Doctrine

THE CONCEPT OF "ACTING TOGETHER" IN THE ANTI-HYBRID RULES OF ATAD 2

KEITH O'DONNELL

MANAGING PARTNER
ATOZ TAX ADVISERS
(TAXAND LUXEMBOURG)

SAMANTHA SCHMITZ

CHIEF KNOWLEDGE OFFICER
ATOZ TAX ADVISERS
(TAXAND LUXEMBOURG)

Since 1 January 2020 the amended anti-hybrid rules of EU Directive 2017/952 of 29 May 2017[1] (the "Anti-Tax Avoidance Directive 2" or "ATAD 2") are in force in Luxembourg. These rules constitute most probably one of the most complex pieces of Luxembourg tax legislation and their practical application raises a lot of issues which still remain to be clarified, pending the release of administrative guidelines. One of these issues is the practical application of the undefined concept of "acting together", a concept to be applied when determining whether a specific situation involves "associated enterprises" which is one of the conditions required for being in the scope of the anti-hybrid rules. The Luxembourg legislator was wise enough to introduce some "safe harbour" rules deeming no "acting together" in certain situations. However, there are still many circumstances in which the acting together concept will have to be analysed, but the question is: how?

The concept of "acting together" appeared in the various discussion drafts and in the final report on Action 2 (*Neutralising the Effects of Hybrid Mismatch Arrangements*) of the OECD project on Base Erosion and Profit Shifting "BEPS")[2]. It was then incorporated into the EU legal framework on anti-hybrid mismatch rules in ATAD 2 and is now part of the Luxembourg legislation since Article 168*ter* of the Luxembourg Income tax law ("ITL") was amended[3] with effect as from 1 January 2020. Although the concept is part of 2 different pieces of legislation (ATAD 2 and Article 168*ter* of the ITL), it is not defined, which makes it all the more difficult to analyse and apply in practice. However, reference to this concept and explanations are included in the BEPS Action 2 report, which are useful to better understand the meaning of the concept and how to apply it.

1. THE ANTI-HYBRID RULES OF ARTICLES 168*TER* AND 168*QUATER* OF THE ITL IN BRIEF

On 1 January 2020, an amended version of Article 168*ter* of the ITL came into force which replaced the existing hybrid mismatch rules that had been introduced as part of the 2019 tax reform when implementing EU Directive 2016/1164 of 28 January 2016 (the "Anti-Tax Avoidance Directive" or "ATAD") and extended their scope to transactions involving non-EU countries in accordance with ATAD 2. Hybrid mismatches typically result from a different tax treatment of an entity or financial instrument under the laws of two or more jurisdictions and may result in deduction without inclusion outcomes or double deductions. The purpose of Article 168*ter* of the ITL is to neutralise mismatch outcomes that occur in specific hybrid mismatch situations, but without creating economic double taxation.

Article 168*ter* of the ITL addresses the four following categories of hybrid mismatches:

- hybrid mismatches that result from payments under a financial instrument, including hybrid transfers;
- hybrid mismatches that are a consequence of differences in the allocation of payments made to a hybrid entity or permanent establishment ("PE"), including as a result of a payment to a disregarded PE;
- hybrid mismatches that result from payments made by a hybrid entity to its owner or deemed payments between the head office and PE or between two or more PEs; and
- double deduction outcomes resulting from payments made by a hybrid entity or PE.

Article 168*ter* of the ITL generally applies in case of mismatch outcomes that include deductions without inclu-

1. Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, OJ L 144, 7.6.2017, p. 1–11.
2. Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 – 2015 Final report, 5 October 2015.
3. Loi du 20 décembre 2019 portant modification de la loi modifiée du 4 décembre 1967 concernant l'impôt sur le revenu (...) en vue de transposer la directive (UE) 2017/952 du Conseil du 29 mai 2017 modifiant la directive (UE) 2016/1164 en ce qui concerne les dispositifs hybrides faisant intervenir des pays tiers, Mémorial A, N°889.

sions and double deductions. However, mismatch outcomes shall not be treated as hybrid mismatches unless they arise:

- between associated enterprises;
- between a taxpayer and an associated enterprise;
- between the head office and a PE;
- between two or more PEs of the same entity; or
- under a structured arrangement (in this case, even unrelated parties may come within the scope of the anti-hybrid mismatch rules).

Article 168*ter* of the ITL further provides for rules that target "imported" hybrid mismatches that shift the effect of a hybrid mismatch between parties in third countries into the jurisdiction of EU Member States through the use of a non-hybrid instrument. Finally, Article 168*ter* of the ITL provides for rules that neutralise double deduction outcomes in case of tax residence mismatches (i.e. when an entity is resident for tax purposes in two or more jurisdictions).

Article 168*quater* of the ITL, also implementing ATAD 2, provides for a so-called "reverse hybrid mismatch rule" that will apply as from tax year 2022. A reverse hybrid is an entity that is treated as transparent under the laws of the jurisdiction where it is established but as a separate entity (i.e. opaque) under the laws of the jurisdiction(s) of the investor(s). As a consequence, the income of a reverse hybrid may neither be taxable in its establishment jurisdiction (as the income is deemed to be allocated to the investor) nor in the residence state of the investor(s) (where the income of the opaque entity is not included in the taxable income of the investor(s)). In many cases, the income realised by a reverse hybrid entity will only be taxable at the level of the investor when the income is distributed, resulting potentially in a (long-term) tax deferral. The purpose of the reverse hybrid mismatch rule is to eliminate double non-taxation outcomes through the treatment of reverse hybrids as resident taxpayers.

2. THE ASSOCIATED ENTERPRISE REQUIREMENT & THE "ACTING TOGETHER" CONCEPT

The scope of the hybrid mismatch rules of Article 168*ter* of the ITL is generally limited to transactions between "associated enterprises" with a participation of at least 50% in terms of voting rights or capital ownership, or entitlement to receive at least 50% of an entity's profit, effectively a "related party" requirement. With regard to hybrid mismatches involving hybrid financial instruments, the threshold requirement of 50% is reduced to 25%.

As far as the reverse hybrid mismatch rule of Article 168*quater* of the ITL is concerned, it only applies when the entity is owned by one or more non-resident associated enterprises within the meaning of Article 168*ter* (1) No. 18 of the ITL (individuals or entities) that are resident in a jurisdiction or jurisdictions that regard the Luxembourg entity as opaque and hold directly or indirectly a participation of at least 50% in terms of voting rights or capital ownership (or are entitled to receive at least 50% of the entity's profit). Thus, only those investors that are resident in jurisdictions that view the Luxembourg entity as opaque are to be considered when determining whether the 50% threshold is met.

In certain circumstances, the shareholding percentages of otherwise unrelated parties have to be aggregated for the purpose of the related party test. This is what is referred to as the "acting together" concept according to which a person who acts together with another person in respect of voting rights or capital ownership of an entity shall be treated as holding a participation in all of the voting rights or capital ownership of that entity that are held by the other person.

2.1. Acting together in accordance with the BEPS Action 2 report

The purpose of the "acting together" concept is to prevent taxpayers from avoiding the related party test being met by transferring their voting interest or equity interest to another person, who continues to act under their direction in relation to those interests. The other situation targeted by the acting together concept is when a taxpayer or a group of taxpayers who individually hold minority stakes in an entity, enter into arrangements that would allow them to act together (or under the direction of a single controlling mind) to enter into a hybrid mismatch arrangement with respect to one of them.[4]

According to the BEPS Action 2 final report[5], the acting together test covers voting rights or equity interests held by a **single economic unit** such as a family and covers the following three basic scenarios:

(1) where one person is required, or can be expected to act, in accordance with the wishes of another person in respect of the voting rights or equity interests held by that first person;

4. See Final Report on BEPS Action 2, page 117, No. 369.

5. See Final Report on BEPS Action 2, page 117, No. 370.

(2) where two or more people agree to act together in respect of voting rights or equity interests that they hold;

(3) where a person (or people) agree that a third person can act on their behalf in respect of voting rights or equity interests that they hold.

- Members of the same family

As far as members of the same family are concerned, the report states that a person will be deemed to hold any equity or voting interests that are held by the members of that person's family.[6] The principle of aggregation of interest in case of members of the same family is something which is already known in the Luxembourg tax framework: Article 100 of the ITL also considers that when determining whether an important (more than 10%) participation is sold, one will look at the participation held not only by the seller itself but also by other family members (i.e. spouse, partner and minor child). Thus, aggregating interests in a family context is not completely new.

In our view, for the purpose of the acting together test, one should adopt a strict approach of the "family concept" and only aggregate interests of members of the same household. Also, should a family member not be aware of the investment/transaction performed by the other and be able to demonstrate the absence of acting together, to us, there should be no aggregation of the equity or voting interests.

- Regularly acting in accordance with the wishes of the other person

On the concept of regularly acting in accordance with the wishes of the other person, the report states that "a person will be treated as acting in accordance with the wishes of another person where the person is legally bound to act in accordance with another's instructions or if it can be established that one person is expected to act, or typically acts, in accordance with another's instructions. The focus of the test is on the actions of that person in relation to the voting rights or equity interests. The equity interests or voting rights held by a lawyer for example, will not be treated as held by the lawyer's client under the acting together test, unless it can be established that such rights or interest are held as part of the lawyer – client relationship."[7]

Thus, it appears that a case-by-case analysis of the facts will have to be performed each time in order to see whether either there is a formal agreement in place regarding the voting rights or equity interests of the 2 individuals or legal entities, or whether it can be expected that one person will act in accordance with the instructions of the other, based on the specific circumstances. In any case, one will have to analyse the relationships of both persons concerned and if there is no relationship in place between them, it is clear that their voting rights or equity interests will not have to be added together.

- Entering into an arrangement that has a material impact on the value or control of any such rights or interests

On the concept of entering into an arrangement that has material impact on the value or control of any such rights or interests, the report states that "one person will be treated as holding the equity or voting interests of another person if they have entered into an arrangement regarding the ownership or control of those rights or interests. (...) The test is intended to capture arrangements that are entered into with other investors and does not cover arrangements that are simply part of the terms of the equity or voting interest or operate solely between the holder and issuer. The arrangement regarding the ownership or control of voting rights or interests must have a material impact on the value of those rights or interests. The materiality threshold prevents an investor having its equity or voting interests treated as part of a common holding arrangement simply because the investor is a party to a commercially standard shareholder or investor agreement that does not have a material impact on the ability of a holder to exercise ownership or control over its equity or voting interest."[8]

The report provides the example of an investor who is a party to a shareholder's agreement that requires the investor to first offer his equity interest to existing investors (at market value) before selling to a third party. The report concludes in this example that such agreement will not generally have a material impact on the value of the holder's equity interest and should not be taken into account for the purposes of the acting together requirement.

Here, one will have to analyse the facts in order to see whether both parties have actively entered into an arrangement and that this arrangement has a material impact on the value or control of the rights or interest.

6. See Final Report on BEPS Action 2, page 117, No. 371.
7. See Final Report on BEPS Action 2, page 117, No. 372.
8. See Final Report on BEPS Action 2, page 117, No. 373.

- Ownership or control managed by the same person or group of persons

The third element provided in the BEPS Action 2 report is the situation where investors will be considered as acting together if their interests are managed by the same person or group of persons. This requirement would pick up a number of investors whose investments are managed under a common investment mandate or partners in an investment partnership.[9]

This element of the acting together test contains an exception for investors that are collective investment vehicles ("CIV")[10] where the nature of the investment mandate and the investment means that two funds under the common control of the same investment manager will not be treated as acting together if the circumstances in which they make the investment (including the terms of the investment mandate) mean that the funds should not be treated as acting together for the purposes of the test. In the Action 2 report, CIV means a collective investment vehicle as defined in paragraph 4 of the Granting of Treaty Benefits with Respect to the Income of Collective Investment Vehicles, i.e. funds that are widely-held, hold a diversified portfolio of securities and are subject to investor-protection regulation in the country in which they are established. Here, the exception included in the report refers to the situation of investment funds in their investor capacity and not in their capacity as investment vehicle. Therefore, the fact that a partnership is widely held and otherwise meets the test for a CIV does not permit the partnership to rely on the exclusion because that exception only applies to investors that are CIVs and not investors in a CIV.[11]

However, it does not mean that limited partners in a partnership have always to be treated as acting together: in examples 11.2[12] and 11.5[13] of the BEPS Action 2 Report, investors pool into an investment fund their interest in the underlying investment and place this indirect interest under the common management of the general partner.

In example 11.2, it is concluded that the investors are associated to the partnership on the ground that each holds 25%, which is the threshold applicable for the associated enterprise test based on para 357 of the BEPS Action 2 Report, whereas the threshold is 50% in respect of most ATAD 2 anti-hybrid rules.

However, the conclusion in example 11.2 is not that the association with the partnership relies on the fact that the investors are acting together with respect to their interest in the partnership itself.

In any case, in our view, interests should not be aggregated in situations where there are multiple investors in an investment limited partnership that do not even know each other and it should always be a matter of fact as to whether 2 limited partners are acting together. If limited partners ("LPs")are not connected and do not even know each other, we are of the view that it should always be reasonable to argue that they are not acting together, unless they make some concerted effort to work together or make decisions together. In effect, to take the wording of para 370 can it really be said that LPs who have no communication or even don't know of each other's existence "agree that a third person can act on their behalf in respect of voting rights or equity interests that they hold"? This question is all the more relevant in the frequent case of a diversified investment limited partnership where the LPs do not even know of the structure of the underlying investments, which are often the investments that can give rise to hybrid mismatches, and therefore have no real capacity to act with other LPs in respect of voting rights or equity interests.

2.2. Acting together under ATAD 2

According to ATAD 2, for the purposes of Articles 9 (hybrid mismatches) and 9a (reverse hybrid mismatches), a person who acts together with another person in respect of the voting rights or capital ownership of an entity shall be treated as holding a participation in all of the voting rights or capital ownership of that entity that are held by the other person.

Recital 13 of ATAD 2 refers to the acting together concept when dealing with mismatches that, in particular, result from the hybrid nature of entities: "The ownership, or rights of persons who are acting together, should be aggregated for the purposes of applying this requirement." ATAD 2 does not provide any definition of "acting together".

However, in Recital 28, it is stated that "In implementing this Directive, Member States should use the applicable explanations and examples in the OECD BEPS report on Action 2 as a source of illustration or interpretation to

9. See Final Report on BEPS Action 2, page 117, No. 377.
10. See Final Report on BEPS Action 2, page 117, No. 378.
11. See Final Report on BEPS Action 2, Example 11.5., Analysis, page 454.
12. See Final Report on BEPS Action 2, page 447.
13. See Final Report on BEPS Action 2, Example 11.5., page 453.

the extent that they are consistent with the provisions of this Directive and with Union law."

2.3. Acting together under Article 168ter (1) N°18 of the ITL

In the same way as ATAD 2, Article 168*ter* of the ITL[14] provides that an individual or an entity who acts together with another individual or entity in respect of the voting rights or capital ownership of an entity shall be treated as holding a participation in all of the voting rights or capital ownership of that entity that are held by the other individual or entity. Article 168*ter* of the ITL does not provide any positive definition of what is understood as "acting together". Instead, the Article and the related commentary to the draft law provide a negative definition of what is not considered as "acting together".

- "Negative" definition: investors holding less than 10% in an investment fund are not acting together

The commentary to the draft law refers to the BEPS Action 2 report in order to explain the aim of the concept, which is to prevent taxpayers from avoiding the related party test being met by transferring their voting interest or equity interest to another person, who continues to act under their direction in relation to those interests. The commentary provides that on this basis, since investors in an investment fund generally do not effectively control the investments made by the fund, Article 168*ter* of the ITL provides a safe harbour rule according to which an investor (an individual or an entity) that directly or indirectly owns less than 10% of the shares or units in an investment fund and that is entitled to less than 10% of the fund's profits is considered not to act together with other investors, unless the opposite can be evidenced. According to the commentary to the draft law, an investment fund is a collective investment vehicle which raises capital from a certain number of investors with the aim of investing, in accordance with a defined investment policy, in the interest of these investors. The investment fund definition is therefore very broad and may include any type of undertaking for collective investment, i.e. undertakings for collective investment in transferable securities as well as alternative investment funds. The definition provided in the commentary does not even refer to the requirement of being regulated so that even unregulated investment funds should be covered by the 10% safe harbour rule.

Hence, in an investment fund context, the ownership of stakes below 10% should generally not be added together when considering a potential aggregation of interests as a consequence of the "acting together" concept. However, the 10% *de minimis* rule is only an assumption and should the specific circumstances actually reflect that 2 investors holding less than 10% in the investment fund are actually acting together, the tax authorities will have the possibility to evidence that the 2 participations should be aggregated under the acting together concept. In such case, the burden of proof will be on the tax authorities[15] who will have to demonstrate that the investors are acting together based on the information at their disposal or provided by the taxpayer at their request.

- Case-by-case analysis when investors hold 10% or more in an investment fund

When investors in an investment fund own 10% or more of the shares or units of the fund, or are entitled to 10% or more of the fund's profits, a case-by-case analysis has to be performed to determine whether two or more investors are acting together in a given case. In other words, there is no presumption of acting together simply because the 10% threshold is exceeded. While this is not mentioned expressly in the commentary to the draft law, this reflects the general understanding of how to apply the "acting together" concept, as reflected in the comments of the Luxembourg State Council[16]. Therefore, in case of investors holding 10% or more in an investment funds, in application of either Article 168*ter* (6) of the ITL (hybrid entities and hybrid instruments) or Article 168*quater* (3) of the ITL (reverse hybrid entities), the burden of proof will be on the taxpayer who will be able to demonstrate that the investors are not acting together.

- At which level in the investment structure should the "acting together" test be performed?

In practice, since institutional investors have to comply with various regulatory requirements, investment managers may be inclined to accommodate these requirements through the implementation of additional pooling vehicles (so-called "feeder funds") that collect the capital from investors and invest in the main fund. Feeder funds may be established in Luxembourg or abroad in the form of a corporate entity, a partnership or a contractual fund (e.g. a *fonds commun de placement*, "FCP"). Depending on their legal forms, some may be considered as tax transparent and some may be considered as opaque from a tax point of view. Therefore, the question arises as to the level at which the "acting together" test should be performed, i.e. whether one should take a "tax approach"

14. Article 168*ter* (1), n°18 of the ITL.
15. See Comments of the Luxembourg State Council of 10 December 2019, Document N°7466[04] , page 18.
16. See Comments of the Luxembourg State Council of 10 December 2019, Document N°7466[04] , page 18.

and look through investment vehicles considered as tax transparent when identifying investors potentially acting together or whether one should rather take a legal approach and make the acting together test at the first level of investors.

Absent any guideline from the tax authorities nor commentary of the legislator in this respect, it is understood (and this understanding is confirmed in the comments made by the chamber of commerce)[17] that if the feeder fund is considered as opaque from a Luxembourg tax perspective, the related party test (i.e. whether or not the 50% threshold requirement is exceeded) and the 10% de minimis rules should be applied at the level of the feeder fund, i.e. one will look at the participation held by the feeder fund into the main fund. In the opposite, if the feeder fund is classified as transparent from a Luxembourg tax perspective, a look through approach will be applied and the related party test and the *de minimis* rule will be applied at the level of the investors in the feeder fund (who invest indirectly into the main fund).

Therefore, investors in the feeder vehicle that indirectly own less than 10% in the main fund should not be aggregated for the purposes of the related party test and the anti-hybrid rule would not apply even if the direct investment of the tax transparent feeder fund into the main fund represents more than 10% . As regards investors that indirectly own 10% or more in the main fund, it has to be analysed on a case-by-case basis whether or not the acting together concept applies. The fact that the feeder fund is managed by a general partner or a management company does not, on its own, suffice to trigger the application of the acting together concept.[18]

3. HOW TO DETERMINE WHETHER INVESTORS ARE ACTING TOGETHER IN PRACTICE?

The main principle arising from the guidelines provided in the BEPS Action 2 report and the draft law introducing the current version of Article 168*ter* of the ITL is that a case-by case analysis has to be performed each and every time in order to analyse whether interests have to be aggregated when determining whether an individual or entity is an associated enterprise. Even in situations in which there is a presumption of absence of acting together based on the law provisions, taxpayers should always make sure to have good arguments at their disposal to be in the position to demonstrate the absence of common action in case of challenge by the tax authorities. Still, in the investment fund context, in case of a participation of less than 10% in the fund, the fund should in most cases be considered as widely held and when funds are widely held, in principle, investors are not acting together.

In case of investors in an investment fund holding 10% or more of the shares or units of the fund, as well as in any other situation not covered by the 10% *de minimis* rule, a case-by-case analysis will have to be made in order to determine whether interests have to be aggregated under the "acting together" concept. The presence of a common general partner does not automatically mean that the investors are acting together. Instead, investors have to be effectively acting together for the acting together principle to apply. Indeed, when reviewing any situation, one should always keep in mind the aim of the "acting together" concept: it is about bringing the situation in terms of investor ownership back to what it should have been. In other words, it is about converting an artificial situation which was created in order to avoid the related party test being met into a situation which reflects reality. Even though there is no requirement of an active and intentional behaviour of the investors, one should still keep in mind that the aggregation of ownerships should only take place if it reflects reality and, in the opinion of the authors, there should be in any case no aggregation of interests where investors do not even know each other.

3.1. Practical example in an investment fund context

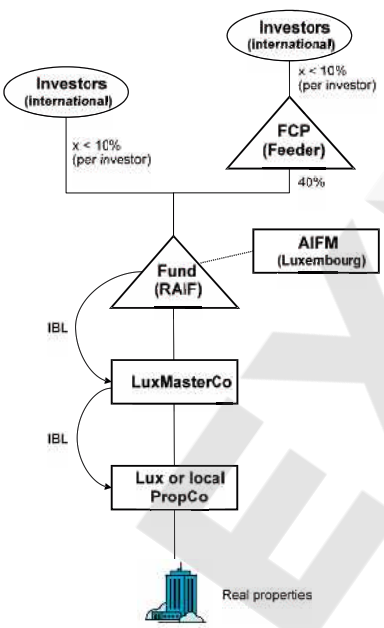
Given the size of the Luxembourg investment fund industry, clarifying the practical application of the acting together concept in an investment fund context was of high importance. This is why the negative definition of the "acting together" concept in an investment fund context is very welcome. In the example below[19], we illustrate the application of the "acting together" concept:

A Luxembourg Reserved Alternative Investment Fund ("RAIF") invests into pan-European real estate assets. The fund is managed by a Luxembourg Alternative Investment Fund Manager ("AIFM") that makes investments in accordance with the Fund's investment policy as outlined in the prospectus. Thus, the RAIF qualifies as an investment fund for the purposes of the 10% de minimis rule. The investments of the RAIF are made through a Luxembourg master company ("LuxMasterCo") that operates as the fund's investment platform and sepa-

17. See Comments of the Chamber of Commerce of 27 September 2019, page 15.
18. See Oliver R. Hoor, "Hybrid Mismatch Rules in Luxembourg – A practical guide", Legitech, 2020, Section 2.4.3. page 32.
19. To see other examples of practical applications of the "acting together" and "associated enterprises" concept, see Oliver R. Hoor, "Hybrid Mismatch Rules in Luxembourg – A practical guide", Legitech, 2020.

rate property companies ("Lux or local PropCo") that are financed by a mixture of equity and debt instruments (interest-bearing loans, "IBL").

The investors in the RAIF are not involved in the investment process and there exists no special relationships between them. 60% of the investments in the RAIF are made directly by institutional investors, which each hold shareholdings ranging from 2 to 9% (thus, less than 10%) and the remaining 40% of the investments are made via a Luxembourg fund in contractual form (fonds commun de placement, "FCP") that operates as a feeder fund for those investors that have a preference for such vehicle from a foreign regulatory perspective. While the FCP owns 40% in the RAIF, the investors investing into the FCP hold each less than 10% in the FCP and thus indirectly less than 10% in the RAIF (applying a look-through approach since the FCP is seen as a tax transparent vehicle from a Luxembourg tax point of view).



In this example, all investors hold directly or indirectly less than 10% in the investment fund. Therefore, it is assumed that the investors are not acting together in accordance with Article 168*ter* (1) No. 18 of the ITL.

In addition, even if the Luxembourg tax authorities are still allowed to prove that the investors are acting together, in the present case there is no indication that investors are acting together within the meaning of Art. 168*ter* (1) No. 18 of the ITL since the investors are not involved in the investment process and there exists no special relationships between them. As a result, there is no associated enterprise and the anti-hybrid rules do not apply.

3.2. Burden and mean(s) of proof

The taxpayer has the burden of proof that the hybrid mismatch rules[20] or the reverse hybrid mismatch rules[21] do not apply in a given case. This means that the taxpayer has, upon request, to provide the tax authorities with comprehensive, objective and verifiable information and documentation in order to demonstrate that the hybrid mismatch rules provided under Article 168*ter* (3) – (5) of the ITL or the reverse hybrid mismatch rules provided under Article 168*quater* (1) of the ITL are not applicable. Therefore, the taxpayer has also to evidence that the acting together concept does not apply each time the presumption of not acting together falls away (because an investor has more than 10% in an investment fund).

Even though the evidence will only have to be provided upon request, taxpayers should not await a request of the tax authorities to prepare the documentation they will need to support their position. Instead, especially regarding the proof of not acting together, they will have to pay attention upfront to each step taken in the set-up of the investment structure, or the arrangement/financial instrument and to the drafting of the related documentation.

The question arises as to how investors will be able to demonstrate that they are not acting together and which type of proof will be considered as sufficient from the point of view of the tax authorities. To demonstrate that something does not exist is always difficult. Absent any guidelines of the tax authorities in this respect, the following can be recommended:

- it is important to document all steps of the investment structuring in order to see under which terms and conditions and at which moment in time one or another investor has been involved for the first time in the investment structure, when the investor has planned to make its investment and when it has entered into the investment structure;
- it is becoming common market practice to ask investors to confirm in subscription agreements that they are not acting together with another investor;
- since it is difficult to demonstrate a negative fact, it could be envisaged to send to the Luxembourg tax authorities a confirmation from the GP or the fund ma-

20. See Article 168*ter* (6) of the ITL

21. See Article 168*quater* (3) of the ITL.

nager that, to the best of their knowledge, there are no investors acting together .

However, it remains to be seen which type of document will be requested by the tax authorities in practice in order to demonstrate that investors are not acting together.

4. KEY TAKEAWAYS

When implementing ATAD 2, the Luxembourg legislator took the positive initiative to introduce some common-sense safe harbour rules providing for an assumption of absence of "acting together" in certain situations, responding to concerns of overreach of the provisions.

The many concerns raised when applying the concept of "acting together" can be seen not only in Luxembourg but also in other jurisdictions. As an example, the UK, one of the first countries which introduced anti-hybrid rules[22] based on the BEPS Action 2 report, is currently considering reviewing its rules and more specifically narrow the definition and so the scope of application of the "acting together concept" in order to make sure that the concept is not applied too disproportionately. On 19 March 2020, the UK tax authorities (Her Majesty's Revenue and Customs, "HMRC") launched a consultation in this respect which is running until the end of August 2020 and in which they indicate that they are aware that the breadth of the rules defining persons as acting together is such that parties between whom there is no relationship of the type described above may be taken to be acting together. They are prepared to consider the case for change such that some arrangements which would otherwise come within scope of the current definition of "acting together" would not be treated in that way. Finally, they are aware that in practice, in situations where the acting together rules do apply, it is often very difficult for taxpayers to obtain the information as to their counterparties' structures which is necessary in order to assess the application of the wider hybrid provisions, in cases where there is no, or minimal, commonality of ownership between the taxpayer and its counterparty.[23]

In Luxembourg, although some progress has been made, there is still a need to define and clarify the application of the concept in all other situations not covered by the 10% de minimis rule. It will be necessary to apply the guidelines provided in the BEPS Action 2 report in a pragmatic way, in order to make sure that interests are only aggregated in situations in which either (i) taxpayers try to avoid the related party test by transferring their voting interest or equity interest to another person who continues to act under their direction or (ii) a taxpayer or a group of taxpayers who individually hold minority stakes in an entity, enter into arrangements that would allow them to act together to enter into a hybrid mismatch arrangement with respect to one of them. The acting together concept should be seen as a kind of anti-abuse rule making sure that taxpayers do not prevent the application of the anti-hybrid rules in situations which should clearly be caught by these rules.

Clarifications and guidelines will also have to be provided by the tax authorities regarding the means of proof related to the acting together test. Indeed, whether taxpayers fall within the scope of the 10% de minimis rule or not, they should always make sure to have good arguments at their disposal in order to be able to support their position in case of challenge by the tax authorities.

22. With effect as from 1 January 2017, so without awaiting ATAD 2.
23. See Hybrid and other Mismatches – Consultation Document, 19 March 2020: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/873562/Consultation_Hybrid_and_other_mismatches.pdf