Aggressive Tax Policy versus Aggressive Tax Planning

Akın, Emre

1 June 2020

Aggressive Tax Policy versus Aggressive Tax Planning

Emre Akın[1]

1. Preliminary remarks

In the last decade, the Organisation for Economic Cooperation and Development (OECD) leads the works and strategies dealing with aggressive tax planning all around the world. The United Nations (UN) can be added to this struggle. However, especially OECD has published many BEPS Action Plans and some other issues(i.e. the MLI[2], Pillar One and Pillar Two) to reach multilateral or common and mutual measures to prevent aggressive tax planning. It was intended to combat aggressive tax planning multilaterally and mutually with these works.

Today, even if many countries follow OECD BEPS Plans and the MLI they do not deem those actions to be solution because some have started to take different and unilateral actions rather than waiting for OECD proposals such as Pillar One and Two.

This new unilateral actions by giving up to follow OECD proposals are new-fashioned in tax matters. We can name this *"aggressive tax policy"*, even though there is no the term in the tax literature because of being new situation. In this scope, according to my observation, the method of cooperation and multilateral measures on aggressive tax planning replaces by aggressive tax policy meaning unilateral and solid solutions.

In this article, the background of bilateral or multilateral measures of jurisdictions, the terms related to aggressive tax planning, the jurisdictions adopting aggressive tax policy and their examples will be addressed. At the same time, the possible reasons and prospective future perspective also will take part following sections.

2. Background of International Tax Issues

To deal with international tax issues there are many methods but the commonly used one is tax treaties since previous centuries. These treaties are generally involved two parts. When we come to today, for the last decade international tax issues have been addressing by mutual actions i.e. BEPS Action Plans or multilateral treaties i.e. the MLI. Because this decade tax challenges i.e. digital economy taxation and double non-taxation need common, unified and tight measures not to leave a room for tax avoidance.

The treaties giving some tax exemptions and low rate tax as privileges between the Ottomans, England, Netherlands and France can be an example for tax treaties in the history.[3] With twentieth century, UN started to work on model tax conventions. Then, OECD started to be effective in the tax treaty models with the year of 1960s.[4]

---

[1] Emre Akın is a Tax Inspector at the Ministry of Treasury and Finance of Turkey and pursuing Master's Degree in International Taxation (LL.M Int. Tax) from Vienna University of Economics and Business. He is also a PhD candidate in Accounting(Auditing) at Istanbul University. The Author can be reached at emreakinv@gmail.com.

[2] Multilateral Convention To Implement Tax Treaty Related Measures To Prevent Base Erosion And Profit Shifting. (24 Nov. 2016)

[3] H. Inalcık, *The Ottoman Empire and Europe*. (Cronic Books) Istanbul, 2018, p. 132

[4] Tax History Database https://www.taxtreatieshistory.org/ (accessed 29 Mar. 2020)

Both UN and OECD Model Tax Conventions adopted new provisions and commentaries based on combating aggressive tax planning mainly after their versions of year 2000s. Later on, OECD started the working on base erosion and profit shifting issues in the scope of aggressive tax planning with the year of 2012 at G20 Summit in Mexico.[5] Until now, fifteen BEPS action plan has been published including the MLI. Also, some other works such as Global Forum which provides exchange of information globally existed. This process, until 2019, now has been called BEPS 1.0.[6] In this scope, BEPS 1.0 includes both multilateral and unilateral but joint measures. Thus, aggressive tax planning had been aimed to be prevented via common tax policy without leaving a room to taxpayers.

However, it might be said that these struggles have been failed. In this manner, some countries started to prefer unilateral actions in order to deal with digital economy taxation and double non-taxation problems. For example, one of the those unilateral actions is that proposing digital services tax(DST) legislations starting from 2017. Today, many countries have DST unilaterally. These unilateral actions say these countries follow aggressive tax policy versus aggressive tax planning because they want urgent result to gain losses of digital economy back and they don't expect[7] a solution in a short period.

Also, the European Commission joined these struggles proposing new rules to ensure that digital business activities are taxed in a fair and growth-friendly way in the EU. [8] Consequently, with the year of 2019[9], OECD has started the working of Pillar One and Pillar Two so called BEPS 2.0. These include allocation of taxing rights and a global minimum tax rate issues. Therefore, OECD accelerated its work on aggressive tax planning of taxing nexus and digital economy to provide multilateral solutions instead of unilateral.

Now, there is no consensus yet on OECD proposals of Pillar One and Two which are also under progress. Moreover, countries enact their digital services tax acts increasingly..

2.1. The terms: aggressive tax planning and aggressive tax policy

In tax literature, there are many words used i.e. tax avoidance, evasion, abuse, tax planning etc. The term "evasion" should be separated from others because tax evasion[10] describes illegal arrangements where liability to tax is hidden or ignored to pay less taxes than which they must. In this scope, tax evasion should not be considered to involve in aggressive tax planning term.

Tax avoidance is defined as the arrangement which could be legal of a taxpayer’s affairs that is intended to reduce his tax liability. So, tax avoidance is an aim for taxpayers and they make tax planning in order to reach this aim. Therefore, tax planning is a method while tax

[5] *Action Plan on Base Erosion and Profit Shifting,* OECD 2013.
[6] https://en.wikipedia.org/wiki/Base_erosion_and_profit_shifting accessed 29 Mar. 2020
[7] Ocampo, J.A. *A rare chance to fix the global corporate tax system.* Financial Times 11 Feb 2019 (accessed 27 Mar. 2020)
[8] Council Directive 2018/0072 (CNS) of 31 March 2018 on The Laying Down Rules Relating To The Corporate Taxation Of A Significant Digital Presence.
[9] http://www.oecd.org/tax/beps/public-comments-received-on-the-possible-solutions-to-the-tax-challenges-of-digitalisation.htm accessed (29 Mar. 2020)
[10] *Evasion*, in OECD Glossary of Tax Terms (accessed 29 Mar. 2020), available at http://www.oecd.org/ctp/glossaryoftaxterms.htm.

avoidance is a goal. However, we can sometimes see all these terms are being used instead of each others.

For example,[11] the term “abuse” is seen frequently in the BEPS Reports, where it is used much more than the term “aggressive tax planning”[12] (apart from in the Action 12 Final Report).[13] In the BEPS Reports, tax abuse is used by likening to tax avoidance, such as the sentence[14], "such avoidance strategies may be addressed through domestic general anti-abuse rules". Namely, there is no certain difference between abuse and tax planning, both can be used in the same way.

On the other hand, it should be assessed whether tax planning and "aggressive tax planning" are different from each other. The OECD is aware of the difficulties in precisely differentiate what it is aggressive and what is not. Furthermore, it should be noted that the OECD’s language is inconsistent in identifying what is “aggressive”, since this adjective has been used in combination with the dissimilar nouns such as[15] arrangements, techniques, strategies etc.[16] In this manner, it might be thought that the term aggressive may emphasize the magnitude of tax loss amount, but it is not related. However, the term "aggressive tax planning" generally is used for international tax issues[17] while tax planning is used in domestic tax systems. Also, being complex and international makes it "aggressive" in the literature.

Accordingly, "aggressive tax policy" which is apart from "tax policy" describes unilateral measures taken by countries to combat aggressive tax planning transactions. It also includes protective perspective in terms of tax losses. If a country takes measures unilaterally to tax global transactions in its jurisdictions, this behaviour results from adopting aggressive tax policy. In this scope, aggressive tax policy emphasizes international transactions versus international tax planning. However, aggressive tax policy can be implemented domestically. For example, if a country implements many anti-abusive rules such as substance over form, interest barrier, it can be regarded it as the supporter of aggressive tax policy. Therefore, the term of aggressive tax policy contains aggressive measures both in global(international) and domestic transactions. Also, all unilateral measures which are opposite of multilateral struggles globally can be regarded as aggressive tax policy. In other words, if an implementation effects non-residents directly by taxing, it can be deemed to be international(global) aggressive tax policy. Nevertheless, the article focuses on aggressive tax policy for international related transactions.

---

[11] P. Piantavigna, Tax Abuse and Aggressive Tax Planning in the BEPS Era: How EU Law and the OECD Are Establishing a Unifying Conceptual Framework in International Tax Law, despite Linguistic Discrepancies, 9 World Tax J. (2017), Journals IBFD (accessed 29 Mar. 2020).

[12] BEPS Action Plan; Action 1 Final Report and Action 2 Final Report, supra n. 5; OECD/G20, Limiting Base Erosion Involving Interest Deductions and Other Financial Payments – Action 4: Final Report (OECD/G20 2015) International Organizations’ Documentation IBFD.

[13] Action 1 Final Report, supra n. 5, at 245.

[14] Action 2 Final Report, supra n. 5, at 137. See also OECD, Addressing Base Erosion and Profit Shifting, p. 38 (OECD 2013), International Organizations’ Documentation IBFD

[15] BEPS Action Plan, supra n. 5, at 22; Action 1 Final Report, supra n. 5, at 86, 112 and 144; Action 11 Final Report, supra n. 81, at 238; Action 12 Final Report, supra n. 13, at 13 and 40.

[16] Piantavigna (2017, section 3.3.)

[17] Piantavigna (2017, section 3.3.)

3. Aggressive Tax Policy Implementations

Countries need to decide on which action will support their interests, while taxpayers apply aggressive tax planning leading to reduce or double non taxation on their transactions especially in digital economy by using tax treaties and advantageous tax havens. In that point, countries may be inclined to unilateral measures when multilateral or bilateral actions are insufficient against aggressive tax planning or they may believe that multilateral measures i.e. BEPS 1.0 or Pillar One and Two take much time to conclude. Therefore, they could choose unilateral measures until global actions would conclude. Also, these aggressive tax policy implementations might trigger and quicken mutual struggles to conclude.

Generally, many countries have started to apply aggressive tax policy on taxation of digital economy. France proposed a new tax on internet companies with the rate of %3 in April, 2019 and implemented November, 2019. Some other examples [18] include Italy, which established a 3% web tax on digital transactions, effective January 1, 2019; Slovakia inserted digital tax to its income tax in January 2018 to add a tax on providers of services on digital platforms; Hungary, which proposed an internet tax with the rate of %7,5, which is the one of highest DST rate, in October 2017; and India, which introduced an equalization levy on online advertising revenue in 2016,[19] Turkey which has also implemented the same pattern in 2016 then has implemented DST in 2020. Following subheadings will give detailed examples on aggressive tax policies implemented by different countries.

3.1. Turkey

Turkey generally follows OECD guidelines and works for long years to contribute to global consensus on tax issues. For example, it has implemented OECD's transfer pricing guidelines likewise into its corporate income tax[20] as it now started to exchange information automatically[21] in the line of Common Report Standard(CBS) of OECD Global Forum. Besides, Turkey has began to require country-by-country reporting(CbCR) based on BEPS Action 13 by starting from this year.[22] With this continuous compliance by Turkey, it also adopts aggressive tax policy in the taxation of digital economy. The reason that Turkey adopts this principal is explained by the Ministry of Treasury and Finance saying that digital economy without taxing is not fair and it should be acted urgently because multilateral actions are late.[23]

We can divide aggressive tax policies on digital economy in Turkey into three parts. One is value-added tax(VAT) that non-resident service providers would register to Turkey Tax Authority via online[24] and pay VAT when they have B2C transactions(domestic individual

---

[18] Asen, E. *Announced, Proposed, and Implemented Digital Services Taxes in Europe.* 25 Oct. 2019 Tax Foundation. https://taxfoundation.org/digital-taxes-europe-2019/ (accessed 28 Mar. 2020)

[19] *New digital tax policies: What, when, where, how and by whom?,* EY, Issue 22, 2018. https://www.ey.com/Publication/vwLUAssets/EY-new-digital-tax-policies-what-when-where-how-and-by-whom/%24FILE/EY-new-digital-tax-policies-what-when-where-how-and-by-whom.pdf (accessed 28Mar. 2020)

[20] TR: Corporate Income Tax Act, 2006, Official Gazette (21 June 2006)

[21] TR: The Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information Official Gazette 30995/5 (31 Dec. 2019)

[22] TR: Presidential Decree No. 2151, Official Gazette (25 Feb. 2020).

[23] https://vergikonseyi.hmb.gov.tr/bas%C4%B1nda-biz (accessed 30 Mar. 2020)

[24] Registering website: https://www.digitalservice.gib.gov.tr/

consumers) in Turkey which it entered into force in 1 January 2018.[25] This implementation might be asserted to be align with BEPS Action 1[26], but it was a temporary solution in terms of BEPS 2.0. Accordingly, when these are evaluated with DST legislation it shows that is aggressive policy because DST doesn't abolish previous that application.

Second is that withholding tax on online advertising revenue of foreign service providers and its intermediaries.[27] India has implemented the same pattern as well as explained above.

Third is to impose digital services tax independently, while other levies(one and second) is still being applied. DST is almost the same with the application of other countries. All digital services such as selling application, software, music, games, advertising, digital content are subject to DST with rate 7.5% as entering in force in March 2020[28]. But only the supplier of services which their revenue exceed TRY 20 million(about 3.1 million Euro) in Turkey or EUR 750 million worldwide will be subject to DST. Group companies will be taken account with their consolidated accounts. Although general DST rate in proposed or implemented countries is about %3 and the thresholds of revenue are more or less the same, Turkey implements %7,5 rate like Hungary.

For Turkey, those are the latest measures in accordance with aggressive tax policy until now, but the Ministry of Treasury and Finance stated that protective customs duties might be planned to be imposed for import by consumers i.e. Amazon shopping.[29]

3.2. Japan

Economic and fiscal reforms in Japan have been among Prime Minister Shinzo Abe's efforts to stimulate the Japanese economy, commonly referred to as "Abenomics".[30] Japan as a contributor member of the OECD usually follows its struggles and BEPS. Also, Japan had adopted principal rules of BEPS Action Plans into its domestic tax laws before BEPS Final Reports were published.[31] Even if Japan had little different rules from BEPS, it has mainly adopted these with the 2017 and 2018 Tax Reforms. Adopting OECD rules may be connected to its economic policy.

In the year of 2015, Japan introduced a withholding system on digital transaction inserting it to Japan Consumption Tax Act. Inbound digital contents transaction became taxable via destination method. For B2B transactions are subject to the reverse charge system under which Japanese purchasers have to pay consumption tax which is credited. For B2C inbound digital transactions, foreign suppliers have to register as taxable persons to pay consumption tax to the Japanese tax authority.[32]

---

[25] TR: Value Added Tax Act No: 3065. Article 9.

[26] A. (Adam) Becker, Japanese Tax Reforms Square Up to BEPS Action 1 to Tackle Tax Challenges of the Growing Digital Economy, 72 Bull. Intl. Taxn. 4a/Special Issue (2018), Journals IBFD (accessed 30 Mar. 2020).

[27] TR: Presidential Decree No. 476, Official Gazette (19 Dec. 2018)

[28] It was delayed to July 2020

[29] https://vergikonseyi.hmb.gov.tr/bas%C4%B1nda-biz (accessed 30 Mar. 2020)

[30] J. Hagelin & S. Muto, The OECD/G20 Base Erosion and Profit Shifting Initiative and the 2019 Tax Reform in Japan: Revisions to the Earnings Stripping Rules and the Introduction of Hard-to-Value Intangibles into Transfer Pricing, (Section 2.) 73 Bull. Intl. Taxn. 5 (2019), Journals IBFD (accessed 30 Mar. 2020).

[31] Ohno M., The Adoption of BEPS in Japan, in Kerrie Sadiq et al. ed., Tax Design and Administration in a Post-BEPS Era: A Study of Key Reform Measures in 18 Jurisdictions (Fiscal Publications, 2019) 145-159.

[32] Ohno M. (2019, pp. 150-151)

However, Japan has not introduced or proposed any digital services tax independently other than presenting in Japan consumption tax as explained above so far. It means Japan didn't take aggressive tax policy tools due to either being contributor member of OECD or its economy policy It seems Japan will wait for Pillar One and Two to be concluded. In this manner, it can be said Japan is closer to multilateral/mutual actions than unilateral measures meaning aggressive tax policy.

3.3. United States

The United States is very aggressive in tax policy, although it is a member of OECD. US didn't ratify the MLI and doesn't follow BEPS. It might be asserted that BEPS 2.0 are coming from US by pushing countries because it takes unilateral measures. On the other hand, US model tax convention[33] has its own provisions such as limitations on benefits(LoB). This provision has been adapted into the MLI[34] later. The proposal of minimum tax rate so called Pillar two is inspired by the GILTI and BEAT regimes of the 2017 US tax reform.[35]

The first country implementing a global minimum tax rate for own taxpayers is the US via GILTI. GILTI is subject to a worldwide minimum tax of between 10.5 and 13.125 percent on an annual basis of taxpayers. Thus, the incentive to shift corporate profits out of the United States by using intellectual property (IP) would reduce.[36]

As seen, the US applies tax policy aggressively and in protective way. However, it can not be told it contributes to global consensus, rather it prefers to take actions directly without involving common struggles unlike other countries which follow sometimes aggressive tax policy.

3.4. Russia

Countries conclude tax treaties between themselves to prevent double taxation and to provide certainty for taxpayers on tax issues. This also contributes to investment between parties. Although tax treaties are concluded for this aim, taxpayers have started to use them as treaty shopping, thereof it gives rise to double non-taxation or to benefit reduced tax rates through artificial or complicated transactions or arrangements.

As explained foregoing, while aggressive tax policy includes to impose new taxes it also contains to terminate or change tax treaties unilaterally.

In an address to the nation on 25 March 2020, the President of Russia announced that “all income payments (in the form of interest and dividends) that flow out of Russia to offshore jurisdictions must be taxed appropriately which is at 15 per cent. …this [decision to impose a 15% rate on dividends] will require adjustments to be made to our double taxation agreements with certain countries. I ask the Government to arrange for that to be done. If any of our foreign partners do not accept our proposals, Russia will unilaterally withdraw from

[33] United States Model Income Tax Convention. Art. 22 (2016)

[34] Multilateral Convention To Implement Tax Treaty Related Measures To Prevent Base Erosion And Profit Shifting. Art. 7 (24 Nov. 2016)

[35] J. Englisch & J. (Johannes) Becker, International Effective Minimum Taxation – The GLOBE Proposal, 11 World Tax J. (2019), Journal Articles & Papers IBFD (accessed 30 Mar. 2020).

[36] Kyle, Pomerleau, What’s up with Being GILTI?, https://taxfoundation.org/gilti-2019/ (accessed 29 Mar. 2020).

those agreements. And we will begin with those countries through which significant resources of Russian origin pass, as having the greatest impact on our country".[37]

Russia applies already %15 rate for dividends distributed to foreign countries which has no tax treaty with Russia, but if dividends are paid to jurisdictions of Russia's tax treaty partner, those are taxable at reduced rates of %5 or %10. In this case, Russia should negotiate with jurisdictions which it has tax treaty to amend dividend tax rate, but it takes too much time by nature even its partners accept to negotiate, or it should use the termination provision to abolish treaties. The President says they can withdraw from treaties unilaterally.

Even though the President calls "offshore jurisdictions", they don't have any characterization as offshore in nearly 80 treaties.[38] The reason of this announcement is to take protective measures for tax losses through shifting profit to low tax jurisdictions. Actually, BEPS action plans are to solve exactly those issues,[39] but Russia prefers to follow aggressive tax policy because it may not want to suffer this type of tax losses futher.

Thus, terminating tax treaties unilaterally can be another tool of aggressive tax policy. That aspect reflects our aggressive tax policy definition completely.

4. Conclusion and Future Forecasts

Aggressive tax policy can be regarded as new-fashioned principals in international tax issues. While it is applied in domestic tax issues via protectionist movements, it is adopted now in international tax issues such as imposing digital taxes unilaterally which is apart from mutual and multilateral struggles globally and amendments or termination of tax treaties unilaterally. In the future, we will encounter these actions more frequently and widely all around the world, namely aggressive tax policy, because countries can't stand anymore tax losses due to aggressive tax planning. We may infer that countries don't expect a certain and accurate solution in a short period from mutual plans of OECD.

Aggressive tax policy(ATPol) is a solution for preventing tax avoidance, just as aggressive tax planning is a solution for taxpayers to avoid taxes. Even though ATPol is considered solution it will be harmful at the end of the day. If countries go towards ATPol it means accumulation and culture of mutual works on tax field are ignored. The countries which follow aggressive tax policy may reach their aim on aggressive tax planning in the short term but it will not work in the long period. The world came to this mutual and multilateral accumulation in the long period and these struggles started after unilateral actions had been insufficient.

Therefore, the world needs mutual, common and multilateral solutions much more than ever. In this manner, OECD and countries should conclude on BEPS 2.0 immediately and effectively to cover all aggressive tax planning issues. Otherwise, countries will have to take and implement aggressive tax policy(ATPol) growingly.

---

[37] Tax rise planned for Russian source income. 26 March 2020. https://www.ey.com/en_ru/tax/tax-alert/2020/03/ey-tax-rise-planned-for-russian-source-income-26-march-2020-tax-rus (accessed 30 Mar. 2020)

[38] Supra n. 36.

[39] On the other hand, Russia may use the MLI provisions i.e. LOB in this scope, but it can change from country to country based on their reservation or opting in on the provisions.