

Unconstitutionality of the Interest Limitation? Evidence from Germany Adequate amount of interest expense in an enterprise and interest coverage ratio

Thomas Kollruss

Tax and Accounting Research, Berlin, Germany

Abstract

The tax deductibility of interest expenses is an issue for companies. However, the interest limitation rule may restrict the tax-effective deduction for interest expenses of a business to 30% of the EBITDA. The German Supreme Tax Court (BFH) has submitted the interest limitation to the German Federal Constitutional Court to examine its constitutionality (BFH I R 20/15; 2 BvL 1/16). Since the interest limitation has been introduced by European secondary legislation (Art. 4 ATAD; Anti-Tax-Avoidance Directive) in all EU Member States, and the German rule corresponds exactly to Art. 4 ATAD, the decision of the German Federal Constitutional Court (BVerfG) will have a great signaling effect. The unconstitutionality of the interest limitation rule may prevent important tax policy goals of limiting tax-related debt financing of businesses and corporations from being achieved. According to the BFH, the German Federal Bar Association and the predominant opinion in the German literature, the interest limitation rule violates the ability-to-pay principle under Article 3 (1) of the German Basic Law. However, the existing analysis falls short. An economic and legal analysis of the interest limitation shows that it does not violate constitutional law. Under constitutional law, the legislator may limit the amount of the tax-effective deduction of business expenses to interest expenses that are customary in the market. In doing so, the legislator can use recognized financial ratios, such as the interest-coverage ratio (ICR) that stands behind the 30% EBITDA limit. Constitutional law does not provide for an unlimited tax deduction of interest expenses.

Keywords

Interest limitation • constitutional law • tax policy • debt financing • profit shifting • interest expense • interest coverage ratio

JEL codes

H25 • K34 • O16 • G30

Interest Limitation and Constitutional Law

European secondary legislation introduced the interest-limitation rule in all 27 EU Member States effective from 01.01.2019 (Art. 4 ATAD¹, EU Anti-Tax Avoidance Directive, Directive 2016/1164). Consequently, the interest limitation applies throughout the internal market. Numerous third countries and EEA States also provide for similar profit-dependent or EBITDA²-dependent limits on tax-effective interest deductions – for example, the USA (EBIT), Canada, Japan (20% EBITDA), Mexico, Argentina, UK, South Korea, Iceland, and Norway (OECD Transfer Pricing Country Profiles). The interest limitation according to Art. 4 of the Anti-Tax Avoidance Directive (ATAD) corresponds to the German regulations of the interest barrier, which were already introduced there with the Corporate Tax Reform Act of 2008 (§ 4h EStG and § 8a KStG; BT-Drs. 16/4841, 31, 47; BGBl I 2007, No. 40).

1 Council Directive (EU) 2016/1164 of 12 July 2016: (5) It is necessary to lay down rules against the erosion of tax bases in the internal market and the shifting of profits out of the internal market. Rules in the following areas are necessary to contribute to achieving that objective: limitations to the deductibility of interest; [...] (6) To reduce their global tax liability, groups of companies have increasingly engaged in BEPS, through excessive interest payments. The interest limitation rule is necessary to discourage such practices by limiting the deductibility of taxpayers' exceeding borrowing costs. It is therefore necessary to fix a ratio for deductibility which refers to a taxpayer's taxable earnings before interest, tax, depreciation and amortisation (EBITDA).

2 EBITDA stands for earnings before interest, taxes, depreciation and amortisation.

[†] Corresponding author: Thomas Kollruss

E-mail: T.Kollruss@gmx.at

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By order of the German Supreme Tax Court (the Bundesfinanzhof or BFH), the interest limitation is currently being reviewed by the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) for its constitutionality (BFH I R 20/15; 2 BvL 1/16). According to the BFH, the German Federal Bar Association (BRAK) and the predominant opinion in the German literature, the interest limitation may violate the ability-to-pay principle under Article 3(1) of the German Basic Law. It may also breach the objective net principle without any objective reason. Should this apply, the deduction restriction under the interest limitation would not be applicable due to constitutional law. Accordingly, the tax legislator would not be able to combat shareholder debt financing of corporations using the interest limitation rule and would have to allow all interest expenses to be deducted for tax purposes. In principle, the interest limitation rule restricts the tax-effective interest deduction for a business to 30% of the EBITDA per fiscal year.

Thus, the constitutionality of the interest limitation is a very important issue. Its application goes beyond Germany to the EU and beyond. The upcoming decision of the German Federal Constitutional Court will have a major signalling effect. The important conclusion for legislators is whether they can achieve the tax-policy goal of preventing the erosion or reduction of the corporate tax base of companies through tax-related (shareholder) debt financing (an issue that arises not only across borders but also in purely domestic cases) in a constitutionally permissible manner through an instrument such as interest limitation, which is profit-dependent or adjusted to the EBITDA of the company. Empirical studies (Buslei and Simmler 2012, 16; Maßbaum et al. 2012, 1389 et seq.) indicate that a profit-dependent interest deduction restriction in the form of the interest limitation (interest barrier) is effective in limiting tax-related shareholder debt financing compared to conventional thin-capitalization rules (debt-to-equity ratio). For this reason, regulations have been introduced almost universally that measure the tax-effective interest deduction against the EBITDA of the business.

This article sheds light on the constitutionality of the interest limitation and examines its economic background. It critically examines the opinion of the German Supreme Tax Court (BFH) and the Federal Bar Association on the unconstitutionality of the German interest limitation. Furthermore, the article classifies the constitutional ability-to-pay principle and the objective net principle using the interest deduction limitation as an example. This study shows that the legislator is entitled by constitutional law to limit the tax-effective interest deduction of a business to reasonable or customary interest expenses. In doing so, it may orient itself using recognized financial ratios such as the interest coverage ratio, which is behind the interest limitation.

Functioning of the Interest Limitation

The German interest limitation restricts the tax deductibility of interest expenses for enterprises. It corresponds to the provisions of Art. 4 of ATAD. Under the interest limitation's basic rule, enterprises may only deduct net interest expenses³ of up to 30% of the EBITDA in a fiscal year for tax purposes (§ 4h para. 1 sentences 1 and 2 EStG). Interest expenses exceeding this amount do not reduce the tax base and lead to non-deductible business expenses. However, they can be carried forward to the following fiscal years and taken into account there in a tax-effective manner within the limits of the interest limitation.

This restriction of the tax-effective interest deduction to 30% of the EBITDA of the business does not apply if a business fulfils one of the three exemptions of § 4h para. 2 EStG. This is, on the one hand, the so-called exemption limit. If the net interest expenses of the business amount to less than three million euros in the relevant fiscal year, the business can generally deduct all interest expenses for tax purposes. Considering an interest rate of 5%, for example, a business can borrow almost 60 million euros without triggering the interest limitation and without having to maintain a certain equity ratio for tax purposes. As a result, a large number of businesses fall outside the interest limitation, especially small and medium-sized enterprises (BT-Drs. 16/4841, 48). If the leveraged business does not belong to a group in terms of the consolidated financial statements, it can tax deduct its entire interest expenses, regardless of the amount. However, this exception is subject to the backstop of harmful shareholder debt financing as described in § 8a (2) KStG, typically in the case of a corporation. Finally, the business can also deduct its entire interest expenses for tax purposes if it belongs to a group of companies such as IFRS, German GAAP or US-GAAP and passes the equity ratio test. In this case, the equity ratio of the leveraged group company may not be more than 2 percentage points (or 1 percentage point for financial years ending before 1 January 2010) below the equity ratio of the group to which it belongs. This exemption is also subject to the provision of harmful external shareholder financing (§ 8a (3) KStG). The German legislature has introduced a new concept for limiting excessive debt financing for tax purposes with the interest limitation. The amount of the tax-effective interest deduction has in principle been made profit-dependent (30% EBITDA limit).

³ The term "net interest expense" refers to the excess of interest expense over the interest income of an enterprise.

Aside from the interaction with the aforementioned exceptions and re-exceptions, the interest limitation only covers harmful (shareholder) debt financing of corporations and group-affiliated companies. All other companies are, in principle, not affected by the interest limitation. It is also new that the consolidated financial statements according to IFRS, HGB and US-GAAP play a role in taxation.

Unconstitutionality of the Interest Limitation? Submission of the German Supreme Tax Court (BFH)

However, the tax policy objective of limiting tax-related debt financing of businesses and, in particular, of corporations using the interest limitation could be contradicted by the BFH's submission of 14 October 2015, I R 20/15 to the BVerfG. In this submission decision, the BFH judges the interest deduction restriction under the interest limitation not to be in line with constitutional law. The dispute has been pending since 21 February 2016 and is awaiting a decision of the BVerfG soon. At the request of the BVerfG, the German Federal Bar Association (BRAK) has commented on this pending case and follows the argumentation of the BFH's order for reference (BRAK 2022). The literature largely agrees with the opinion of the BFH on the unconstitutionality of the interest limitation (Weggenmann, 2016, 1175; Stöber 2018, 135- 138; different view constitutionality given Ismer 2014, 779 ff; Staats 2014, 521 ff; Mitschke 2016, 412). The underlying dispute in the BFH's order for reference concerns a purely domestic case with harmful external shareholder debt financing of a group company within the purview of § 8a (3) KStG. Therefore, the group company could not deduct all interest expenses in the affected years 2008 and 2009. However, this group company did not carry out the possible equity ratio test.

The BFH argues the unconstitutionality of the interest limitation as follows: The restriction of the tax deductibility of interest expenses triggered by the interest limitation rule violates the ability-to-pay principle regulated in Article 3 (1) Basic Law (GG), because this restriction is dependent on income and thus violates the requirement of the consistent structuring of income taxation according to financial capacity (BFH 2015, para. 9). Under these rules, the financial capacity of the taxpayer is assessed according to the objective net principle, according to which only income, less operating expenses, may be the subject of income taxation (BFH 2015, paras. 15, 16). Furthermore, the interest limitation would impermissibly breach the objective net principle, and there would be no constitutional justification for this infringement (BFH 2015, para. 28). According to the opinion of the BFH, the reasons for the introduction of the interest limitation mentioned in the explanatory memorandum to the law (BT-Drs. 16/4841) – (i) avoidance of excessive debt financing, (ii) combating profit shifting, (iii) strengthening the equity capital base, (iv) incentives for investments in Germany, (v) safeguarding the German tax revenues – are not sufficient to justify the breach of the objective net principle (BFH 2015, paras. 29, 30, 32).

Real Content of the Ability-to-Pay Principle and Objective Net Principle

On closer examination, the argumentation of the BFH in its order for reference (I R 20/15) is not likely to be convincing. The BFH ignores the real content of the ability-to-pay principle and the objective net principle. Furthermore, it is noticeable that the BFH fails to recognize the decisive reason for the introduction of the interest limitation or its main regulatory core – namely, the restriction on the excessive debt financing of companies. Thus, the explanatory memorandum for the introduction of the interest limitation explicitly states (BT-Drs. 16/4841, 31, 47, 48):

*The so-called **interest limitation** for corporate income tax is therefore **fundamentally directed against excessive debt financing of companies** and is intended to prevent a high debt ratio being sought solely for reasons of tax optimization. The previous **regulation on shareholder debt financing** of Section 8a KStG a. F. **is replaced by the new regulation**. In principle, the interest limitation does not apply to sole proprietorships that do not hold any other shareholdings, the splitting of operations that is widespread among small and medium-sized enterprises, tax groups, PPP project companies that are not part of a group, and securitization special purpose vehicles. In **these cases, the interest barrier is only applicable in the case of shareholder debt financing**.*

Thus, the core object of the interest limitation is to determine what an adequate amount of interest expenses of an enterprise is for income tax purposes. This follows from the explanatory memorandum to the law, according to which excessive interest expenses from debt financing are to be restricted for tax purposes. Moreover, the continuation of the previous regulation of Section 8a KStG a.F. on shareholder debt financing had precisely this purpose within the framework of the new regulation, as

well as the tax-systematic classification of the rule in the tax law as a deduction limitation of business expenses (non-deductible business expenses) within the determination of profits (§ 4h EStG, § 8a KStG).

However, the BFH ignores this core regulatory object of the interest limitation – namely, the restriction of the amount of excessive, unreasonable, or unusual interest expenses – by inadmissibly elevating the secondary purpose of the interest limitation – the combating of abusive tax arrangements and the general prevention of abuse – to be its main purpose. Furthermore, the BFH does not examine the main purpose of the tax restriction of excessive, i.e. unreasonable, interest expenses in terms of amount against the background of a consistently design tax regulation system. The BFH only examines the strengthening of the equity of enterprises, the incentive for domestic investments, the safeguarding of German tax revenues, and the fight against tax abuse (BFH 2015, paras. 29-53; BRAK 2022, 5-6).

The BFH also skips the fact that the legislator may regulate the adequate amount of business expenses under tax law, irrespective of abuse and domestic or foreign cases. From a constitutional point of view, the legislator is also allowed to do this for interest expenses of companies. This is precisely what the legislator has done with the interest limitation (§ 4h EStG). Therefore, any further objectives or secondary objectives of such regulation are irrelevant. The principle of taxation according to the ability to pay, which follows from Article 3 (1) of the Basic Law, does not oblige the tax legislator to allow deductions for income tax purposes for unreasonable or unusual income expenses in the form of interest expenses. At the same time, the objective net principle as a possible form of taxation according to the ability to pay is not affected if the legislator, under the general view of the market, does not allow the deduction of excessive income expenses – in this case, excessive interest expenses – for tax purposes.

Here, the BFH fails to recognize how the tax legislator has implemented the objective net principle in the Income Tax Act, namely by excluding the deductibility of unreasonable or excessive income-related expenses. This is because according to the general implementation of the objective net principle in the German Income Tax Act in § 2 para. 2 sentence 1 no. 1 EStG, the profit is determined according to §§ 4 to 7k EStG. According to this legal implementation of the objective net principle, the tax deduction of unreasonable or excessive business expenses is excluded. In this regard, the legislator has, for example, implemented a deduction limitation for business expenses like business-related gift expenses of more than 35 Euro net per recipient and calendar year (§ 4 para. 5 no. 1 EStG), and a 30% business expense deduction restriction for business-related hospitality expenses, whereby only such expenses are taken into account for hospitality are to be regarded as reasonable, according to the general view of the market (§ 4 para. 5 no. 2 EStG). Unreasonable business expenses according to the general perception of the market are not deductible according to § 4 para. 5 sentence 1 no. 7 EStG, even if the expenses are business-related (BFH 2014, VIII R 20/12). For tax purposes, they are treated as non-deductible business expenses.

Contrary to the BFH order for reference (I R 20/15, paras. 15, 16), the legislator does not tax according to a pure net principle (income less all business expenses, § 4 para. 4 EStG), but in this context excludes unreasonable or excessive business expenses from a tax deduction, insofar as these are regarded as unreasonable according to the general view of the market. Therefore, the BFH does not succeed with its assertion of a non-consequentially designed tax code. Nor is there a breach of the objective net principle concerning the deduction limitation for unreasonable or excessive interest expenses under the interest limitation. The objective net principle does not even apply when it comes to unreasonable or excessive business expenses. Under constitutional law, the legislator is largely free to regulate the appropriate amount or customary nature of interest expenses and, in this sense, to exclude from the tax-effective interest deduction excessive interest expenses that are to be considered unreasonable according to the general view of the market. This is exactly what the German tax legislator has done with the introduction of the interest limitation (§ 4h EStG).

The BFH's argument that the interest limitation would violate constitutional law because the interest deduction restriction is designed to be result-dependent does not apply. First, the interest limitation rule does not exclude interest expenses from tax deductions as business expenses on the merits. Second, the tax legislator is allowed under constitutional law to define the adequate amount or customary nature of interest expenses of an enterprise. In doing so, the legislator can use profit-related parameters such as the EBITDA of the business. This is exactly what the legislator has done in determining the adequate amount of interest expenses for a business (see section 5).

Economic and Financial Background of the Interest Limitation

It is not easy to determine the adequate amount of a business's interest expense that should be considered reasonable according to the general view of the market. Companies and businesses are not uniform. In addition, there are sector-specific differences in (debt) financing. However, the legislator is allowed by constitutional law to regulate the adequate or customary

nature of interest expenses and, in doing so, to use recognized financial ratios. Behind the 30% EBITDA limit is the *interest coverage ratio* (ICR). The ICR is an internationally recognized financial ratio. It assesses the company's ability to bear interest on debt, its ability to service interest expenses from its operating business (debt service capacity), and its credit risk in direct connection with the concrete performance of the company. The BFH and the BRAK ignore this important connection.

The interest limitation defines the adequate amount of interest expenses (IE) for each business per fiscal year as follows (§ 4h (1) sentences 1 and 2 EStG):

$$EBITDA \times 0.3 = \text{Interest expenses (IE)}$$

Mathematically transformed, the result is:

$$\frac{EBITDA}{IE} = \frac{1}{0.3} \text{ or } \frac{EBITDA}{IE} = 3.33 \quad \text{Interest Coverage Ratio (ICR)} = 3.33$$

EBITDA divided by interest expenses results in the so-called *interest coverage ratio* (Wurzer 2016, 45; Giesen 2022, 53).

Accordingly, the interest limitation generally sets an *interest coverage ratio* (ICR) of 3.33 for businesses. This ratio is used to determine the appropriate level of interest expense for a company. EBITDA can be interpreted as the sustainable operating cash flow before taxes (Seppelfricke 2020, 297). It is used for cash flow approximation. Due to the elimination of numerous fluctuating parameters such as depreciation and financing policies, as well as goodwill treatment and tax systems, EBITDA has a greater stability than other results and is therefore a good starting point for estimating the sustainable profitability of a business (Seppelfricke 2020, 297).

The interest coverage ratio (ICR) assesses the debt interest sustainability of a company. It measures the extent to which a company can service its interest payments from its operating cash flow and is an important core ratio or financial risk ratio for companies (Wurzer 2016, 45; Seppelfricke 2020, 154; Gillmore 2015, 14; S&P 2013). The interest coverage ratio is used by banks, lenders, rating agencies, investors, and analysts with regard to credit financing, as it indicates financial risks. According to S&P, the interest coverage ratio should always be above 4.5 – i.e. the operationally generated funds (EBITDA) must be 4.5 times higher than the interest to be paid to leave enough room for repayments, taxes, dividends and other investments. S&P considers an interest coverage ratio of 1.3 to be too low (worst rating) (Wurzer 2016, 45, with further references), and an interest coverage ratio lower than 3 already indicates that it is difficult for companies to service loans (Giesen 2022, 53). A lower interest coverage ratio already indicates difficulties in growth. Banks and investors already see an interest coverage ratio of 2.5 or less as critical. With an interest coverage ratio of 2, the company would have to spend 50% of its operating cash flow or annual profit on interest payments, so if sales fall and/or interest rates on borrowed capital rise, the company's existence is already at risk.

In this context, the interest coverage ratio of 3.33 (or permissible interest expenses of the business amounting to 30% of the EBITDA per fiscal year) set by the interest limitation is suitable for determining an adequate amount of interest expenses for a business in a standardized manner. It corresponds exactly to what is considered appropriate according to the general understanding of the market. This applies irrespective of the business sector since an interest coverage ratio of 3.33 is already at the lower limit of sustainability according to the general view of the market. This is because a lower interest coverage ratio, or the permitting of higher interest expenses in relation to the operating earning power of the business or to EBITDA, is regarded as inappropriate according to the general view of the market – irrespective of the sector to which the respective company belongs. This is shown by the above interpretation and application of the interest coverage ratio in practice.

Thus, the BFH cannot prevail with its argument that the earnings-related interest deduction limitation violates the ability-to-pay principle (Art. 3 (1) Basic Law). On the contrary, the limit on the amount of interest expenses (30% of EBITDA; interest coverage ratio of 3.33), which is directly linked to the operating profitability and cash flow in the form of EBITDA, precisely takes into account the performance of the business according to the standards that are customary for every business, irrespective of the sector to which it belongs. Accordingly, with the interest limitation, the legislator has defined the adequate amount of interest expenses of a business in a constitutionally permissible way. The legislator has correctly qualified unreasonable interest expenses exceeding this amount as non-deductible business expenses. In addition, the dynamic determination of the adequate amount of interest expense, which is based on the operating profitability in the form of EBITDA, takes particular account of the performance of the business. The higher a company's EBITDA, the greater its ability to pay interest, and the higher the amount of reasonable interest expenses it is allowed to deduct for tax purposes.

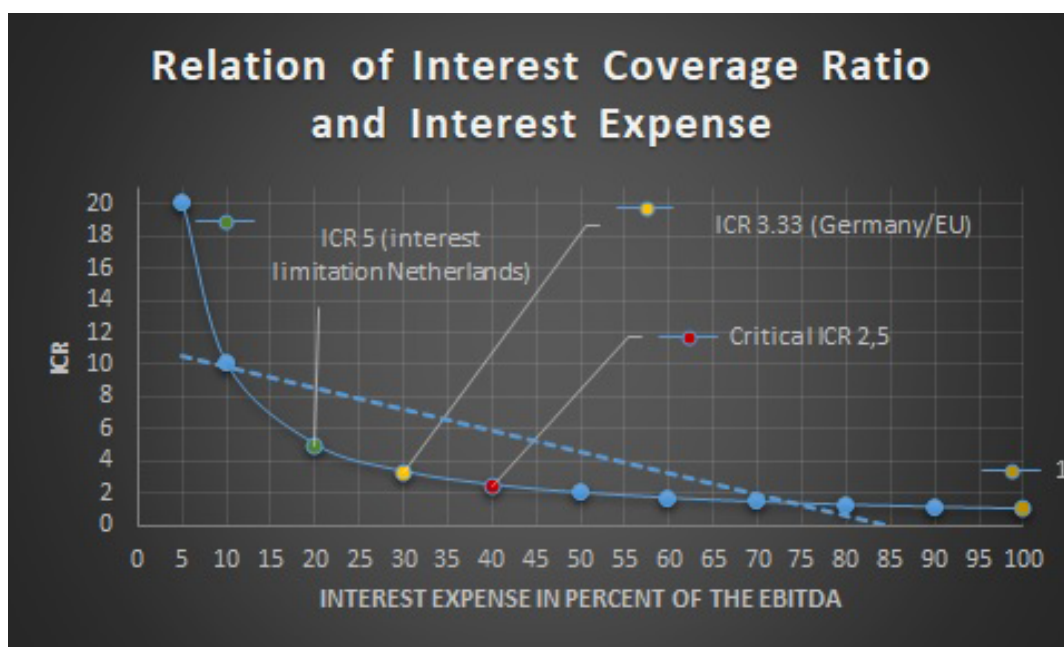


Figure 1. Interest coverage ratio and adequate amount of interest expense in relation to EBITDA.

Furthermore, an interest coverage ratio of 3.33 for a business, or an allowed adequate interest expense of 30% of its EBITDA per fiscal year, is also not to be considered disproportionate, as this is at the lower limit concerning financial risk. Moreover, compared to other countries that measure the permissible interest deduction against EBIT (e.g. USA, 30% of EBIT; IRC § 163(j)(1)(B)), a higher tax-effective interest deduction is granted. This is because the German interest limitation uses the EBITDA, which is increased by depreciation compared to EBIT. Furthermore, some EU Member States have set the tax-deductible interest expenses at 20% of the EBITDA (Netherlands) or 25% of EBITDA (Slovakia) in accordance with European secondary legislation under Art. 3, 4 ATAD.

One should also consider that the use of the interest coverage ratio allows for a more precise adjustment than under a regulation with a rigid debt-equity ratio (e.g. § 8a KStG a.F.) and that there is still an exemption limit, equity ratio test, EBITDA carryforward and interest carryforward with no time limit. Incidentally, the German legislator also uses typifying and administrable benchmarks in other areas, such as a simplified business-valuation method for determining an enterprise's value for inheritance and gift tax purposes (§§ 199, 200, 203 BewG). Carrying out complete financial ratings (with a multi-year observation period) for each individual business with regard to the permissible interest deduction is not feasible in practice.

Summary and Conclusions

Contrary to the BFH's order for reference, I R 20/15, and the BRAK's opinion, the interest limitation (§ 4h EStG, § 8a KStG) should not violate constitutional law. The tax-deduction limitation of interest expenses should not violate the ability-to-pay principle under Article 3(1) Basic Law and the principle of consistency. The interest limitation does not breach the objective net principle.

The BFH's contrary analysis falls short. It ignores the fact that, under constitutional law, the legislator is largely free to regulate the adequate or customary amount of business expenses and can exclude from the tax-effective interest deduction unreasonable or excessive interest expenses that are not considered appropriate according to the general view of the market. This is precisely what the legislator has done with the introduction of the interest limitation. In this respect, the legislator has used the interest coverage ratio (ICR) as a permissible benchmark under constitutional law, which, according to a general market view, reflects the appropriateness or permissibility of a business's interest expenses in terms of amount: ICR of 3.33 or appropriate interest expenses in terms of 30% of the EBITDA. Interest expenses of a business exceeding this amount are to be regarded as inappropriate according to the general understanding of the market (interest coverage ratio). The interest

coverage ratio is a generally recognized and widely used financing ratio that measures the economic viability of the business's external financing expenses in direct relation to its concrete financial performance. However, in its pure formal consideration, the BFH only deals with the interest deduction on the merits, which is already not the subject of the interest limitation – the adequate amount of interest expenses is.

Moreover, the BFH comes to incorrect conclusions about the objective net principle. Contrary to the BFH and Article 3 (1) Basic Law, the objective net principle as a possible way of taxation according to the ability to pay does not justify a tax-effective deduction of income-related expenses (including interest expenses) of an amount regarded as unusual according to the general perception of the market. A purely arithmetical net principle (income minus all business expenses), as the BFH suggests in its order with incorrect reference to § 4 (4) EStG, does not exist. It also contradicts the ability-to-pay principle and the principle of consistency. If the BFH's view were taken as a basis, the legislator would not be able to effectively implement any regulations in line with constitutional law to limit shareholder debt financing, which is a major problem not only across borders but also in purely domestic cases (erosion of the corporate tax base of the business). Tax policy measures to restrict excessive shareholder debt financing would not be possible for the legislator. All interest expenses of a (group-affiliated) company would then be deductible without any limitation for income tax purposes and irrespective of their customary nature. This cannot be true.

The BFH's argument that the interest limitation is not precisely targeted, or only covers companies belonging to a group, is not correct. On closer examination, the interest limitation covers excessive shareholder debt financing in typical constellations (corporations, group companies). The exemption limit of € 3 million also applies to group companies. Moreover, even in the case of intra-group shareholder debt financing, group companies can receive the full interest deduction for net interest expenses that exceed the exemption limit of € 3 million per financial year. They have the possibility of using the equity ratio test. Groups can also influence the amount of interest deduction by injecting equity into group-affiliated companies. Moreover, no specific minimum equity ratio is required as in the case of a rigid safe-harbour concept (e.g. permissible debt capital 1.5 times the equity capital). Rather, the average equity ratio of the entire group to which the business belongs is used as a reference for the equity ratio test.

It is also important to note that, under constitutional law, group companies are not comparable to non-affiliated companies and are structurally different from them. Therefore, the legislator is not prevented by constitutional law from using differentiated criteria to identify harmful shareholder debt financing or to limit the adequate amount of interest expenses, which also take into account the actual circumstances of the company, such as group affiliation (e.g. average group equity ratio as a benchmark for excessive debt financing of the group-affiliated company) or a "group view".

Therefore, the decision of the German Federal Constitutional Court (BVerfG) in the case 2 BvL 1/16 is anticipated with great excitement. Hopefully, the BVerfG will critically examine the BFH's submission decision and the BRAK's opinion and take into account the actual content of the interest limitation. However, since the interest limitation has been introduced in all 27 EU Member States by EU law, it will continue to apply for a period after the implementation of the EU directive on combating tax avoidance (Art. 4 ATAD), even if the German Federal Constitutional Court should conclude that the interest limitation breaches constitutional law (Stöber 2018, 153; BVerfG 1986, 2 BvR 197/83; BVerfG 2007, 1 BvF 1/05).

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