PUBLIC CBC REPORTING WILL NOT ACHIEVE ITS GOALS

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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

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1 Ryan Finley, Winning the Tax Wars Conference: German Tax Head Supports Joint Audits, But Not Public CbC Reporting, 82 TAX NOTES INT’L 847 (2016) (Michael Sell, the head of Germany’s Ministry of Finance, cited the “sensitivity of multinationals’ investment decisions and cost structures” as a reason to opposes public CbC reporting); Stephanie Soong Johnson, U.S. May Stop Exchange With Partners Who Publish CbC Reports, 81 TAX NOTES INT’L 931 (2016) (European Commission director noting attempts to prevent public reporting from creating “more red tape for companies”).


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.\(^4\) These 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.”\(^5\) 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.\(^6\) 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.