BALANCING THE PUBLIC'S RIGHT TO KNOW AND CORPORATE PRIVACY RIGHTS — SAFEGUARDING COMPETITION IN THE ERA OF COUNTRY-BY-COUNTRY REPORTING: A RESPONSE TO REUVEN S. AVI-YONAH

Rick D’Avino*

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.

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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.”

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.”

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. 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.” 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.”

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

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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

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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.