The Interest Limitation Rule

Art. 13 of the CCTB-Proposal

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Overview

I. Legal environment

II. General features

III. Comparison to other thin capitalisation regimes

IV. Analysis and critique

I. Legal environment

- CCCTB-proposal of 2011
- OECD BEPS Action 4: Limiting Base Erosion Involving Interest Deductions and Other Financial Payments
- ATAD
- National law

1. Personal scope

a) EU-companies (Art. 2 para. 1)

- subject to CIT of a member state,
- member of a consolidated group, and
- *either* parent/subsidiary (Art. 3)
  or having PE(s) (Art. 5)

b) Third country companies (Art. 2 para. 2)

c) Opt-in companies (Art. 2 para. 3)

d) Exception for standalone companies (Art. 13 para. 4)

- not part of a consolidated group,
- no associated enterprises and
- no PEs

2. Non-deductibility of exceeding borrowing costs

a) Definition of borrowing costs (Art. 4 para. 12)

b) Net interest (Art. 13 para. 1)

c) Fixed ratio rule based on EBITDA (maximum 30%)

d) de minimis threshold (maximum 3.000.000 €)

e) Group consolidation

f) Carrying forward (Art. 13 para. 6)

III. Comparison to other thin capitalisation regimes

Components	CCTB	ATAD	Germany
Earnings limitation approach	30% of EBITDA	≤ 30% of EBITDA	30% of EBITDA
Inclusion of external debt	+	+	+
Exception for standalone entities	+	option	+
Group consolidation of exceeding borrowing costs and EBITDA	+	option	-
Safe harbour (group debt-to-equity ratio)	-	option	+
De minimis threshold	3.000.000 €	option (≤ 3.000.000 €)	3.000.000 €
Carryforward	exceeding borrowing costs	exceeding borrowing costs (option) unused interest capacity (option) carry back (option)	exceeding borrowing costs and exceeding EBITDA
Exception for loans used to fund public infrastructure	+	option	-

IV. Analysis and critique

1. **Timing issues: Fluctuation of interest and EBITDA**

   EBITDA /unused net interest carryforward?
   Carry back?

2. **Inconsistencies with ATAD**

   Thin capitalisation rule shopping?

3. **Dichotomous policy aims?**

   Anti Tax avoidance
   vs.
   Reducing the tax bias in favour of equity finance