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Taxation and Human Rights: A Delicate Balance

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CHAPTER 11

TAXATION AND HUMAN RIGHTS

A Delicate Balance

REUVEN S. AVI-YONAH AND GIANLUCA MAZZONI

I. INTRODUCTION

The intersection of tax law and human rights can be viewed from two opposing perspectives. On the one hand, the ability of rich residents of developing countries and multinational corporations operating in those countries to evade or avoid taxation is directly linked to violations of human rights in those countries, especially from the perspective of social and economic rights like health and education. Providing such countries with the means to fight back and collect adequate revenues is essential in advancing such rights. On the other hand, some of the techniques used to achieve adequate revenue collection, like automatic exchange of information (AEoI) and country-by-country reporting (CbCR), risk violating other human rights like privacy and the legitimate protection of trade secrets. This chapter seeks to discuss both aspects and the need to find a reasonable balance between them.

The first part will be dedicated to the compatibility of reporting obligations under the US Foreign Account Tax Compliance Act (FATCA) and the Organisation for Economic Co-operation and Development (OECD) Common Reporting Standard (CRS) with the EU harmonized framework on privacy and data protection as enshrined in the European Convention on Human Rights (ECHR), the Charter of Fundamental Rights of the European Union (CFREU), and Directive 95/46/EC. It will be argued that AEoI under FATCA and CRS go beyond what is strictly necessary to achieve the goal of fighting offshore tax evasion. For example, reporting obligations apply even to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with tax evasion. In the authors' opinion, low-risk accounts should be exempted from reporting. The question is how to identify those financial institutions and accounts that present a low risk of being used to evade taxes in order to exclude them from the scope of reporting obligations. To this extent, the authors suggest an enhancement of due diligence procedures through the elaboration of a list of subjective and objective "red flag indicators" as provided under the anti–money

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laundering legislation (AML). That list would facilitate not only the detection of those accounts that present a high risk of tax evasion but also of a reasonable balance between the AEoI and the right to privacy and to the protection of personal data.

If any legal uncertainty arising from any conflict between the AEoI and the right to respect for private life and to data protection is not rapidly removed, there is a great risk that large parts of the edifice erected for AEoI might be struck down by the Court of Justice of the European Union with the undesirable consequence that national tax authorities will not have, at their disposal, the necessary measures to provide their residents the above-mentioned social and economic rights of health and education.

II. FATCA, CRS, AND HUMAN RIGHTS

A. THE INTERACTION BETWEEN CROSS-BORDER EXCHANGE OF INFORMATION AND THE RIGHT TO PRIVACY

The right to privacy does not share the same scope of protection between the tax and nontax context. The notion of privacy in tax law is not as broad as in tort law or in constitutional law. Taxpayers cannot claim the right to be let alone or be free from unwarranted governmental intrusion. The reason is that, at stake, there is also the country's economic well-being to be protected. As Justice Roberts argued in *Bull v. U.S.*, taxes are the "lifeblood" of government.[1] Therefore, an appropriate balance is required between societal and individual interest.

This tax exceptionalism can be seen in *Yeong Yae Yun v. U.S.*, a case involving cross-border exchange of information between the Internal Revenue Service (IRS) and Korean taxing authorities, where it was held that "[p]etitioners have no legitimate expectation of privacy in their bank accounts."[2] In addition, since the IRS International Examiner also sent copies of the summons to the Korean taxpayers, the court ruled that all administrative steps necessary for the issuance of a proper summons were fulfilled.[3]

Such view has also been shared by the European Court of Human Rights (ECtHR). Article 8 (right to respect for private and family life) of the ECHR has been recently raised in *G.S.B. v. Switzerland*, which concerned the transmission to US tax authorities of the applicant's bank account details in connection with the mutual assistance agreement signed between Switzerland and the United States after the UBS scandal.[4] The ECtHR held that there has been no violation of Article 8, since "only his bank account details, that is to say purely financial information, had been disclosed. No private details or data closely linked to his identity, which would have deserved enhanced protection, had been transmitted."[5] Moreover, the applicant had benefited from several effective and genuine procedural guarantees against the transfer of his data to the US tax authorities.

For these reasons, the authors believe that in the context of taxation and, in particular, within the process of international exchange of information, individuals are only entitled to procedural safeguards, not a substantive right to privacy. These procedural rights are: (1) the right to be informed of the information request; (2) the right to participate in the investigations in the requested state; and (3) the right to challenge the assessment decision in the requesting state.[6] The absence of a procedural right (notification, consultation, or intervention) might constitute an infringement of the substantive right, i.e., the right to privacy.[7] In other words, taxpayers will not be in the position to effectively protect this substantive right without any basic procedural right.[8] The results of a survey conducted by Philip Baker and Pasquale Pistone indicate that only

22 percent of the countries examined provide a taxpayer the right to be informed before information is sought from third parties in response to a specific request for exchange of information, and only 17 percent provide a taxpayer the right to be heard by the tax authorities before information related to him is exchanged with another country.[9]

The importance of procedural safeguards has also been highlighted by two recent judgments of the ECtHR, e.g., *M.N. & Others v. San Marino*[10] and *Brito Ferrinho Bexiga Villa-Nova v. Portugal*.[11] The first case concerns the complaint of four Italian nationals about a decision by the San Marino judicial authorities ordering the seizure of banking documents pertaining to them and their lack to access to court to challenge that decision. The second case concerns access to the bank accounts of a lawyer charged with tax fraud. Each is discussed in turn.

In the context of criminal proceedings instituted in Italy against several individuals (not including the applicants) who were charged, inter alia, of a number of offences, the Italian prosecutors asked the San Marino authorities for assistance. Following that, the San Marino first-instance tribunal ordered an investigation in respect of all banks, fiduciary institutes, and trust companies in San Marino. The applicants lodged a complaint before the judge of criminal appeals against the decision concerning the seizure of banking documents related to them. They noted the absence of the *fumus delicti* and of any link between the crimes at issue and their position. In February and June 2011, complaints were declared inadmissible because of the lack of juridical interest of the appellants.[12] The judge of criminal appeals further noted that any breach of the rights of a person who may only have an eventual interest in the effects of the *exequatur decision* had to be raised in the ambit of the Italian jurisdictions.[13] The third-instance criminal judge confirmed the appeal decision.

Based on ECHR Article 6(1), the applicants complained that they did not have effective access to court to complain about the *exequatur* decision. They further complained under Article 8 that the measure had interfered with their private life and correspondence and it had failed to provide relevant procedural safeguards. Last, they complained that they had been denied an effective remedy for the purposes of their Article 8 complaint, in breach of Article 13.

The ECtHR first concluded that the seizure of banking data amounted to interference for the purposes of Article 8.[14] However, the interference was prescribed by law[15] and pursued various legitimate aims, namely, the prevention of crime, etc.[16] Therefore, the ECtHR had to determine whether the measure was necessary in a democratic society and, in particular, whether it was accompanied by the relevant procedural safeguards.[17] In this regard, the ECtHR found that the applicants did not have the "effective control" to which citizens are entitled under the rule of law and which would have been capable of restricting the interference in question to what was "necessary in a democratic society."[18] Accordingly, there had been a violation of the right to privacy.

Similar conclusions were reached by the ECtHR in the case of *Brito Ferrinho Bexiga Villa-Nova v. Portugal*.[19] While inspecting the accounts of Ms. de Brito Ferrinho Bexiga Villa-Nova's law firm, the tax authorities noted that she had not remitted value-added tax on professional fees which had been deposited into her personal bank account. Accordingly, tax authorities asked for details of that account. She refused on grounds of professional confidentiality and bank secrecy.

Under a domestic law provision, however, the prosecuting authorities may require the Court of Appeal to authorize the lifting of professional confidentiality and bank secrecy. The investigating judge requested it here and on January 12, 2010, the Court of Appeal ordered the lifting on the grounds that the principles of administration of justice and ascertainment of the material truth should prevail over private interests. Ms. Brito Ferrinho Bexiga Villa-Nova's appeal before the Supreme Court was declared inadmissible. Therefore, she complained of a breach of Articles 6, 8, and 13 of the ECHR.

The ECtHR held that the consultation of her personal bank statements had constituted an interference with her right to respect for professional confidentiality, which fell within the scope of private life. That interference was in accordance with the law and pursued a legitimate aim. However, as argued by Baker,[20] it could not be regarded as necessary in a democratic society since the lack of procedural guarantees and effective judicial control meant that there was not a fair balance between the demands of the general interest and the requirements of the protection of the applicant's right to respect for her private life. As observed by the ECtHR, she had not been involved in the proceedings at any time and had thus been unable to submit her arguments.

B. AUTOMATIC EXCHANGE OF INFORMATION AND THE RIGHT TO DATA PROTECTION

On the other hand, as discussed by Baker and Pistone, in the case of AEoI, the issues of taxpayer protection are different. Here, another fundamental right, separate and distinct from the right to privacy, comes into play: the right to data protection.

The protection of personal data is enshrined in several EU legal sources, including the treaties establishing the European Union.[21] However, the central piece of legislation protecting the right to data protection is Directive 95/46/EC,[22] which will be replaced by a General Data Protection Regulation.

In particular, according to Article 6(1) of the Directive 95/46/EC, personal data must be: (1) processed fairly and lawfully (legal basis); (2) collected for specified, explicit, and legitimate purposes and not further processed in a way incompatible with those purposes (purpose limitation); (3) adequate, relevant, and not excessive in relation to the purposes for which they are collected and/or further processed (necessity and proportionality); (4) accurate and, where necessary, kept up to date; (5) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed (data retention).[23]

In addition, personal data may be processed only if the data subject has unambiguously given his consent, which means "any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed."[24] Moreover, the data subject has the right of access to their own data and to have the data rectified, erased, or blocked when the processing does not comply with the provisions of the Directive, especially because of the incomplete or inaccurate nature of the data.[25]

Additional safeguards are included in Article 11 (right to be informed about the data processing and the transfer of data), Article 23 (right to receive compensation for the damage suffered as a result of an unlawful processing operation), and Article 25 ("transfer to a third country of personal data . . . may only take place if . . . the third country in question ensures an adequate level of protection"[26]).

Based on the concerns expressed by the Working Party set up under Article 29 of Directive 95/46/EC and on the recent judgments of the Court of Justice of the European Union (CJEU), namely, *Digital Rights Ireland* (Joined Cases C-293/12 and C-594/12)[27] and *Smaranda Bara* (Case C-201/14),[28] neither FATCA nor OECD CRS or DAC2 are fully compliant with the right to data protection.

In particular, under FATCA, foreign financial institutions (FFIs) are required to report to the IRS, directly or through their home government, the following information: (1) the name, address, and Taxpayer Identification Number (TIN) of each account holder which is a specified

US person and, in the case of any account holder which is a US-owned foreign entity, the name, address, and TIN of each substantial US owner of such entity; (2) the account number; (3) the account balance; (4) the gross receipts and gross withdrawals or payments from the account.[29] In a letter of June 21, 2012, the Working Party stated: ". . . FATCA must be mutually recognized as necessary from an EU perspective. This requires . . . [a] careful assessment of how FATCA's goals balance with that of . . . the right to a private and family life, i.e. *by demonstrating necessity by proving that the required data are the minimum necessary in relation to the purpose. A bulk transfer and the screening of all these data is not the best way to achieve such a goal*."[30]

Similarly, in a letter of September 18, 2014 on CRS, the Working Party underlined that "*it is necessary to demonstrably prove the necessity of the foreseen processing and that the required data are the minimum necessary for attaining the stated purpose*."[31] It also observed: "The practical roll-out of CRS in Europe based on existing FATCA IT solutions currently lacks adequate data protection safeguards, notwithstanding the EU proposed to amend the Directive 2011/16/EU regarding mandatory automatic exchange of information in the field of taxation. *This Directive*—which could be considered as transposition of the US FATCA and CRS in EU law—*so far falls short of data protection safeguards*."[32]

As a consequence of these concerns, Article 25 of Directive 2011/16/EU was amended in December 2014 through Article 1(5) of Council Directive 2014/107/EU.[33] The original text of Article 25 became paragraph 1 and three new paragraphs were added:[34]

2. Reporting Financial Institutions and the competent authorities of each Member State shall be considered to be data controllers for the purposes of Directive 95/46/EC.
3. Notwithstanding paragraph 1, each Member State shall ensure that each Reporting Financial Institution under its jurisdiction informs each individual Reportable Person concerned that the information relating to him referred to in Article 8(3a) will be collected and transferred in accordance with this Directive and shall ensure that the Reporting Financial Institution provides to that individual all information that he is entitled to under its domestic legislation implementing Directive 95/46/EC in sufficient time for the individual to exercise his data protection rights and, in any case, before the Reporting Financial Institution concerned reports the information referred to in Article 8(3a) to the competent authority of its Member State of residence.
4. Information processed in accordance with this Directive shall be retained for no longer than necessary to achieve the purposes of this Directive, and in any case in accordance with each data controller's domestic rules on statute of limitations.

As argued by Baker,[35] this was a critical change for EU member states since it clarified the scope of the taxpayer's right to be informed. Under the new wording, each Reporting Financial Institution (RFI) is required to inform the taxpayer that information will be collected and transferred and to do so in sufficient time for the individual to exercise his data-protection rights (including: the right to be *informed* of the identity of the controller, the purposes of the processing, the recipients or categories of recipients of the data; the right of *access* to data and the right to have data *rectified* in case of inaccuracies).

The right to be *informed* has been recently discussed by the CJEU in *Smaranda Bara and Others*.[36] The case concerned the transfer of income data between two public bodies, including the tax administration, of a member state. The CJEU held that the transfer of data from the national tax authority to the National Health Insurance Fund, without first informing[37] the individuals concerned, was a breach of Article 10, 11, and 13 of the Data Protection Directive.[38] According to Baker,[39] this clearly has significant ramifications for the systems currently being

put in place for automatic exchange of financial information in tax matters between reporting institutions and tax authorities and between tax authorities of different states.

It should be noted that the modification of December 2014 was not exempt from criticism, especially the new paragraph 4, which refers to the retention of data. According to Maryte Somare and Viktoria Wöhrer,[40] due to the lack of clear deadlines this provision does not substantially enhance data protection and is most certainly not enough to ensure the proportionality of data retention. Indeed, Article 25(4) is formulated in a way which does not allow one to objectively determine the data-retention period as required by the CJEU in *Digital Rights Ireland*[41] and the Working Party's Guidelines.[42]

However, in the authors' opinion, the most critical aspect is that all these forms of AEoI do not request the existence of indicia of unlawful behavior of taxpayers. Borrowing the words of CJEU in *Digital Rights Ireland*, AEoI applies even to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even indirect or remote, with tax evasion. Thus, AEoI could be considered disproportionate since it fails to narrow down the reporting obligations to individuals suspected of tax evasion. What can be done?

The European Data Protection Supervisor (EDPS) in its opinion on the EU-Switzerland agreement on AEoI argued that:

> [T]he Agreement should have included provisions and criteria that explicitly link the reporting of personal data concerning financial accounts to possible tax evasion and that exempt low-risk accounts from reporting. In this respect, such criteria should be applicable *ex ante* to determine which accounts (and which information) would need to be reported. Only at that stage—once the relevance (or irrelevance) of the reporting for the purpose of countering tax evasion has been established—the electronic search might help determining the residence of the account holder.[43]

In this regard, the authors suggest an enhancement of due diligence procedures through the elaboration of a list of subjective and objective "*red flag indicators*" as provided under the AML. That list would facilitate the detection of those accounts that present a high risk of tax evasion. Only once the likelihood of tax evasion has been assessed, would FFIs be required to report those accounts.

III. COUNTRY-BY-COUNTRY REPORTING AND CORPORATE TAX PRIVACY

A. PUBLIC DISCLOSURE OF COUNTRY-BY-COUNTRY REPORTING: A MATTER OF PRIVACY OR COMPETITIVE DISADVANTAGES?

This second part is dedicated to the interaction between country-by-country reporting (CbCR) and corporate tax privacy. The first author has argued elsewhere that the question whether the results of CbCR should be made public has nothing to do with privacy.[44]

Corporations are legal entities, and the concept of privacy does not apply to them.[45] As argued by Cockfield and MacArthur,[46] corporate taxpayer privacy concerns are more concrete in relation to the tax information of small closely held private corporations. The argument is that small privately held corporations merely serve as the alter egos of their owners.[47] Their business

matters are inextricably intermingled with the individual shareholder's personal financial affairs.[48] Therefore, revealing the taxes paid by a small, "mom-and-pop" closely held corporation might be viewed as violating legitimate expectations of privacy by its shareholders.[49] But this is not the case here, since multinational enterprise (MNE) groups with annual consolidated group revenue less than EUR 750 million will be exempted from the general filing requirement.[50]

B. THREE (UN)ANSWERED QUESTIONS ON CBCR

Instead, whether or not large multinationals should be required to publish CbCR depends on the following questions:

1. Does CbCR include information that could reasonably be regarded as confidential, in that revealing it will lead competitors to discover future business plans (like the APAs[51])?
2. Do these costs overcome the advantage of making CbCR 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 CbCR is already public (e.g., profits reported by subsidiaries in tax havens). Would making CbCR public change significantly the information that is already publicly available?

With regard to the first question, it should be noted that, under the current EU Commission proposal,[52] MNEs will be required to disclose to the public significant financial information, including: (1) the nature of the activities, (2) the number of employees, (3) the total net turnover made, which includes the turnover made with third parties as well as between companies within a group, (4) the profit made before tax, (5) the amount of income tax due in the country as a reason of the profits made in the current year in that country, (6) the amount of tax actually paid during that year, and (7) the accumulated earnings.[53] As has already been argued,[54] none of the financial information mandated by CbCR, in either the maximalist or the minimalist version, would constitute a trade, business, or other secret as defined by the OECD in the commentary on the model treaty. In the authors' opinion, the information that could reasonably constitute a commercial or trade secret and put the corporation at a competitive disadvantage are included in the *Master*[55] or *Local File*.[56] For example, MNEs will be required to generally describe in the master file their overall strategy for development, ownership, and exploitation of intangibles, including location of principal R&D facilities and location of R&D management, as well as important drivers of business profit and important business restructuring transactions, acquisitions, and divestitures occurring during the fiscal year.[57] However, neither the OECD Action 13 report nor the EU Commission proposal makes such information publicly accessible.[58] Nonetheless, the master file will be available to all relevant tax administrations of the countries where the MNE had operations, but on a confidential basis.[59] Thus, concerns raised over public disclosure of the data reported in the CbCR template seem to be exaggerated and are based more on fear than on reality.

With regard to the second question, do the costs outweigh the benefits of making CbCR public? Evers, Meier, and Spengel argued that CbCR is associated with several direct and implicit costs.[60] According to their opinion, direct costs would arise for adjusting the existing financial reporting systems to the requirements of CbCR.[61] On the other hand, implicit costs

of CbCR would primarily stem from disclosing the information to the public.[62] Publishing commercially sensitive information could harm firm competitiveness. Finally, they argued that CbCR could be potentially associated with the danger of double taxation.[63] Tax authorities of source jurisdictions might use the newly disclosed data to support their own claims towards MNEs[64] or adopt anti-abuse provisions.[65]

The authors believe that CbCR requirements would not impose any significant additional burdens on MNEs. As argued by Richard Murphy, attribution of profits to countries already has to take place for tax purposes and, under existing financial reporting standards, the reporting of geographically delineated data is already permitted.[66] One major company suggested that the additional costs incurred by MNEs to prepare data for CbCR would be very small.[67]

In relation to implicit costs, the authors do not believe that public disclosure of CbCR will harm competitiveness. As noted by the All-Party Parliamentary Group (APPG) on Responsible Tax, this argument is unproven.[68] In July 2013, Directive 2013/36/EU, the so-called Capital Requirements Directive IV (CRD IV) was adopted. Its Article 89 introduces a new country-by-country public reporting obligation for banks and investment firms. From January 1, 2015, these institutions will have to report annually, for each country in which they have an establishment, data on: (1) name(s), activities, geographical location; (2) turnover; (3) number of employees on a full-time equivalent basis; (4) profit or loss before tax; (5) tax on profit or loss and; (6) public subsidies received. It also requires the Commission to conduct a general assessment as regards potential negative economic consequences of the public disclosure of country-by-country data, including the impact on competitiveness, investment, and credit availability and the stability of the financial system. Therefore, the Commission awarded a study to PwC on the potential positive and negative consequences of CbCR, including a stakeholder survey and an econometric analysis of the impact of disclosure quality on capital markets outcomes. The majority of respondents (53 percent) felt that Article 89 would have *no impact on the competitiveness of EU institutions*.[69]

In conclusion, as argued by Pomp, opponents of public disclosure have never been able to illustrate how knowing the amount of tax paid or credit claimed reveals anything of competitive value.[70] Moreover, in those situations, timing is also very important.[71]

In contrast to these potential costs, someone argued that CbCR might solve the key issue of general lack of information and, most importantly, have a deterrent effect.[72] In particular, in his comments on OECD Discussion Draft of January 2014, Antony Ting stated: "[I]f a MNE knows that it will have to disclose the detailed country-by-country information to tax administrations, *it may have less incentive to undertake aggressive BEPS transactions*."[73] Proponents of public disclosure of corporate tax returns have made a similar argument. They argue that disclosure will promote increased tax compliance, either by discouraging outright evasion or because companies *might become less inclined to take aggressive tax positions such as tax shelters that are arguably within the rules*.[74] In this regard, a study by Joel Slemrod, Thor O. Thoresen, and Erlend E. Bø, found an approximately 3 percent average increase in reported income among business owners when Norway made its returns searchable online in 2001.[75] On the other hand, Hasegawa et al. argue that in the Japanese case, companies' taxable income did not decline after the end of the public disclosure system in 2004.[76]

CbCR could also be a very effective tool in increasing MNEs' accountability. Customers could put pressure on multinationals to increase tax payments in different consumer markets.[77] Despite what Evers et al. argued,[78] MNEs publicly accused of having engaged in aggressive tax planning suffer from damage to their reputation.[79] This is what happened with the Starbucks saga in the United Kingdom. Thousands of customers were angry over revelations[80] that it has paid only £8.6 million in tax in fifteen years of trading in the United Kingdom on revenue of

more than £3.4 billion.[81] Starbucks reduced its taxable profit through:[82] (1) an intercompany loan between the US Starbucks business and the UK Starbucks with the interest rate set at a higher rate than any similar loan; (2) a 4.7 percent payment for intellectual property (which was 6 percent until recently) that the UK company paid to the Netherlands-based company, and (3) a 20 percent markup that the Netherlands-based company paid to the Swiss-based company on its coffee-buying operations. Within a few days of the publication of the parliamentary investigative committee report,[83] Starbucks announced that it would voluntarily pay £20 million in UK corporate tax over 2013 and 2014.[84] Finally, as argued by Christiana HJI Panayi, yielding to international pressure, Amazon changed its business structure so that from May 1, 2015, it would record sales made to customers in the United Kingdom and some other jurisdictions in those jurisdictions rather than in Luxembourg.[85]

With regard to the third and last question, as noted above for US-based multinationals, some of the information included in CbCR is already public, e.g., profits reported by subsidiaries in tax havens.[86] Citizens for Tax Justice recently stated that the majority of US offshore subsidiary profits were earned in ten low-tax jurisdictions, namely, Netherlands, Ireland, Bermuda, Luxembourg, Cayman Islands, Switzerland, Bahamas, Singapore, Hong Kong, and British Virgin Islands.[87] Using data from World Bank, CTJ estimates that US affiliate corporate profits were 1,884 percent of Bermuda's GDP and 1,313 percent of Cayman Islands' GDP in 2012.[88] In the same vein, a study by Keightley and Stupak, based on data from the US Bureau of Economic Analysis (BEA), estimates that seven tax-preferred jurisdictions (Netherlands, Ireland, Luxembourg, Bermuda, Switzerland, Singapore, and UK Caribbean Islands) accounted for 50.1 percent of all profits reported as being earned outside the United States, in comparison to the 14.6 percent being reported in the three non-tax-preferred jurisdictions (United Kingdom, Canada, and Norway).[89] Interestingly, they argue that there is no connection or, in other words, there is a large discrepancy between the location where US MNEs report profits with that of their physical presence (where their employees and tangible capital are located).[90] This may be an indication of profit shifting by US MNEs. The authors believe that public CbCR will increase pressure on companies to align their reported profits with the location in which they are truly and economically active. Therefore, it is likely that a reduction in the share of profits reported by subsidiaries in low-tax jurisdictions might occur.

IV. CONCLUSION

Tax law has always been considered somehow deeply different from other areas of law, mainly because of the public nature of the relationship between the taxpayer and the tax authority. This exceptional attitude toward tax has also had unfortunate effects on the applicability of basic procedural guarantees to tax proceedings, such as the right to be heard before any individual measure which adversely affects a person is taken. "*Taxes are the lifeblood of government and their prompt and certain availability an imperious need*," ruled the Supreme Court in *Bull v. U.S.*[91] Thus,

> the usual procedure for the recovery of debts is reversed in the field of taxation. Payment precedes defense, and the burden of proof, normally on the claimant, is shifted to the taxpayer. The assessment supersedes the pleading, proof, and judgment necessary in an action at law, and has the force of such a judgment. The ordinary defendant stands in judgment only after a hearing. *The taxpayer*

often is afforded his hearing after judgment and after payment, and his only redress for unjust administrative action is the right to claim restitution.[92]

This exceptional view of tax is also reflected in EoIR and AEoI. States are compelled to restrict taxpayers' rights to the extent required in order safeguard their important financial interest. However, in the authors' opinion, recent judgments of the European Courts have eroded this obligation by striking down those measures that did not provide a *proportionate balance* between the legitimate interest of the state and the conflicting rights of individuals. Legal challenges might arise from the current different versions of AEoI mainly because of the massive and indiscriminate collection of data. Absent any indicia of unlawful behavior, AEoI goes *beyond what is strictly necessary* to achieve the goal of fighting against offshore tax evasion.

On the other hand, the second part of this chapter was dedicated to the intersection of corporate privacy and public disclosure of CbCR. The US Supreme Court made it clear that corporations cannot claim equality with individuals regarding right to privacy. Therefore, whether the results of CbCR should be made public has nothing to do with privacy but rather turns on three (un)answered questions. First, the information disclosed under CbCR does not appear to be commercially confidential. Second, numerous existing financial reporting systems are already technically able to provide country-specific data. Third, there will be no negative impact on the competitiveness of reporting institutions. Therefore, no significant additional burden would be imposed on MNEs by making CbCR public. Finally, as the first author argued elsewhere,[93] the threat of revealing corporate tax information could be a very effective in curbing corporate tax shelters and other abusive arrangements designed to eliminate corporate tax. The mere threat of public disclosure is likely to do more than an audit to keep large corporations from crossing the line that differentiates between reasonable tax planning and unduly aggressive tax minimization. That is a line that is hard to define precisely. The potential for public disclosure would help keep corporations on the safe side of that line. Sunshine is, as Justice Brandeis once said, the best disinfectant.

NOTES

1. *Bull v. United States*, 295 U.S. 247, 259 (1935).
2. *Yeong Yae Yun v. United States*, No. CV 00-06975 MMM BQRx, 2000 U.S. Dist. LEXIS 20188, at *12.
3. Ibid. at *4.
4. ECtHR, *G.S.B. v. Switzerland*, Appl. no. 28601/11, Judgment of 22 Dec. 2015. All ECtHR decisions are available online at http://hudoc.echr.coe.int/. The UBS scandal arose after the United States sought to investigate a multibillion dollar tax evasion scheme involving the Swiss bank.
5. Ibid. at para. 93.
6. X. Oberson, *International Exchange of Information in Tax Matters, Towards Global Transparency* (2015), at 238; J. M. Calderón Carrero and A. Quintas Seara, 'The Taxpayer's Right of Defence in Cross-Border Exchange-of-Information Procedures', 68 *Bulletin for International Taxation* (2014), 9, at 504: "Those 'participation rights' include: the notification of the request for information to the taxpayer; the right to be heard before transmitting the information to the requesting state; and the right to challenge the decision of the requested state concerning the transmission of the information gathered."
7. P. Baker, 'Taxation and the European Convention on Human Rights', 40 *European Taxation* (2000), 8, at 326: "The only point one might make with respect to the exchange of information relates to the question of whether there is adequate judicial supervision of exchange under the EC Directive

or under a tax treaty. Though practice varies from country to country, in most countries a taxpayer is not informed that information which has been gathered by one revenue authority is being exchanged with the authorities of another country. *In the absence of notification, the taxpayer is in no position to challenge the exchange of information*. Bearing in mind the decision in *Funke* with respect to the importance of judicial safeguards on infringements of the right of privacy, *one wonders whether the absence of any opportunity to challenge an exchange of information might constitute a breach of the Convention*." (emphasis added).

8. Oberson, *supra* note 6, at 238–242: ". . . absent rights of defense in the requested State, based for instance on the 'fact gathering' doctrine, the taxpayer will in our view not enjoy an effective right of protection."
9. P. Baker and P. Pistone, 'The Practical Protection Of Taxpayers' Fundamental Rights', *in* International Fiscal Association, 100B *Cahiers De Droit Fiscal International* (2015), at 60, notes 220–221.
10. ECtHR, *M.N. And Others v. San Marino*, Appl. no. 28005/12, Judgment of 7 Oct. 2015.
11. ECtHR, *Brito Ferrinho Bexiga Villa-Nova v. Portugal*, Appl. no. 69436/10, Judgment of 1 Mar. 2016; see Press Release, Registrar of the Court, Tax Authorities' Consultation of Lawyer's Bank Accounts Amounted to an Interference With Her Right to Respect for Private Life (1 Dec. 2015), available online at http://hudoc.echr.coe.int/eng-press#%20 (last visited 26 May 2017). For a comment on these two cases, see P. Baker, 'Some Recent Decisions of the European Court of Human Rights on Tax Matters (and Related Decisions of the European Court of Justice)', 56 *European Taxation* (2016), 8, at 342–351.
12. ECtHR, *M.N. And Others v. San Marino*, Appl. no. 28005/12, Judgment of 7 Oct. 2015, at para. 13: ". . . an *exequatur* decision may only be challenged by a person who is involved in the investigation being carried out by the requested authority, or by a third party who is not investigated but who was been subjected to the measure."
13. Ibid. at para. 27: ". . . the applicants were indirectly involved by the effects that the evidence collected through the enforcement of the *exequatur* decision could possibly have within the legal system of the Italian state."
14. Ibid. at para. 55.
15. Ibid. at para. 74.
16. Ibid. para. 75.
17. Ibid. at para. 76.
18. Ibid. at para. 83. See also para. 79: ". . . the applicant . . . only became officially aware of the exequatur decision and its implementation . . . more than a year after the measure was ordered"; para. 80: ". . . there is no immediate reason why term 'interested persons' in Article 30.3 of Law no. 104/2009 should be interpreted as referring solely to persons affected by the order such as the charged and the owners or possessors of the banking and fiduciary institutes/establishments but not to the applicant, who was also affected by the measure"; para. 81: ". . . the Government have not shown, by means of examples or effective and substantiated argumentation, that [an ordinary civil remedy] could have examined the applicant's challenges to the exequatur decision in a timely procedure, or that it could have, if necessary, annulled the said order or its consequences in respect of the applicant."
19. ECtHR, *Brito Ferrinho Bexiga Villa-Nova v. Portugal*, Appl. no. 69436/10, Judgment of 1 Dec. 2015.
20. Baker, *supra* note 7, at 349.
21. Art. 16, Treaty on the Functioning of the European Union (TFEU): "1. Everyone has the right to the protection of personal data concerning them. 2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities. The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 39 of the Treaty on European Union"; Art. 8, Charter of Fundamental Rights of the European Union: "1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must

be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority."

22. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281/31.
23. Ibid.
24. Ibid. Art 2(h).
25. Ibid. Art 12(b).
26. Ibid. Art 25(1).
27. European Court of Justice, Joined Cases (C-293/12 and C-594/12), *Digital Rights Ireland Ltd* and *Kärntner Landesregierung and others* (Grand Chamber), 8 Apr. 2014.
28. European Court of Justice, Case C-201/14, *Smaranda Bara and Others v. Presidentele Casei Nationale de Asigurari de Sanatate and Others*, Judgment of the Court (Third Chamber), 1 Oct. 2015.
29. I.R.C §1471(c)(1).
30. Letter from Jacob Kohnstamm, Chairman of the Article 29 Data Protection Working Party, to Heinz Zourek, Director General of Taxation and Customs Union, European Commission, 21 June 2016, available online at http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2012/20120621_letter_to_taxud_fatca_en.pdf, at para. 8.3 (emphasis added) (last visited 13 Sept. 2017).
31. Annex to letter from Isabelle Falque-Pierrotin, Chairwoman of the Article 29 Data Protection Working Party, to OECD, G20, European Commission, European Parliament, Council of the European Union, 18 Sept. 2014, available online at http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/index_en.htm#maincontentSec4 (emphasis added) (last visited 13 Sept. 2017).
32. Letter from Isabelle Falque-Pierrotin, Chairwoman of the Article 29 Data Protection Working Party, to OECD, G20, European Commission, European Parliament, Council of the European Union, 18 Sept. 2014, available online at http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/index_en.htm#maincontentSec4 (emphasis added) (last visited 13 Sept. 2017).
33. Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory exchange of information in the field of taxation, OJ 2014 L 359/1.
34. Ibid. Art 1(5).
35. P. Baker, 'Privacy Rights in an Age of Transparency: A European Perspective', *Tax Notes International* (9 May 2016), at 586.
36. Case C-201/14, *Smaranda Bara and Others v. Presidentele Casei Nationale de Asigurari de Sanatate and Others*, Judgment of the Court (Third Chamber), 1 Oct. 2015.
37. Ibid. at para. 74: ". . . the requirement to inform the data subjects about the processing of their personal data, which guarantees transparency of all processing, is all the more important since it affects the exercise by the data subjects of their right of access to the data being processed, referred to in Article 12 of Directive 95/46, and their right to object to the processing of those data, set out in Article 14 of that directive."
38. Ibid. at para. 34: "It follows that the requirement of fair processing of personal data laid down in Article 6 of Directive 95/46 requires a public administrative body to inform the data subjects of the transfer of those data to another public administrative body for the purpose of their processing by the latter in its capacity as recipient of those data."
39. Baker, *supra* note 7, at 351.
40. M. Somare and V. Wöhrer, 'Automatic Exchange of Financial Information under the Directive on Administrative Cooperation in the Light of the Global Movement towards Transparency', 43 *Intertax* (2015), 12, at 812; S. Moreno González, 'The Automatic Exchange of Tax Information and the Protection of Personal Data in the European Union: Reflections on the Latest Jurisprudential and Normative Advances', 25(3) *EC Tax Review* (2016), 146, at 153: ". . . in our opinion, the absence

of clear time frames does not substantially improve the protection of data and, in light of the Digital Rights Ireland case . . . could be insufficient to guarantee the principle of proportionality."

41. Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland and Others v. Minister for Communications, Marine and Natural Resources and Others*, Judgment of the Court (Grand Chamber), 8 Apr. 2014, at paras. 63 and 64: ". . . Article 6 of Directive 2006/24 requires that those data be retained for a period of at least six months, *without any distinction* being made between the categories of data set out in Article 5 of that directive on the basis of their possible usefulness for the purposes of the objective pursued or according to the persons concerned. Furthermore, that period is set at between a minimum of 6 months and a maximum of 24 months, *but it is not stated that the determination of the period of retention must be based on objective criteria in order to ensure that is limited to what is strictly necessary*." (emphasis added).
42. Article 29 Data Protection Working Party, *Guidelines For Member States On The Criteria To Ensure Compliance With Data Protection Requirements In The Context Of The Automatic Exchange Of Personal Data For Tax Purposes*, 16 Dec. 2015, available online at http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2015/wp234_en.pdf, at 7 (last visited 19 May 2017).
43. European Data Protection Supervisor, *Opinion Of The EDPS On The EU-Switzerland Agreement On The Automatic Exchange Of Tax Information*, 8 July 2015, available online at https://edps.europa.eu/sites/edp/files/publication/15-07-08_eu_switzerland_en.pdf, at 5 (last visited 26 May 2017).
44. See, e.g., R. S. Avi-Yonah, 'Country by Country Reporting and Corporate Privacy: Some Unanswered Questions', 8(1) *Columbia Journal of Tax Law—Tax Matters* (2016), 1.
45. See *Hale v. Henkel*, 201 U.S. 43, 74–75 (1906): "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"; *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 65–66 (U.S. Cal. 1974): "While they may and should have protection from unlawful demands made in the name of public investigation, *corporations can claim no equality with individuals in the enjoyment of a right to privacy*. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation. Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest" (emphasis added); A. Cockfield and C. MacArthur, 'Country-by-Country Reporting and Commercial Confidentiality', 63(3) *Canadian Tax Journal/Revue Fiscale Canadienne* (2015), 627, at 650–651: "At the outset, it is important to note that, in Canada and elsewhere, there are often different legal conceptions of the right to privacy for individuals (natural persons) and for business entities such as corporations that are legal persons (albeit of the artificial variety). As discussed in the legal academic literature, taxpayer privacy rights tend to focus on individual rights." For a (different) European perspective, see J. Kokott and C. Sobotta, 'The Distinction Between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR', 3(4) *International Data Privacy Law* (2013), 222, at 225: "However, as regards the personal scope, the European Court of Justice has excluded legal persons from data protection, *though they can rely on the right to privacy*. It is difficult to base this exclusion on the wording of the Charter, as both privacy and data protection are granted to 'everyone.' However,

the definition adopted by the Luxembourg Court results from Article 2(a) and Recital 2 of the Data Protection Directive, which limit data protection to natural persons. The Convention on Data Protection seems to be more ambiguous in this regard, as it refers to 'individuals' in Article 2(a). But the similarly binding French version of the Convention uses the clearer term '*personne physique*' that also excludes legal persons." In this sense, see Joined Cases C-92/09 and C-93/09, *Volker und Markus Schecke and Eifert* [2010] ECR I-11063, at para. 53: ". . . legal persons can claim the protection of Articles 7 and 8 of the Charter in relation to such identification only in so far as the official title of the legal person identifies one or more natural persons"; para. 87: ". . . The seriousness of the breach of the right to protection of personal data manifests itself in different ways for, on the one hand, legal persons and, on the other, natural persons. It is necessary to point out in this regard that legal persons are already subject to a more onerous obligation in respect of the publication of data relating to them"; ECtHR, *Bernh Larsen Holding AS and Others v. Norway*, Appl. no. 24117/08, Final Judgment of 8 July 2013, at para. 159: "One factor that militates in favor of strict scrutiny in the present case is that the backup copy comprised all existing documents on the server, regardless of their relevance for tax assessment purposes . . . On the other hand, the fact that the measure was aimed at legal persons meant that a wider margin of appreciation could be applied than would have been the case had it concerned an individual."

46. Cockfield and MacArthur, *supra* note 45, at 654.
47. R. Pomp, 'The Disclosure of State Corporate Income Tax Data: Turning the Clock Back to the Future', 22 *Capital University Law Review* (1993), 373, at 451.
48. Ibid. at 451.
49. Ibid. at 437.
50. OECD, *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13—Final Report* (2015), available online at http://dx.doi.org/10.1787/9789264241480-en, at 21 (last visited 19 May 2017): "It is believed that the exemption [. . .] which provides a threshold of EUR 750 million, will exclude approximately 85 to 90 percent of MNE groups from the requirement to file the Country-by-Country Report, but that the Country-by-Country Report will nevertheless be filed by MNE groups controlling approximately 90 percent of corporate revenues. The prescribed exemption threshold therefore represents an appropriate balancing of reporting burden and benefit to tax administrations"; see also Commission Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU as Regards Disclosure of Income Tax Information by Certain Undertakings and Branches, COM (2016) 198 final (12 Apr. 2016), at 2: "This proposal focusses on corporate groups with a worldwide consolidated net turnover of more than EUR 750 million, in line with the scope of global OECD initiatives on tax transparency. The proposal does not impose any obligations on small and medium-sized companies." For these reasons, the authors believe there are similarities between the campaign against public CbCR and that against the "pink slip" provision inserted in the Revenue Act of May 10, 1934; see M. Kornhauser, 'More Historical Perspective on Publication of Corporate Returns', 96 *Tax Notes* (2002), 745, at 746: ". . . The key to the campaign's success was the same one used more than 60 years later to secure the repeal of the estate tax. *Although in both instances fewer than 10 percent of the population were affected, opponents gained support by focusing on the damage done to the* '*common man*' *and the small businessman* . . . The campaign urged people to send [. . .] protest pink slip plus other antipublicity letters and telegrams to their congressmen. *Thousands of ordinary people who would never be touched by the publicity did so*, often using form letters and/or sending in the mock pink slip emblazoned with the refusal to pay. They protested that publicity of income tax returns would, invade their privacy, reveal business secrets, create harassing sales pitches, and increase crimes targeted at the wealthy, especially kidnapping . . ."; see also D. Lenter, D. Shackelford, and J. Slemrod, 'Public Disclosure of Corporate Tax Return Information: Accounting, Economics and Legal Issues', 56(4) *National Tax Journal* (2003), 803, at 809–810 (emphasis added).
51. K. E. Hickman, 'Should Advance Pricing Agreements be Published?', 19 *Northwestern Journal of International Law and Business* (1998–1999), 171, at 191: "Entities contemplating the advance pricing agreement process have already expressed concern over confidentiality with respect to the extensive disclosures required. To reach agreement with the IRS on the appropriate transfer pricing

methodology, a multinational corporation is required to provide *sensitive financial and proprietary technical data concerning business organization and cost structures, relationships with controlled entities, divisions of responsibility, and research and production activities*. Required publication of advance pricing agreements, even in redacted form, could result in a decrease in the number of such agreements sought and corresponding increase in audits and litigation over transfer pricing issues"; M. McIntyre, 'The Case for Public Disclosure of Advance Rulings on Transfer Pricing Methodologies', 2 *Tax Notes International* (1990), 1127.

52. Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches, COM/2016/0198 final—2016/0107 (COD).
53. Ibid., Art. 48(c).
54. Cockfield and MacArthur, *supra* note 45, at 656.
55. OECD, *supra* note 50, at 15: "The information required in the master file provides a 'blueprint' of the MNE group and contains relevant information that can be grouped in five categories: a) the MNE group's organizational structure; b) a description of the MNE's business or businesses; c) the MNE's intangibles; d) the MNE's intercompany financial activities; and (e) the MNE's financial and tax positions."

    Douglas Holtz-Eakin, former director of the Congressional Budget Office, defined the master file as the *multinational's* "*playbook*" since it provides: "an overview of the company's business, the global allocation of its activities and income, and its overall transfer pricing policies—a complete picture of its global operations, profit drivers, supply chains, intangibles and financing"; see D. Holtz-Eakin, 'Subsidiaries in Europe? Playbook, Please', *Wall Street Journal*, 27 Dec. 2015, available online at http://www.wsj.com/articles/subsidiaries-in-europe-playbook-please-1451259515 (last visited 23 June 2017). In the same vein, see letter from Orrin G. Hatch, Chairman, Senate Finance Committee, and Paul D. Ryan, Chairman, House Ways and Means Committee, to Jacob Lew, Secretary of the Treasury, 9 June 2015, available online at http://www.finance.senate.gov/imo/media/doc/Hatch,%20Ryan%20Call%20on%20Treasury%20to%20Engage%20Congress%20on%20OECD%20International%20Tax%20Project.pdf, at 1 (last visited 23 June 2017): "[W]e are concerned about the country-by-country (CbC) reporting standards that will contain sensitive information related to a U.S. multinational's group operations. We are also concerned that Treasury has appeared to agree that foreign governments will be able to collect the so-called 'master file' information directly from U.S. multinationals without any assurances of confidentiality or that the information collection is needed. *The master file contains information well beyond what could be obtained in public filings and that is even more sensitive for privately-held multinational companies*." For a comment on the letter sent by Sen. Hatch and Rep. Ryan to the Secretary of the Treasury, see M. Levey, I. Gerdes, and A. Mansfield, 'The Key BEPS Action Items Causing Discussion in the United States', 44 *Intertax* (2016), 5, at 404–405. Finally, in less alarming tones, Joshua D. Blank argued that "access to the BEPS master file of multinational corporations should be restricted to participating taxing authorities rather than provided to the general public"; see J. D. Blank, 'Reconsidering Corporate Tax Privacy', 11(1) *New York University Journal of Law & Business* (2014), 31, at 105–109. Cf. Y. Brauner (arguing that CbCR must be publicly available), 'What the BEPS?', 16 *Florida Tax Review* (2014), 55, at 106; R. S. Avi-Yonah and H. Xu, 'Evaluating BEPS: A Reconsideration of the Benefits Principle and Proposal for UN Oversight', 6(2) *Harvard Business Law Review* (2016), 185 (arguing that the relevant stakeholders and the public need to have access to the MNEs' transfer pricing documentation).
56. OECD, *supra* note 50, at 15: ". . . The local file focuses on information relevant to the transfer pricing analysis related to transactions taking place between a local country affiliate and associated enterprises in different countries and which are material in the context of the local country's tax system. Such information would include relevant financial information regarding those specific transactions, a comparability analysis, and the selection and application of the most appropriate transfer pricing method. . . ."
57. Ibid. at 25.

58. Press Release, European Commission, Fact Sheet—Introducing Public Country-by-Country Reporting for Multinational Enterprises—Question & Answers, 12 Apr. 2016, available online at http://europa.eu/rapid/press-release_MEMO-16-1351_en.htm?locale=en (last visited 23 June 2017): “Public reporting does not serve the same purpose as information sharing and reporting between tax authorities. There are some types of information that are required to be shared between tax authorities, but that are not part of this latest proposal for public CbCR. EU tax authorities will receive 12 pieces of information, whereas public CbCR will consist of just seven pieces of information. EU tax authorities will receive more granular data for all third countries in which an EU company is active. They will also get from companies more complex data relating to the breakdown of a group’s turnover between that made with external parties and that made solely between group entities, as well as figures for stated capital and a company’s tangible assets. When it comes to public disclosure, it is important that EU citizens get information about where in the EU companies are paying taxes. Citizens also have a legitimate interest in knowing whether companies active in the EU are also active in so-called tax havens. However, demanding publicly disaggregated data for all third countries could affect companies’ competitiveness and divulge information on key strategic investments in a given country. Similarly, the disclosure of turnover and purchases within a group poses a threat to multinationals in that it could divulge key information to competitors.”
59. OECD, *supra* note 50, at 19: “Tax administrations should take all reasonable steps to ensure that there is no public disclosure of confidential information (trade secrets, scientific secrets, etc.) and other commercially sensitive information contained in the documentation package (master file, local file and Country-by-Country Report). Tax administrations should also assure taxpayers that the information presented in transfer pricing documentation will remain confidential. In cases where disclosure is required in public court proceedings or judicial decisions, every effort should be made to ensure that confidentiality is maintained and that information is disclosed only to the extent needed.”
60. M. T. Evers, I. Meier, and C. Spengel, ‘Transparency in Financial Reporting: Is Country-by-Country Reporting Suitable to Combat International Profit Shifting?’, 68(6/7) *Bulletin for International Taxation* (2014), 295, at 301.
61. Ibid.
62. Ibid.
63. Ibid.
64. J. Blouin, ‘Transparency and Financial Accounting’, 68(6/7) *Bulletin for International Taxation* (2014), 304, at 307: “Frankly, Action 13 sounds as though it is a request for apportionment information. Unless an apportionment regime is approved, *this proposal could result in countries choosing to pursue tax claims using this information when it suits a particular country*. Countries that would not benefit from apportionment would most likely continue to pursue some arm’s length principle measure of activity. Country-by-country reporting without coordination rules could simply exacerbate existing cross-jurisdictional transfer pricing conflicts.” (emphasis added).
65. M. Sala, ‘Country-by-Country Reporting: Potential Audit and Legislative Risks For MNEs’, 73 *Tax Notes International* (2014), 1127, at 1129: “Consider, for example, an auditor’s review of the manufacturing subsidiary of an MNE. The entity has typically collected nominal margins on the production of merchandise for distribution to sales affiliates in other jurisdictions. Under the arm’s length standard, this was supportable; development of intellectual property occurred elsewhere in the organization, and no strategic or other high-value functions were performed at this location. Despite a supportable transfer price, a local country auditor will now receive a CbC template showing: • a high proportion of total headcount and/or payroll located in the manufacturing jurisdiction; • a high proportion of total enterprise tangible asset balances; and • a tax return reflecting relatively low allocation of the total enterprise’s profit. Will the manufacturing country auditor, armed with apportionment like data notionally supporting greater profit allocation to the manufacturer, use these data in support of a deficiency notice? In the longer term, will these jurisdictions adopt antiabuse provisions using these data to bring taxable income in line with ‘economic activity’?”

66. R. Murphy, *Country-by-Country Reporting—Holding Multinational Corporations to Account Wherever They Are, Task Force on Financial Integrity and Economic Development* (2009), available online at http://www.financialtransparency.org/wp-content/uploads/2015/04/Final_CbyC_Report_Published.pdf, at 21 (last visited 19 May 2017); Cockfield and MacArthur, *supra* note 45, at 646: "MNEs already need to calculate taxable profits in most countries where they operate in order to comply with local tax laws. Hence, they already keep records and disclose taxable profits and taxes paid to the relevant tax authorities. In addition, certain countries mandate the public disclosure of such information by public corporations."
67. Murphy, *supra* note 66, at 28; Transparency International et al., *Why Public Country-by-Country Reporting for Large Multinationals Is a Must*, 24 Feb. 2016, available online at http://www.transparencyinternational.eu/wp-content/uploads/2016/03/Joint_Civil_Society_QA_pCBCR-2016.pdf, at 6–7 (last visited 19 May 2017): "Her Majesty's Revenues & Customs (HMRC) in the United Kingdom did an assessment of the implementation costs for businesses of CbCR and found that 'one-off costs are estimated as negligible, with annual costs to businesses affected by the measure of £0.2 million'. These are not significant costs for most transnational enterprises and rate as insignificant when compared to the likely benefits of increased transparency."
68. The All-Party Parliamentary Group: Responsible Tax, *A More Responsible Global Tax System or a 'Sticking Plaster'? An Examination of the OECD's Base Erosion and Profit Shifting (BEPS) Process and Recommendations* (2016), available online at https://www.appgresponsibletax.org.uk/publications/, at 9 (last visited 19 May 2017).
69. European Commission, *General Assessment Of Potential Economic Consequences of Country-by-Country Reporting Under CRD IV* (2014), available online at: https://www.pwc.com/gx/en/eu-institutions-services/pdf/pwc-cbcr-report-en.pdf, at 9 (last visited 19 May 2017): "The fact that three of the fourteen GSIBs have published their Article 89 disclosures in full in 2014 would suggest that they are not overly concerned that there will be a detrimental effect on their competitiveness. While many stakeholders recognized that there is a compliance cost for firms in complying with Article 89, it was generally felt not to be significant when compared to the overall cost of the wider regulatory compliance burdens faced by the reporting institutions. The compliance cost associated with Article 89 therefore seems unlikely to disadvantage reporting institutions significantly compared to non-reporting institutions."
70. Pomp, *supra* note 47.
71. Ibid. at 439: ". . . even if this information were relevant in the abstract, it is unlikely to be available in a timely-enough fashion to be very useful. For information to be valuable, a business needs to know yesterday what a competitor is going to do tomorrow . . . Yesterday's information obtained tomorrow is worthless to a competitor."
72. M. A. Grau Ruiz, 'Country-by-Country Reporting: The Primary Concerns Raised by a Dynamic Approach', 68(10) *Bulletin for International Taxation* (2014), 557, at 559; OECD, *Public Comments Received Volume I: Letters to A to C—Discussion Draft on Transfer Pricing Documentation and CbC Reporting*, 23 Feb. 2014, available online at http://www.oecd.org/ctp/transfer-pricing/volume1.pdf, at 65–66 (last visited 19 May 2017).
73. OECD, *supra* note 72, at 66.
74. Lenter, Shackelford, and Slemrod, *supra* note 50, at 820.
75. J. Slemrod, T. Thoresen, and E. Bø, 'Taxes on the Internet: Deterrence Effects of Public Disclosure', 7(1) *American Economic Journal: Economic Policy* (2015), 36.
76. M. Hasegawa et al., *The Effect of Public Disclosure on Reported Taxable Income: Evidence from Individuals and Corporations in Japan*, 12 Mar. 2012, available online at http://ssrn.com/abstract=1653948, at 29 (last visited 19 May 2017). Nonetheless as the first author argued elsewhere: "this does not mean that US payments would remain the same if disclosure were adopted. There are good reasons to suspect that Japanese corporations are less aggressive (with or without disclosure) vis a vis the Japanese National Tax Administration than US corporations are toward the IRS; Japan did not have a corporate tax shelter phenomenon like the US did"; R. S. Avi-Yonah and A. Siman, 'The One Percent Solution: Corporate Tax Returns Should be Public (and How to Get There)', 73 *Tax Notes International* (2014), 627, at 627–628.

77. Evers, Meier, and Spengel, *supra* note 60, at 301.
78. Ibid. at 302.
79. A. Christians, 'How Starbucks Lost Its Social License—And Paid £20 Million to Get It Back', 71 *Tax Notes International* (2013), 637, at 639 (". . . But the message from the OECD in its base erosion and profit shifting project and the response from professionals in the U.S. tax community are that *reputational risk is a very real phenomenon facing multinationals if the public judges them to be too successful in reducing their tax bills*. Starbucks's experience overseas demonstrates that *ignoring reputational risk carries a potentially high cost: acquiescence to the unpredictable and uncontrollable terms of a social license to operate*.") (emphasis added).
80. T. Bergin, *Special Report: How Starbucks Avoids U.K. Taxes*, 15 Oct. 2012, available online at http://uk.reuters.com/article/uk-britain-starbucks-tax-idUKBRE89E0EW20121015 (last visited 19 May 2017)
81. J. Thompson and V. Houlder, *Starbucks Faces Boycott Calls Over Tax Affairs*, 17 Oct. 2012, available online at http://www.ft.com/cms/s/0/5cd14dcc-187f-11e2-8705-00144feabdc0.html#axzz4IMnXYSkw (last visited 23 June 2017).
82. E. Kleinbard, 'Through a Latte Darkly: Starbucks's Stateless Income Planning', 139 *Tax Notes* (2013), 1515.
83. H. M. Revenue and Customs, *Public Accounts Committee—Nineteenth Report*, 28 Nov. 2012, available online at http://www.publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/716/71602.htm (last visited 23 June 2017).
84. V. Houlder, J. Pickard, L. Lucas, and B. Jopson, *Starbucks to Pay £20m U.K. Corporate Tax*, 7 Dec. 2012, available online at https://www.ft.com/content/ac97bb1e-3fa5-11e2-b0ce-00144feabdc0 (last visited 23 June 2017).
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87. Citizens for Tax Justice, *American Corporations Tell IRS the Majority of Their Offshore Profits Are in 10 Tax Havens*, 7 Apr. 2016, available online at http://ctj.org/pdf/corpoffshore0416.pdf, at 1 (last visited 19 May 2017): "Recently released data from the Internal Revenue Service show that U.S. corporations claim that 59 percent of their foreign subsidiaries' pretax worldwide income is being earned in ten tiny tax havens."
88. Ibid: "Amazingly, American corporations reported to the IRS that the profits their subsidiaries earned in 2012 (the latest year for which data are available) in Bermuda, the Cayman Islands, the Bahamas and Luxembourg were greater than the entire gross domestic product (GDP) of those nations in that year. For example, in Bermuda, U.S. corporations claimed they earned more than $18 for each $1 of actual GDP."
89. M. P. Keightley and J. M. Stupak, Congressional Research Service, R44013, Corporate Tax Base Erosion and Profit Shifting (BEPS): An Examination of the Data (30 Apr. 2015), at 4–5.
90. Ibid. at 6: "While accounting for 50% of reported profits reported worldwide, 5% of employees and 11% of property can be attributed to the tax-preferred country group. In contrast, the three non-tax-preferred countries of Canada, Norway, and the United Kingdom account for 20% of employees and 29% of property held by American MNCs worldwide"; K. A. Clausing, *The Effect of Profit Shifting on the Corporate Tax Base in the United States and Beyond*, 17 June 2016, available online at http://ssrn.com/abstract=2685442, at 7–8 (last visited 19 May 2017): "The U.S. Bureau of Economic Analysis (BEA) does annual surveys of U.S. based multinational firms and their affiliated firms abroad. These data indicate a large discrepancy between the physical operations of U.S. multinational firm affiliates abroad and the locations in which they report their income. For example, Figure 1 shows the top locations of U.S. multinational firm affiliate gross profits in 2012; gross profits are net income with foreign income tax payments added. Of the top nine locations, seven of them

are tax havens with effective tax rates less than 5%: Netherlands, Ireland, Luxembourg, Bermuda, Switzerland, Singapore, and the UK Caribbean Islands (including the Caymans) . . . These countries alone account for 50% of all foreign income earned by affiliates of U.S. multinational firms, but they only account for 5% of all foreign employment of such firms. Further, the economic size of these countries is quite small relative to this disproportionate profit; their combined population is less than that of Spain, or California"; G. Zucman, 'Taxing Across Borders: Tracking Personal Wealth and Corporate Profits', 28 *Journal of Economic Perspectives* (2014), 4, at 128: "So 31 percent (650/2,100) of US corporate profits were made abroad in 2013. Where do the $650 billion of foreign profits come from? The balance of payments provides a country-by-country decomposition of this total, indicating that 55 percent are made in six tax havens: The Netherlands, Bermuda, Luxembourg, Ireland, Singapore, and Switzerland."

91. 295 U.S. 247, 259 (1935).
92. Ibid. at 260.
93. Avi-Yonah and Siman, *supra* note 76, at 627–628.