressive avoidance. There needs to be mutual trust and understanding for that to work fairly and properly so both sides are now more interested in working collaboratively. Fair and sensible administration of any tax system is almost as important as its structure in a competitive world.

That is all, however, by way of background.

In determining legislative policy, I believe the approach here should be:

(1) to define the objective – which is that people should pay the right amount of tax and not be allowed to game or abuse the international tax system by accruing profits tax free or taxed at negligible rates in jurisdictions where there is not commensurate economic activity;

(2) to decide how best and most effectively that objective can be achieved; and

(3) to ensure that the solution, as implemented, does not give rise to unnecessary collateral damage – which (subject to the “public’s right to know”) is what the debate about commercial privacy hinges on.

The question I would thus pose in response to what Reuven has offered is: what is the purpose of disclosure and what is it to achieve?

Questions of the right to privacy and business or other damages that could be caused by disclosure are to my mind secondary to that. If public disclosure is inevitable, then so be it – but it should be avoided if it is simply a “crowd pleaser” that will do more harm than good.

The truth is that any information put into the public domain will not be of much interest to the majority of people who don’t look at the details and are happy to leave it up to tax authorities to regulate matters once the government has laid down policy. The people who, in practice, will trawl over published information are likely those who seek to make money or promote their own reputations by stirring up controversy.

If, having posed the question that in my view matters, the object of disclosure is to make it easier for the tax authorities to check, by reference to a group’s global activities, that profits are being recognised in the right places and the right amounts of taxes are being paid (as well as to check for the existence of abusive transactions), then what is wrong with avoiding uninformed public controversy by relying on the tax authorities to review that information without public disclosure and all the damage that that might entail?

Surely, the whole point here is to have tax authorities that are trusted by the public and put in the position where they can do their job in the most effective way for the public benefit.

Information presented to the tax authorities which enables them to cross-check their positions across the group – and, equally important, having legislative requirements to ensure both that aggressive tax deals are disclosed and, as the UK is considering at present, that those who promote the abusive schemes are potentially subject to penalties themselves – must be the best way of achieving the objective without the downsides.

(In the UK, I suspect it would be said that, largely because of inaccurate media criticism, much of the public does not trust the tax authorities to “do a proper job”, but that
is a separate political issue. I do not know whether there is a similar feeling abroad in the US.)

Generally, in a democracy, we vote for governments to make difficult decisions on our behalves and to appoint and supervise the executive that administers the law. There is every good reason to do that here while avoiding any fall-out from information that may be commercially sensitive or give rise to uninformed public controversy being scattered around.

(Interestingly, in this context, when the UK Prime Minister was recently forced to agree to publish his own tax returns, no one pointed out that the reason why HMRC is a non-ministerial department in the UK and taxpayers have to consent for their information to be made available by HMRC to other government departments is that it was thought, when the Inland Revenue was formed, that political independence prevented politicians from being tempted to introduce taxes that would damage their political rivals but not themselves. Tax confidentiality then had a very definite purpose!)

I thus approach this issue in a very different way. The question in my mind is not what the law in the US does but what it ought to do, and how you can get the benefits of open disclosure without the potential drawbacks. That seems to me to be the real challenge.

None of this should be read as support by me for general non-disclosure or for unchecked corporate tax avoidance. I’m certainly not in favour of either of those – the question here is what should best be done to achieve the objective without unnecessary collateral damage.