De invloed van belangenwijzigingen op verliesverrekening

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Summary and conclusions

THE CENTRAL QUESTION (CHAPTER 1)

This dissertation centres on the following question:

What should a scheme governing the undesirable trade in losses look like for the Netherlands as assessed in terms of the quality requirements of: i) legitimacy and realisation of principles of law; ii) effectiveness, efficiency and proportionality; iii) implementation and enforceability; and iv) consistency and understandability?

The quality requirements mentioned in this central question derive from the government memorandum entitled “A view of legislation” [Zicht op wetgeving]. To answer the central question, I formulated the following sub-questions.

1) Under what circumstances are losses used undesirably or abused?
2) What does the current scheme governing the undesirable trade in losses, i.e., Section 20a of the Dutch Corporate Income Tax Act of 1969 [Wet op de vennootschapsbelasting 1969] (hereinafter “the CITA”), look like; and how is this scheme embedded in the CITA’s loss set-off system?
3) What does the scheme governing the undesirable trade in losses look like in the following countries: Belgium, France, Ireland, the United Kingdom, Austria, Germany, Japan, China, India, Australia, Canada and the United States; and what characteristics can be identified in those schemes that may be relevant to the Dutch scheme governing the undesirable trade in losses?

It follows from the central question that a provision governing the undesirable trade in loss entities is tested on the basis of specific quality requirements. These derive from the assessment framework prepared by legislators and laid down in the memorandum referred to. These quality requirements are:

- legitimacy and realisation of principles of law;
- effectiveness, efficiency and proportionality;
- implementation and enforceability; and
- consistency and understandability.

This dissertation includes a comparative-law section addressing provisions similar to Section 20a of the CITA in the 12 countries listed above. The comparative-law research in question aimed to identify useful characteristics in the relevant non-Dutch schemes that may be applied in respect of the Dutch provision. The 12 countries chosen and researched typically represent a diverse group of countries that are not only the Netherlands’ key trade partners, but also include a few large players in the global economy.

DEFINITIONS OF CONCEPTS (CHAPTER 2)

The concept of “loss” in the Dutch Personal Income Tax Act of 2001 [Wet inkomstenbelasting 2001] (hereinafter “the ITA”) and in the CITA is not always used exactly. In day-to-day language, the term “loss” is commonly associated with business undertakings and not with
other sources of income. This has not stopped legislators from using the concept of “loss set-off” where “income set-off” would be more appropriate. Loss set-off and loss carry-over are synonyms. And strictly speaking, no losses are set off in a horizontal loss set-off, but results for a specific period are determined or netted in that case.

Whether losses are undesirably used or abused depends on the starting point chosen. From the perspective of a taxpayer or group, it makes sense to try and sell to a third party a company whose operations proved unsuccessful but that does offer offsettable losses, in an attempt to derive at least some proceeds from the unsuccessful operations. Based on this principle, there will be no abuse or undesirable use. And from the perspective of tax legislators, considerations relating to budget play an important part in determining the desirability of a specific scheme. Legislators have justified the contravention of the CITAs system with the introduction of a provision banning the trade in loss entities by arguing that the measure in question was necessary to curb the abuse of the trade in losses. Afterwards, legislators weakened the concept of “abuse” to “undesirable use”.

LOSS CARRY-OVER IN THE CITAs (CHAPTER 3)

Chapter 3 sets out the legal framework for loss set-off in the CITAs. The statutory history of loss carry-over for entities in Dutch tax law, and the rationale and economic elements of loss carry-over are addressed. In addition, a number of alternative methods of loss carry-over are discussed. The positive-law elements of Chapter IV of the CITAs (“Set-off of losses”) are also discussed.

Based on a certain sense of justice, it could be stated that losses should be decisive for the results for tax purposes of a business during the life of that business to the same extent as profits, as a loss is simply a negative profit (in an algebraic sense). Based on that thought, it seems only logical that there are no limits to the extent to which losses can be set off against the positive results of a business in order to avoid double taxation (in an economic sense). Hence, any contravention of that basic thought will evoke a certain sense of injustice, but may also jeopardise the continuity of the business as a going concern. On the other hand, it cannot be denied that any system of taxation would be based on annual levying. From the perspective of the system of annual levying, the option of setting off a loss is simply a facility provided by legislators with which a loss can be made easier to bear. From that angle, the question arises whether it should be possible to set off losses to begin with. Following a description of the history of and background to loss carry-over, it is noted that the introduction of either limited or unlimited periods for carrying losses backward or forward was based on various arguments, such as the following.

- The levying system; i.e., if tax is levied on the grounds of profit distributions (as was done in respect of legal entities for a long time), a system of loss carry-over will not be necessary.
- The equalisation method, to take fluctuating income into account, and, for instance, the taxation of average income (averaging).
- The tax rates: income or profit was initially taxed at a relatively low rate. A system of loss carry-over was therefore considered less necessary.
- Faulty tax records: after a number of years, it was difficult to discuss the amount of a loss in detail, specifically because losses were not established by a formal assessment for a long time.
- Political compromises, e.g. abolishing the tax-free reserve and extending the period for carrying losses forward (in 1950).
- Fairness: a sense of injustice in respect of taxpayers with strongly fluctuating income levels compared with taxpayers with more even income levels.
- Social and economic arguments: a loss becomes easier to bear if it can be carried backward.
- A brief economic upswing would suffice to compensate for a loss.
• Considerations relating to budget.
• The concept of prescription: losses are supposedly felt to a lesser extent as time passes.
• Employment policy.
• The tax climate.
• The concept of total-profit: if losses cannot be set off without limitation, more profit can be taxed than is generated during the life of the relevant business.

In spite of these arguments (some of which are of an economic tax nature) for a confined period for loss carry-over, it cannot be denied that loss carry-over ensues from the concept of total-profit by nature. As a result, the period for carrying losses forward should, in principle, be unlimited. This view is also supported from the economic angle (cf. the research by Domar and Musgrave published in *The Quarterly Journal of Economics*, Volume LVIII, May 1944), because a confined period for loss carry-over may, in principle, result in less risky investments. The prevailing doctrine with respect to the carry-back of losses is that an entity’s books must be closed at some point, in part to generate stable revenues from taxation.

In principle, on the grounds of the classic system of the CITA, losses are subject-related and, hence, “connected” to the taxpayer. Nonetheless, the CITA does not appear to be based on an unambiguous and fundamental principle. Accordingly, the subject-related approach to losses can be challenged. On the other hand, it can be stated that it is no more than logical and practical for losses to follow the relevant entity. On several occasions, tax commentators have advocated an object-related approach to losses involving various versions, from connecting the loss to the business, to connecting the loss to specific assets/liabilities. In respect of specific situations, such object-related approach to losses has been given a statutory basis in the event of certain tax neutral restructuring operations.

Although the principle of subrogation for tax purposes basically applies to such restructuring operations, it does not apply to offsettable losses. Nonetheless, legislators felt that losses can, in some cases, be transferred to another taxpayer. However, in those cases, the principle of profit apportionment should be applied. A negative profit-based tax seems to be the most far-reaching alternative for loss carry-over and provides a number of advantages, such as the following.
• The procedural-law provisions governing the determination of losses may be considerably simplified.
• Section 20a of the CITA may be repealed, because losses become worthless, as they may be directly converted into cash.
• Most of the profit-apportionment rules as included in the schemes for company mergers, legal demergers and fiscal entities may be repealed.
• The administrative burden will be eased, because the schemes referred to above are repealed/relaxed.

Nonetheless, the practical and budget objections relating to a negative profit-based tax appear to be too strong, so that the introduction of a negative profit-based tax is not the evident solution. However, the pros and cons of a negative profit-based tax should be examined in more detail.

**HISTORY, RATIONALE AND STRUCTURE OF SECTION 20A OF THE CITA (CHAPTER 4)**

Chapter 4 addresses the history, rationale and structure of Section 20a of the CITA, as well as the relationship between that Section and the civil-law concept of "Durchgriff" or "piercing the corporate veil".

In the Netherlands, the trade in loss entities appears to have commenced when Indonesia nationalised Dutch assets of culture companies, leading to a large supply of shell compa-
Summary and conclusions

In the battle against the trade in loss entities, the Dutch tax authorities were combating the transfer of profit-generating capacity from one company to another. Their attempts to combat the trade in loss entities on the basis of the doctrine of proper taxation (richtige heffing) were unsuccessful before the Supreme Court of the Netherlands (Hoge Raad) (ruling dated 31 December 1958, no. 13.747, Beslissingen in belastingzaken 1959/64). This called for a formal legal basis, which was created with the introduction of the former Section 20, paragraph 5, of the CITA on 1 January 1970. In practice, however, the provision turned out to be insufficiently effective. The key bottlenecks of and objections to the former Section 20, paragraph 5, of the CITA were the following.

1) The former Section 20, paragraph 5, of the CITA did not apply in the event that the taxpayer did not conduct any material business operations but was merely engaged in investing.

2) The former Section 20, paragraph 5, of the CITA did not apply in the event the taxpayer had conducted material business operations that were loss-making and had not yet been discontinued but were continued in a slimmed-down form (long-term rationalisation), including the start-up of new investment operations.

3) The scheme did not apply in the event of “internal shareholder changes”.

4) The possibility of transferring losses of companies that conducted business operations but that generated most of their profits with portfolio assets.

Due to the objections and bottlenecks listed above, there appeared to be enough possibilities, in practice, to evade application of the former Section 20, paragraph 5, of the CITA. This eventually led to the introduction of an entirely new Section 20a of the CITA.

From a civil-law angle, the act of looking through an entity’s structure at the underlying shareholders is referred to with the German term of “Durchgriff” or as “piercing the corporate veil” in English. The company’s or legal personality’s legal shell is disregarded for purposes of liability. In her dissertation (Piercing the Corporate Veil, Kluwer Law International, 2007), Vandekerckhove argues that two legal principles are set aside in case of “Durchgriff”; i.e., first, the principle that a company has legal personality unrelated to its shareholders and, second, the principle that shareholders and directors are not liable for the company’s debts. The underlying thought or need of piercing the corporate veil in civil law in each instance seems to be that application of the relevant applicable law does not result in a fair and reasonable outcome, as a consequence of which it is necessary to set aside a company’s legal personality. The concept of Durchgriff or piercing the corporate veil has also found its place in tax doctrine, with Section 20a of the CITA being a case in point. It is often insufficiently considered in this respect that Durchgriff also ensues from civil law. Although it is true that looking through a structure at underlying shareholders under special circumstances is an exception in civil law, this does not change the fact that such an exception to the main rule is apparently justified under special circumstances (e.g. fighting abuse) in civil law as well. Hence, the controversial character of Section 20a of the CITA ensues much more from its contravention of the statutory system of the CITA as based on the total-profit principle than from the civil-law concept of Durchgriff. On the grounds of the identification thought or the breakthrough of the loss entity’s legal autonomy, it would be expected that the offsettable losses were left with the underlying shareholders in lieu of being lost. From the perspective of Durchgriff, the lapse of those losses on the grounds of Section 20a of the CITA does not reflect an impeccable approach.

A provision against the trade in loss entities has frequently led to sharp criticism from tax commentators. This criticism is expressed, in particular, in respect of the fundamental contravention of the statutory system of the CITA and the total-profit principle. Any underlying parties interested in a loss entity should be irrelevant to the question as to whether losses can be set off or not, now or in the future. Giele (‘Het overlaten van winst aan een verlies-n.v.’, Weekblad Fiscaal Recht, 1968/2) was correct in noting that the starting
point chosen is relevant – an observation that also applies to the assessment of Section 20a of the CITA. If a comparison with an entrepreneur subject to personal income tax is made, it may be argued that, just like for personal income tax, losses for corporate income tax purposes cannot be transferred either. Although a case can be made for this position, it is also evident that the structure of corporate income tax simply means that loss entities may be transferred to new shareholders. In addition, from the tax authorities’ angle, there can be understanding for the hurdle they raise against the use of offsettable losses of shell companies. Therefore, when introducing a provision against the trade in loss entities, legislators should carefully weigh all relevant interests, such as theoretical impeccability and interests of a budgetary nature.

The originally proposed Section 20a of the CITA contained many ambiguities, so that it was eventually revised. It is not always clear whether and, if so, to what extent specific parts of the explanatory memorandum to the original legislative proposal still impact the provision eventually introduced, which contains a layered structure. The underlying principle is the shareholder test laid down in Section 20a, paragraph 1, of the CITA. Losses can no longer be carried forward in the event of a significant change in the ultimate interest (i.e., of 30% or more). Legislators rejected a pro-rata-parte approach on the grounds of which only a portion of the loss corresponding to the change in the interest would lapse. From a pragmatic view, this is probably correct. In the event of a qualifying change in interest, it should be assessed whether an exception to the shareholder test should perhaps be made due to an acquisition pursuant to the law of matrimonial property or the law of succession, by application of the group exception provision or in the event that the taxpayer is not or could not have been aware that the ultimate interest in the taxpayer has changed (provided that the change does not go beyond what can be considered usual). Losses will not lapse if the taxpayer is able to meet both the investment test and the activities and restructuring tests. The investment test is laid down in Section 20a, paragraph 4, opening words, of the CITA. It provides that losses will, in principle, not lapse in the event that the majority of a taxpayer’s assets did not consist of investments for at least nine months, and provided that the activities and restructuring tests were met. The activities test is laid down in Section 20a, paragraph 4, subparagraph a., of the CITA. It provides that, immediately prior to the change, the aggregate scope of the taxpayer’s activities may not have decreased to less than 30% of the aggregate scope of the activities at the start of the oldest loss year. In addition to the activities test, the restructuring test laid down in Section 20a, paragraph 4, subparagraph b., of the CITA provides that, at the time of the significant change in interest, there may not be an intention to reduce the aggregate scope of the activities carried out at that time to less than 30% of the aggregate scope of the activities carried out in the oldest loss year within three years.

For purposes of applying Section 20a of the CITA, it is irrelevant whether a specific change in the ultimate interest is (primarily) aimed at the acquisition of the taxpayer’s losses or whether the losses are abused. In other words, any intention to set off losses (animus compensandi) is not required for application of Section 20a of the CITA. This is one of the key defects of the Section. As such, its application can lead to overkill in some cases. On the one hand, it can be noted that overkill simply follows from an anti-abuse measure; legislators cannot obviate all situations and neither should that be their intention. On the other hand, it cannot be understood why Section 20a of the CITA fails to provide for the possibility of submitting contrary evidence.

**POSITIVE-LAW ANALYSIS OF SECTION 20A OF THE CITA (CHAPTER 5)**

Chapter 5 addresses the positive-law elements of Section 20a of the CITA, looking at the various Dutch and non-Dutch taxpayers for corporate income tax purposes subject to Section 20a of the CITA. Subsequently, the shareholder test and its possible exceptions are dealt with in more detail. The investment test as laid down in Section 20a, paragraph 4,
opening words, of the CITAs and the activities and restructuring tests as laid down in Section 20, paragraph 4, subparagraphs a. and b., of the CITAs are then discussed, following which I addressed the other elements of Section 20a of the CITAs, such as carrying losses backward, the treatment of deferred losses and profits, and the formal aspects of Section 20a of the CITAs. Finally, I discussed the interaction between Section 20a of the CITAs and European law, followed by the relationship between the doctrine of abuse of law (fraus legis) and Section 20a of the CITAs. All this yielded an extensive analysis of the various tax aspects of Section 20a of the CITAs. Eventually, this resulted in the listing of the following 32 bottlenecks with respect to the current scheme.

**Bottlenecks in respect of the shareholder test**

1) The interests held by general partners in an open partnership are – incorrectly – included in answering the question as to whether there is a significant change in interests.

2) Section 20a of the CITAs incorrectly applies to specific tax-efficient conversions of legal entities, e.g. the conversion of a BV into a foundation or vice versa.

3) In respect of non-Dutch taxpayers, the tests laid down in Section 20a of the CITAs should be applied to the taxpayer and not to the permanent establishment. As a result, assets irrelevant to those tests are considered. This may lead to a conflict with the freedom of establishment as laid down in Article 49 of the Treaty on the Functioning of the European Union (hereinafter “the TFEU”).

4) Section 20a of the CITAs does not apply with respect to “stored Section 15ad interest”.

5) The non-”revival” of the losses (or their revival on very stringent conditions only) when the shares in the loss entity are retransferred to the original shareholders leads to an unreasonable outcome.

6) Although it is true that the concept of “interest” should be tested substantively, it is not always clear what that concept means. Admittedly, this is a problem that “exceeds” Section 20a of the CITAs, but it is recommended that the concept should be clarified in more detail.

7) Changes in interests within the framework of a periodic or final settlement clause incorrectly come within the scope of Section 20a of the CITAs.

8) There may be an odd and apparently unintended concurrence of the exceptions included in Section 20a, paragraph 2, subparagraphs a. and b., of the CITAs.

9) The scope of the group exception provision laid down in Section 20a, paragraph 2, subparagraph b., of the CITAs following the ruling of the Dutch Supreme Court dated 22 September 2006, no. 42.444, Beslissingen in belastingzaken 2007/27, is unclear, in part as a consequence of the State Secretary of Finance’s view as published in section 3.2 of the Decree dated 6 May 2008, no. CPP2008/984M, Beslissingen in belastingzaken 2008/176.

10) Section 20a, paragraph 3, of the CITAs incorrectly does not apply to a IPOs [initial public offerings].

**Bottlenecks in respect of the investment test**

11) The concept of “investments” as included in Section 20a of the CITAs is superfluous, as the rules for asset labelling laid down in the Dutch Income Tax Act (ITA) can be taken as a basis.

12) The test laid down in Section 20a, paragraph 6, of the CITAs results in a significant change in shareholders always meaning that losses preserved on the grounds of Section 20a of the CITAs may not be set off against returns on investment. This form of ring-fencing of operations seems to overshoot the mark, because, in each case of returns on investment, it must be verified whether a significant change in the interest occurred in the past.

13) The investment test is not sufficiently effective absent any assets or in case of a company that never carried out any activities and only incurred costs.
14) The investment test should apply only to investments effectively subject to Dutch taxation.

15) Section 20a, paragraph 8, subparagraph a., of the CITA incorrectly puts cash on a par with investments. The State Secretary of Finance's approval as evident from section 5.1 of the Decree dated 6 May 2008, no. CPP2008/984M, Beslissingen in belastingzaken 2008/176, on the grounds of which non-business-related cash qualifies as an investment only, confirms this view.

16) The same applies, with all due changes, in respect of the equal treatment of real property and investments by Section 20a, paragraph 8, subparagraph a., of the CITA and the comment made by the State Secretary of Finance in section 4.2 of the Decree dated 6 May 2008, no. CPP2008/984M, Beslissingen in belastingzaken 2008/176.

17) The addition of Section 20a, paragraph 8, subparagraph b., of the CITA, on the grounds of which investments held within the framework of business operations (e.g. by insurers) are not considered as portfolio investments, is superfluous.

Bottlenecks in respect of the activities and restructuring tests

18) It is odd that the scope of the activities in the least recent loss year is decisive for the question as to whether losses of later years can still be set off. A test for each loss year will result in better-balanced outcomes.

19) The practical application and effect of the activities test may be unclear.

20) On the basis of the current wording of the activities and restructuring tests, the scope of the activities only seems to be relevant and not their nature. This is contrary to the goal and purport of the activities and restructuring tests. In addition, unfair situations may occur if both nature and scope of the activities are relevant.

21) Section 20a, paragraphs 5 and 7, of the CITA incorrectly apply to the investment test.

22) Section 20a, paragraph 4, subparagraph b., of the CITA overshoots the mark in the event that the intention exists to rationalise operations by over 70% at the time of the change in interests, but that intention is not pursued. In such situations, the possibility of submitting contrary evidence has – incorrectly – not been provided for.

23) It has been incorrectly provided that, for purposes of applying Section 20a, paragraph 11, of the CITA, the scope of the activities is relevant. This implies that the scope of the activities is not to increase any further, which is contrary to the goal and purport of Section 20a of the CITA.

Other technical bottlenecks

24) No remedy has – incorrectly – been provided to facilitate the filing of an objection to the denial of a request to apply Section 20a, paragraph 11, of the CITA.

25) It is unclear whether the “direct correlation” case law, which was laid down in Section 20a of the CITA on 1 January 2002, applies to Section 20a, paragraph 11, of the CITA.

26) No unambiguous discontinuation or restructuring criterion applies to losses being carried forward or backward.

27) It is not entirely clear whether, effective 1 January 2011, a loss should first be allocated to the preceding period or whether it should first be revalued if Section 20a, paragraph 12, of the CITA is applied. Should revaluation precede allocation, such allocation might perhaps be omitted in the event that revaluation were to result in a profit for the relevant period.

28) Section 20a of the CITA does not apply to unrealised losses. Accordingly, trade in unrealised – liquidation – losses is still possible.

29) The concurrence of the claw-back scheme (former Section 35, paragraph 2, subparagraph b., of the Dutch Double Taxation Avoidance Decree of 2001 [Besluit voorkoming dubbele belasting 2001] in conjunction with Section 33b, paragraph 2, subparagraph b., of the CITA), the Decree dated 16 April 2002 and Section 20a of the CITA is not always clear.
30) Within the framework of application of Section 20a, paragraph 1, of the CITA, pursuant to which a loss from the period preceding a change in shareholders must be allocated to the preceding year, a hiatus may arise in legal protection if the taxpayer can no longer object to the tax assessment and/or the loss decision for the preceding year.

**Bottlenecks resulting from EU law**

31) In inbound situations, Section 20a of the CITA may conflict with the freedom of establishment as laid down in Article 49 of the TFEU.

32) On the basis of the “always somewhere” principle and the related case law (e.g. Marks & Spencer II), it is unclear whether application of Section 20a of the CITA could perhaps in some cases result in the mandatory consideration of a loss at the level of the Dutch loss entity’s underlying shareholders that are based in another Member State.

Legislators should adequately resolve the bottlenecks listed above, so that Section 20a of the CITA meets the testing frameworks put forward in this research dissertation.

**COMPARATIVE-LAW RESEARCH COVERING 12 COUNTRIES (CHAPTER 6)**

Chapter 6 contains the comparative-law part of the dissertation. The Chapter addresses the “change-of-control” laws (hereinafter “the CoC Laws”) in the following countries.

- Belgium
- France
- Ireland
- United Kingdom
- Austria
- Germany
- Japan
- China
- India
- Australia
- Canada
- United States

Although each country has elected to draft its CoC Laws in its own specific way, a certain degree of uniformity can be detected, which is expressed through various aspects.

- The rationale of the provision.
- The elaboration of a qualifying change in shareholders.
- The elaboration of the requirement of “continuation of the business”.

In virtually all cases, the rationale of the CoC provision in question seems to be the wish to combat abuse of the trade in loss entities. Exceptions are found in Germany, the United States and India, where the scheme comes from a budget background.

Like the Dutch scheme laid down in Section 20a of the CITA, none of the countries researched have a contrary-evidence option allowing taxpayers to demonstrate that the acquisition of the qualifying interest in the loss entity is not (primarily) aimed at the acquisition of the relevant losses. In other words, any intention to set off losses is not required with respect to the relevant provision in the 12 listed countries.

The conclusion as to the uniformity of the schemes can be justified using the table below, which lists the key elements of the CoC Laws in the 12 countries researched.
<table>
<thead>
<tr>
<th>Country</th>
<th>CoC provision since</th>
<th>Shareholder test</th>
<th>Activities test</th>
<th>Exceptions/special circumstances</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>1997</td>
<td>&gt; 50% of control</td>
<td>Change meets legitimate or financial needs (‘rechtmatige of financiële behoeften’)</td>
<td>– Intra-group transfers (&quot;control&quot;)</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>– Businesses in trouble</td>
</tr>
<tr>
<td>France</td>
<td>1986</td>
<td>–</td>
<td>No substantial change in activities</td>
<td>– Acquisitions based on gifts, law of succession</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>– Intra-group transfers (75%)</td>
</tr>
<tr>
<td>Ireland</td>
<td>1976</td>
<td>&gt; 50% of issued capital</td>
<td>– No major change in the conduct or nature of trade</td>
<td>– Acquisitions based on gifts, law of succession</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>– No revival of small or negligible scale of activities in a trade</td>
<td>– Intra-group transfers (75%)</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>1970</td>
<td>&gt; 50% of issued capital</td>
<td>– No major change in the conduct or nature of trade</td>
<td>Acquisitions based on gifts, law of succession</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>– No revival of small or negligible scale of activities in a trade</td>
<td></td>
</tr>
<tr>
<td>Austria</td>
<td>1988</td>
<td>≥ 75% of issued capital</td>
<td>Change in taxpayer’s identity resulting from a material change in organisational and economic structure</td>
<td>– Acquisitions based on gifts, law of succession</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td>– Restructuring</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td>– Losses preserved up to amount of hidden reserves</td>
</tr>
<tr>
<td>Germany</td>
<td>1990</td>
<td>≥ 25% ≤ 50% (pro rata) &gt; 50% (full)</td>
<td>Acquisitions based on gifts, law of succession</td>
<td>– Acquisitions based on gifts, law of succession</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>– Group clause (Konzernklausel) for intra-group-transfers (100%)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>– Losses preserved up to amount of hidden reserves</td>
</tr>
<tr>
<td>Japan</td>
<td>2006</td>
<td>≥ 50% of issued capital</td>
<td>Including: identical business operations; loans/capital of over five times the scope of the discontinued business operations</td>
<td>5-year testing period</td>
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The CoC Laws of each country researched provide for their own shareholders tests, on the grounds of which a “change of ownership” is noted, resulting in application of the relevant scheme. In some cases, the test ties in with the accounting concept of “control” (e.g. Belgium and Canada), whereas, in other cases, the focus is on the interest to be acquired by the acquirer (Germany). It is not easy to derive useful elements for the Dutch scheme from such shareholder tests, for two reasons.

1) The shareholder test should be considered within the context of the national scheme. For instance, Canadian law expressly provides that a change in shareholders does not necessarily result in application of the scheme, because it is relevant whether control is acquired. Other countries focus a lot more on the acquirer of the interest (Germany) and on the question as to whether such acquirer (possibly in concert with affiliated parties) acquires an interest qualifying for application of the relevant scheme.

2) A separate concept of “interest” should not be introduced for the Dutch scheme of Section 20a of the CITA, as this will make the scheme even more complicated than it already is and prejudice legal certainty. Neither should the concept of interest be defined separately from the perspective of consistent and simple legislation. Although it is true that the concept of interest as currently used in Section 10a, paragraph 4, and Section 20a of the CITA still carries many ambiguities, the creation of a new concept of “interest” or “control” will not solve this problem.

<table>
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<tr>
<th>Country</th>
<th>CoC provision since:*</th>
<th>Shareholder test</th>
<th>Activities test</th>
<th>Exceptions/special circumstances</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>1994</td>
<td>≥ 75% of issued capital</td>
<td>Real operations</td>
<td>– Tax-efficient restructuring operations only – Duty to report change in operations</td>
</tr>
<tr>
<td>India</td>
<td>1961</td>
<td>&gt; 49% of voting rights</td>
<td>–</td>
<td>Decease of shareholder, gift</td>
</tr>
<tr>
<td>Australia</td>
<td>1964</td>
<td>&gt; 50% of voting rights, dividends, distributions</td>
<td>“Identical business”</td>
<td>– Listed companies on gifts, law of succession</td>
</tr>
<tr>
<td>Canada</td>
<td>1981</td>
<td>&gt; 50% of control “Similar business”, including reasonable profit expectations</td>
<td>Continuity of business enterprise</td>
<td>– Acquisitions based on gifts, law of succession, stock option plans – Obligation to report to the IRS</td>
</tr>
<tr>
<td>United States</td>
<td>1954</td>
<td>&gt; 50% of the interest, in principle only 5% shareholders relevant</td>
<td>Deferral of losses on the basis of transfer price, multiplied by the long-term exempt tax bond rate</td>
<td>– Deferral of losses on the basis of transfer price, multiplied by the long-term exempt tax bond rate</td>
</tr>
</tbody>
</table>

a Including any precursors to the provision.
The following useful elements ensue from the CoC Laws of the 12 countries researched.

- For a qualifying change in interest or control, virtually all countries researched refer to a change of over 50% (in some cases even 75% or more), possibly for each – group of – acquirer(s). This – a quantitative adjustment to a qualifying change in interests – is a sound reference point.

- Ten out of the 12 countries have a type of activities test applying an open standard, which has been supplemented by further guidelines from legislators, the Ministry of Finance or the tax authorities, as the case requires. I advocate such an open standard, because “overkill” can thus be avoided to the extent possible. On the other hand, it must be made sure that the open standard can be implemented and enforced in practice and does not lead to legal uncertainty. Furthermore, the pros and cons of a standard specifically developed for Section 20a of the CITA and an already existing and useful standard should be weighed.

- A pro-rata-parte approach to changes in interest less than 100% should be rejected for pragmatic reasons.

- Many of the countries researched have made arrangements governing the treatment of inner-year loss set-off for the year of the change in interest. The structure of most of those arrangements is simpler than the current scheme of Section 20a of the CITA.

- Exceptions to the shareholder test should be maintained, e.g. for acquisitions pursuant to the law of matrimonial property or the law of succession, and possibly also for listed companies. Such exceptions may be covered by including a general contrary-evidence scheme.

- The scheme for the revaluation of assets as included in the current Section 20a, paragraph 12, of the CITA should, in principle, be maintained. Only three countries have similar or less far-reaching measures.

The useful elements listed above have been included in my proposal for a revised Section 20a of the CITA as presented in Chapter 7.

TOWARDS A WELL-BALANCED PROVISION AGAINST THE TRADE IN LOSS ENTITIES (CHAPTER 7)

Chapter 7 constitutes the core part of the research dissertation. It assesses the current Section 20a of the CITA on the basis of the quality requirements selected, subsequently presenting a general opinion on the quality of the said Section. The quality requirements selected are:

- legitimacy and realisation of principles of law;
- effectiveness, efficiency and proportionality;
- implementation and enforceability; and
- consistency and understandability.

The following picture arises when the 32 bottlenecks identified in Chapter 5 are allocated to the quality requirements listed above.

<table>
<thead>
<tr>
<th>Quality requirement</th>
<th>Bottlenecks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legitimacy and realisation of principles of law</td>
<td>3, 24, 30, 31 and 32</td>
</tr>
<tr>
<td>Effectiveness, efficiency and proportionality</td>
<td>1, 2, 4, 5, 7, 10, 12, 13, 14, 20, 21, 22, 23 and 28</td>
</tr>
<tr>
<td>Implementation and enforceability</td>
<td>6, 19, 25, 27 and 29</td>
</tr>
<tr>
<td>Understandability and consistency</td>
<td>8, 9, 11, 15, 16, 17, 18 and 26</td>
</tr>
</tbody>
</table>
The quality requirement of “legitimacy and realisation of principles of law” is so fundamental that any failure to satisfy it is, by definition, unacceptable. As such, Section 20a of the CITA should be immediately revised. In my opinion, the current Section 20a of the CITA falls short of the mark with respect to this quality requirement, on the basis of the 32 bottlenecks identified.

With the introduction of Section 20a to replace the former Section 20, paragraph 5, of the CITA, it may be concluded that the former provision is effective to the extent that the bottlenecks of the former Section 20, paragraph 5, of the CITA seem to have been resolved. At the same time, the question arises as to whether Section 20a of the CITA is, for instance, sufficiently effective regarding unrealised losses or the application of the activities test, the conclusion possibly being that the nature of the activities is irrelevant. Neither is Section 20a of the CITA efficient and proportional. This follows not only from the absence of an adequate contrary-evidence scheme, but also from most of the bottlenecks that were identified in Chapter 5 and that lead to an unfair and unreasonable outcome. Hence, the current Section 20a of the CITA falls short of the mark with respect to the quality requirement of “effectiveness, efficiency and proportionality”.

On the other hand, the Section appears to satisfy the quality requirement of “implementation and enforceability”. This follows from, among other things, the fact that the burden of proof has been assigned in a balanced way. Apart from this, concurrence with the other provisions laid down in the CITA is complicated but consistent.

Section 20a of the CITA is not simple, clear and accessible and, hence, not understandable. This is evident not only from the detailed way in which the provision has been drafted, but also from the 32 technical bottlenecks identified.

On the basis of the four quality requirements listed above, it may be concluded that the current Section 20a of the CITA does not stand the test of criticism. Its shortcomings are so fundamental and weigh so heavily that the only conclusion can be that Section 20a of the CITA should be revised as soon as possible.

Chapter 7 also deals with the pros and cons of the application of an open standard in a provision against the trade in loss entities. In addition, research has been conducted into the question as to whether and, if so, to what extent a number of already existing open standards could be useful in respect of a revised Section 20a of the CITA.

- Abuse of the law on the basis of the fundamental freedoms.
- The business purposes test laid down in Article 15, paragraph 1, subparagraph a., of the Merger Directive.
- The business purposes test laid down in Section 10a, paragraph 3, subparagraph a., of the CITA.
- The business purposes test laid down in Section 20, paragraph 5, of the CITA.
- The identity criterion discussed in Beslissingen in belastingzaken 2010/214.

The business purposes test laid down in the Merger Directive and the business purposes test laid down in Section 20, paragraph 5, of the CITA — be it with a few adjustments — appear to be the most useful to serve as a contrary-evidence scheme in Section 20a of the CITA. Eventually, it was decided to include a contrary-evidence scheme based on the business purposes test laid down in Section 20, paragraph 5, of the CITA. The identity criterion discussed in Beslissingen in belastingzaken 2010/214 is also useful in replacing the current activities test laid down in Section 20a, paragraph 4, subparagraphs a. and b., of the CITA. To safeguard legal certainty, it is imperative that an open circumstances catalogue be introduced, with the assessment framework presented in the opinion authored by Advocate General Niessen in Beslissingen in belastingzaken 2010/214 serving as an underlying prin-
ciple. This means that the question as to whether the identity of a business has remained essentially the same should always be assessed on the basis of the following factors.

- The nature of the product of the business.
- The production process.
- Factors determining goodwill, such as customer base, special location or procurement channels.
- Other relevant factors.

Due to the replacement of the current activities test by the identity criterion, the activities test will be fleshed out in a different, not necessarily quantitative way, a way that ties in better with economic reality. Based on the foregoing, a proposal was made for a revised Section 20a of the CITA, in order to answer the central question. The following constitutes the core of that revised provision.

- A threshold of more than 50% applies to qualifying changes in interests ("majority criterion").
- The identity criterion discussed in Beslissingen in belastingzaken 2010/214 and the related open circumstances catalogue are taken as a basis for setting off losses.
- The identity criterion does not apply to investment losses, as such losses can no longer be set off following a qualifying change in interests.
- A contrary-evidence option has been included, on the grounds of which the losses can be set off after all if it is demonstrated that the qualifying change in interests is not primarily aimed at the use of the loss entity’s losses.
- If the losses can no longer be set off, the taxpayer may revalue assets upwards, yet not to exceed their fair market value.
- A taxpayer may request the tax authorities to provide advance certainty in respect of the application of the provision.

The proposal above results not only in a simpler provision, but also in a provision that is better-balanced, without prejudicing its effectiveness and efficiency. In addition, it removes almost all 32 bottlenecks identified. Furthermore, the quality requirements I set are satisfied. The application of an already existing open standard (the identity criterion discussed in Beslissingen in belastingzaken 2010/214) supplemented by an open circumstances catalogue, creating a consistent assessment framework, and the introduction of a contrary-evidence option will result in a well-balanced provision against the trade in loss entities.

CONCLUDING COMMENTS

My research into the Dutch provision against the undesirable trade in loss entities is completed. I had not expected many countries to have laws similar to Section 20a of the CITA or the majority of the 12 countries researched to have given substance to those laws in similar ways. Apparently, the tax authorities of those countries have a “uniform sense of justice” in respect of the tax treatment of loss entities. At the same time, this constitutes an important – dogmatic – argument in favour of the existence of a provision against the trade in loss entities. In addition, my research shows that academic arguments may be presented that are in favour of such a provision, for instance based on the civil-law doctrine of “Durchgriff”. However, the confirmation of the right of existence of a provision against the trade in loss entities in the CITA does not mean that the current Section 20a of the CITA satisfies the quality requirements that may be set in respect of such a provision. The 32 bottlenecks identified in this dissertation regarding the current Section 20a of the CITA justify this conclusion. In my opinion, this means that the ball is in the legislators’ court. Hopefully, however, such legislators dare move beyond the whole or partial resolution of those bottlenecks and will seriously consider my proposal for a revised provision against the trade in loss entities.
At the start of this research dissertation, I referred to Van der Geld, who once called the former Section 20, paragraph 5, of the CITTA – the precursor to Section 20a of the CITTA – "a stranger in our midst" viewed from the angle of corporate income tax, also expressing the hope that it would one day be a slightly tall, dark and handsome stranger. Should legislators opt to implement my recommendations for a revised Section 20a of the CITTA, it might even be a quite tall, dark and handsome stranger.

* * *

390 Summary and conclusions