

INTEREST LIMITATION RULES

Anti Tax Avoidance Directive

Status after RD 20-12-2019

Interest limitation rules in a nutshell (1)

- » 'Exceeding borrowing cost' is only tax-deductible within certain limits.
- › '**Exceeding borrowing cost**' (EBC):
net funding cost (positive difference between borrowing costs and interest revenues)
 - Included: costs and revenues 'economically equivalent' to interest (concept defined by Royal Decree – e.g. capitalized interest, guarantee fees, closing fees, discount on low-interest or non-interest-bearing loans, etc.)
 - Excluded: interest disallowed under art. 49, 52, 2°, 54 and 55 ITC
 - Excluded: interest allocated to foreign PE
 - Excluded: interest on loans concluded before 17 June 2016 (grandfathering), *unless if fundamentally modified afterwards*
 - Excluded: interest on loans in execution of PPS Project
 - Excluded: interest received from and paid to (Belgian) group entities (other than excluded entities).
- › **Threshold**: the higher of the following two amounts:
 - 3.000.000,00 EUR (*de minimis*)
 - 30% of the tax adjusted EBITDA
- › **Non-deductibility**: 'exceeding borrowing cost' if and to the extent that it exceeds the highest of two thresholds. Any non-deductible 'exceeding borrowing cost' can be carried-forward (no time limitation) and be utilized in subsequent financial years (within certain limits).

Interest limitation rules in a nutshell (2)

» Calculation of the tax-adjusted EBITDA

'Result of the taxable period' ('first operation' in the CIT return).	
+	tax-deductible depreciations and amortizations of the taxable period
+	carried-forward exceeding borrowing costs of previous taxable periods (exempt profit referred to in article 194sexies of the BITC)
+	tax-deductible exceeding borrowing costs (i.e. exceeding borrowing costs not included in the 'result of the taxable period' – see above)
+	intercompany costs (<i>except interest and economically equivalent costs</i>) paid to an entity that belonged to the group (<i>during the entire taxable period</i>) and is not an excluded entity
-	amount of the 'group contribution' referred to in article 205/5 of the BITC which is deducted from the profits of the taxable period (p.m.: such group contribution is not deducted at the level of the 'result of the taxable period')
-	income from the taxable period eligible for the participation exemption (income of the taxable period referred to in article 202 of the BITC which, in accordance with articles 203 to 205 of the BITC, can be deducted from the profits of the current or a subsequent taxable period)
-	85 pct. of net innovation income of the taxable period eligible for innovation income deduction (85 pct. of the income of the taxable period referred to in articles 205/2 and 205/3 of the BITC which, in accordance with article 205/1 of the BITC, can be deducted from the profits of the current or a subsequent taxable period)
-	patent income deduction or PID (80 pct. of the patent income determined in accordance with article 543 of the BITC that is deductible from the profits of the taxable period)
-	profits of the taxable period that are exempt under a double tax treaty
-	profits realized through a PPS project (provided that the project operator, borrowing costs, assets and profits are all located in the European Union)
-	intercompany revenues (<i>except interest and economically equivalent revenues</i>) received from an entity that belonged to the group (<i>during the entire taxable period</i>) and is not an excluded entity

Specific rules for groups of companies

» **Affiliated companies:**

- › Only Belgian affiliated companies or Belgian permanent establishments of foreign affiliated companies.
- › Affiliated within the meaning of article 1:20 of the Companies and Associations Code (former article 11 of the Companies Code).
- › Affiliated during the entire taxable period.
 - Required for intercompany EBITDA adjustments; not for adjustment of EBC.
 - No autonomous definition in final text – affiliation must exist during entire taxable period of all entities belonging to the group.

» **Specific rules:**

- › Interest (or equivalent costs and revenues) paid to or received from BE group members (that are not excluded) are disregarded for the purpose of calculating the **exceeding borrowing cost**.
- › 'Intercompany eliminations for the calculation of the tax-adjusted **EBITDA** (*Royal Decree: except for intercompany interest and economically equivalent costs and revenues*).
- › Negative **EBITDA's** in the group to be deducted from positive EBITDA's (pro rata).
- › Possibility to 'offset' 'negative exceeding borrowing cost' (interest income > interest costs) against 'positive exceeding borrowing cost' (interest income < interest costs) of other BE group members: not in final version of Royal Decree (!)...
- › Possibility of concluding an 'interest deduction agreement' (transfer of threshold or interest deduction capacity).

Application in practice

1. Calculation of '**exceeding borrowing cost**' and tax-adjusted **EBITDA** per BE group entity

2. Election to be made at group level:
 - A. If the 'exceeding borrowing cost' at group level < 3.000.000 EUR **or** the tax-adjusted EBITDA at group level < 10.000.000 EUR → **simplified calculation** → collective 'waiver' of EBITDA calculation → 3.000.000 EUR threshold divided proportionately to exceeding borrowing cost.
 - B. If the 'exceeding borrowing cost' at group level > 3.000.000 EUR **and** the tax-adjusted EBITDA at group level > 10.000.000 EUR → **extensive calculation** based on the tax-adjusted EBITDA with specific adjustments ('intercompany eliminations'; allocation of negative tax-adjusted EBITDA among the group companies with positive tax-adjusted EBITDA)

3. Possible transfer of interest deduction capacity by means of an interest deduction agreement.

Proportional allocation of 3.000.000 EUR threshold

1. Calculation of '**exceeding borrowing cost**' and tax-adjusted **EBITDA** per BE group entity.
2. In principle allocation of 3.000.000 EUR threshold according to 4-step calculation:
 - A. Positive difference: $[3.000.000 \text{ EUR}] - [\sum \text{EBITDA}]$
(= remaining interest capacity)
 - B. Per group entity: $[\text{Borrowing cost}] - [30\% \text{ EBITDA}]$
(= remaining request for interest capacity)
 - C. Allocate **A** proportionately to 'remaining request' as determined in **B**
 - D. Final threshold: $[30\% \text{ EBITDA}] + \text{C}$

Relation to the 5/1-thin cap rule

- » 5/1-thin cap rule continues to apply to:
 - › loans concluded before 17 June 2016 which have not been *fundamentally modified* since then; and
 - › Interest paid to a recipient that is either not subject to income tax or subject to a significantly more favorable tax regime.

- » (ATAD) interest limitation rule
 - › applicable to (i) loans concluded as of 17 June 2016 or (ii) older loans that have been *fundamentally modified* since then.

Our approach: Calculation sheet

- › Tailor-made assistance and senior level advice in calculating the impact of the interest limitation rules.

- › Extensive Excel spreadsheet to facilitate the calculation at group level (as opposed to a licensed Tool).
 - Guidance in determining whether costs/revenues are to be taken into account for calculating the 'net borrowing cost'.

 - Transparent calculation of tax-adjusted EBITDA (taking into account required intra-group adjustments).

 - Comprehensive overview of deficits and surpluses of interest deduction capacity, and possibility to reallocate interest deduction capacity within the group (via interest deduction agreements).

Our approach: Calculation sheet

CALCULATION TAX EBITDA	TOTAL	NEWCO 1	NEWCO 2	NEWCO 3	NEWCO 4	NEWCO 5	NEWCO 6	NEWCO 7	NEWCO 8	NEWCO 9
Result of the taxable period ('1st operation' in de CIT return)	-	-	-	-	-	-	-	-	-	-
Tax deductible depreciations and amortizations of the taxable period	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Carried-forward exceeding borrowing costs (except profit referred to in article 194sexies BITC)	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Tax-deductible exceeding borrowing costs (i.e. exceeding borrowing costs not included in the 'result of the taxable period')	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Intercompany costs (except interest and economically equivalent costs, only in relation with Belgian companies/PE's)	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
- (amount without +/-)										
Amount of the 'group contribution' referred to in article 205.5 of the BITC which is deducted from the profits of the taxable period	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Intercompany revenues (except interest and economically equivalent costs, only in relation with Belgian companies/PE's)	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Income from the taxable period eligible for the participation exemption	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
85 pct. of net innovation income of the taxable period eligible for innovation income deduction	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
80 pct. of the patent income determined in accordance with article 543 of the BITC that is deductible from the profits of the taxable period	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Profits of the taxable period that is exempted under a double tax treaty	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Profits realized through a "PFS-project"	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
TAX EBITDA	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Correction for negative EBITDA of other group members (-) (if applicable)	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Corrected EBITDA	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
30% corrected EBITDA	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Part of the <i>de minima</i> 3 mio. (+) (if applicable)	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
TOTAL THRESHOLD (interest deduction capacity)	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Exceeding borrowing cost (without taking into account possible excess interest deduction capacity of other BE group members)	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Excess interest deduction capacity	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Interest capacity to be transferred (fill in manually / use '-' sign)	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Received interest deduction capacity (fill in manually)	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
<i>Excess interest deduction capacity (or received capacity) should be 0,00</i>	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Exceeding borrowing cost (taking into account possible excess interest deduction capacity of other BE group members)	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Remaining interest deduction capacity (or disallowed expense in case transferred capacity > own available capacity)	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00

EBITDA AT GROUP LEVEL -

EBITDA GROUP LEVEL < 10 mio? YES ➔ Simplified calculation method suffices

TITLE GENERAL INFO COMPANIES' DETAIL CIT RETURN NET BORROWING COST EBITDA CALCULATION SIMPLIFIED CALCULATION

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- » Dutch (mother tongue)
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