to authorise the action by the company. In any legal proceeding, no person may rely on such limitation, restriction or qualification to assert that such an action is void. Exceptions are proceedings between the company and its shareholders, directors or prescribed officers, or between the shareholders and directors or prescribed officers of the company. The similarity between section 201(1) of the new Companies Act and section 36 of the present Act is striking. Even the criticised expression “the directors” has been retained.

In terms of section 200 of the new Act an outsider dealing with a company in good faith is entitled to presume that the company, in making a decision in the exercise of its powers, has complied with all of the formal and procedural requirements in terms of this Act, its memorandum of incorporation and any rules of the company unless, in the circumstances, the person knew or reasonably ought to have known of any failure by the company to comply with any such requirement. A director, prescribed officer or shareholder of the company is not regarded as an outsider. The new Companies Act stipulates that this provision must be construed concurrently with, and not in substitution for, any relevant common law principle relating to the presumed validity of the actions of a company in the exercise of its powers. The primary, if not the only, “common law principle” in this regard is contained in the Zaipaul-rule.

Clearly, the new Companies Act creates a far more complicated legal position in regard to capacity and representation than the Act. This is especially so because of the continued, though limited, application of complex common law doctrines and their accumulated learning to companies, even small one-man or closely-held private companies.

It amply illustrates the difficulty to cater for the reasonable needs and expectations of all types and sizes of companies, their stakeholders and persons dealing with them, with a “one size fits all” approach.

Continuation of existing close corporations

The new Companies Act provides for its co-existence with the Act. It amends the latter extensively “to avoid regulatory arbitrage”. The new Companies Act repeals the present Companies Act and amends the Close Corporations Act as provided for in Schedule 1. The result is the indefinite continued existence of the Act and thus of existing close corporations. Close corporations will continue to exist until de-registered or dissolved in terms of the Act or converted to companies under the new Companies Act.

New close corporations proscribed

From the effective date of the coming into operation of section 13 of the new Companies Act, the incorporation of new close corporations will be proscribed. Thus new close corporations can still be registered until the coming into operation of section 13 of the Act. In terms of section 225, the new Companies Act comes into operation on a date fixed by the President by proclamation in the Gazette. That date may not be earlier than one year following the date on which the President assented to the Act, namely April 8, 2009. Obviously that date may be later than one year after the date of assent.

Conversion of companies into close corporations proscribed and conversion of close corporations into companies facilitated

From the date on which Schedule 2 of the new Companies Act comes into operation the conversion of companies into close corporations will be proscribed. Until that date companies can still be converted into close corporations under section 27 of the Act.

Schedule 2 provides for the conversion of existing close corporations into companies under the new Companies Act. A close corporation may file a notice of conversion in the prescribed manner and form, with a filing fee, at any time. The notice must be accompanied by a certified copy of a “special resolution” approving the conversion of the close corporation, and either a new memorandum of incorporation, or an amendment to the existing memorandum of incorporation complying with the new Companies Act.

It is clear that a member of a close corporation will in future no longer be faced with an obligation to become a member of the company upon conversion, but will have the freedom of choice to decide whether or not to become a shareholder of that company.

Section 14 of the new Companies Act, read with the changes required in context, applies with respect to the filing of a notice of conversion, as if it were a notice of incorporation in terms of the new Act. Every member of a converted close corporation is entitled to become a shareholder of the company, but the shares need not be in held in proportion to the members’ interests.

Upon conversion of a close corporation in terms of Schedule 2, the Companies and Intellectual Property Commission must cause the registration of the close corporation in terms of the Close Corporations Act, give notice in the Gazette of the conversion of the close corporation into a company and enable the Registrar of Deeds to effect the necessary changes resulting from conversions and name changes.

On the registration of a company converted from a close corporation, the juristic person that existed as a close corporation before the conversion continues to exist as a company. All assets, liabilities, rights and obligations of the close corporation vest in the company. Existing legal proceedings are deemed to have been done by or in respect of the company, and the liability of any member for the

Civil interventions for tackling MTIC fraud: a UK perspective

by Steven Pope and Roderick Stone

Missing trader intra community or MTIC fraud has been a problem across the European Union for over 10 years, and much has been written about its effects and how best to tackle it. So what is MTIC fraud and why does it pose such a challenge to tax administrations across the EU?

In order to understand how MTIC fraud is perpetrated, it is important first to understand how the VAT system functions. VAT is a consumption tax, operating via a fractionated collection system, the VAT on the value added at each stage of a supply chain is paid to the tax authority by VAT-registered businesses. When a business sells goods, the supplier will charge VAT (output tax) on the price of the goods. It normally deducts the output tax any VAT incurred on its purchases (input tax) relating to the supply of the goods and pay the net amount to the tax authority. This way the cost of VAT is only borne by the final consumer of the supply.

VAT is charged by all Member States of the EU. However, transactions between VAT-registered persons in different Member States (intra-community transactions) are exempt from VAT (zero rated). The customer is responsible for payment of the VAT on its intra-community purchases but retains the normal right to deduct input tax in these circumstances the customer effectively has its hands VAT-free goods (or services).

MTIC fraud exploits this zero-rated supply across national boundaries as a means for stealing revenues from national states (carousel fraud) or creating a VAT debt to be used as a subsidy for undertaking legitimate supplies (acquisition fraud). The fraud is perpetrated when a business obtains a VAT registration number in one EU Member State, often with the sole intention of purchasing goods VAT-free from a business in another EU Member State and then selling them on to another business at a VAT-inclusive price but without paying the VAT charged to their tax authority.

In many cases the fraudulent business “disappears” immediately. Such businesses are often called “missing traders.” In some circumstances, the registered business obtains a VAT registration number in one EU Member State and then selling them on to another business at a VAT-inclusive price but without paying the VAT charged to their tax authority. The fraud is perpetrated when a business obtains a VAT registration number in one EU Member State, often with the sole intention of purchasing goods VAT-free from a business in another EU Member State and then selling them on to another business at a VAT-inclusive price but without paying the VAT charged to their tax authority.

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Then again, under section 57(2) of the new Companies Act, if a profit company (other than a state-owned company) has only one shareholder, the shareholder may exercise any or all of the voting rights pertaining to that company on any matter, at any time, without notice or compliance with any other internal formalities, except to the extent that its memorandum of incorporation provides otherwise. In addition its governance is exempted from the detailed requirements of sections 39 to 65 of the new Companies Act.

In terms of section 57(1) of the new Companies Act, if a profit company (other than a state-owned company) has only one director that director may exercise any power or perform any function of the board at any time, without notice or compliance with any other internal formalities, except to the extent that the company’s memorandum of incorporation provides otherwise. In addition sections 71(1) to (7), 71 and 74 do not apply to the governance of such a profit company.

Section 57(4) of the new Companies Act stipulates that if every shareholder of a company (other than a state-owned company) is also a director of that company any matter that is required to be referred by the board to the shareholders for decision may be decided by the shareholders at any time after being referred by the board, without notice or compliance with any other internal formalities, except to the extent that the memorandum of incorporation provides otherwise.

**Single Act approach**

The approach of the drafters of the new Companies Act by preferring a single Act for small and large businesses and by de-emphasising the closing corporate structures, through additional onerous regulation and prohibiting the formation of new ones, contrasts with the basic philosophy underlying the Act that proved so successful. At the root of the development of the Act is the conviction that it is very difficult for a single Act to provide a satisfactory legal form for both the large and sophisticated as well as the small and often marginalised entrepreneur. Historically, South African company legislation developed mainly in response to the needs of and problems posed by large public companies. It had to provide for the large industrial or financial conglomerates with its listed shares and professional management reflecting a clear separation between ownership and control, or direct and indirect control of say an institutional investor, scattered and powerless small shareholders and group problems. Hence it inevitably outgrew the needs and problems of the small entrepreneur who, typically, has restricted means and limited access to professional advice.

As far as the new Companies Act is concerned, a case in point is the dispensation concerning capacity and representation, which are applicable to both public and private companies alike, whether closely-held and/or exempted or not.

The ordinary rules of agency provide the foundation for the representation of juristic persons, but have not been able to supply solutions in all cases. A special or characteristic branch of agency has consequently developed with specific common law doctrines such as the doctrine of ultra vires and the rule of quasi contract payable.

The legislature considered it unwise to burden close corporations with the accumulated learning on the ultra vires doctrine and the doctrine of constructive notice. This Act, instead, in its effect provides that these doctrines have no application and are not relevant to the question of whether a close corporation is bound by a particular contract made on its behalf.

A company incorporated under the new Companies Act is a juristic person. Therefore all the common law doctrines applicable to the capacity and representation of juristic person will apply except to the extent that the new Companies Act provides to the contrary.

From section 19(4) and (5) of the new Companies Act it should be clear that the doctrine of constructive notice, although curtailed, has not been completely abolished. In fact, a person will be regarded as having received notice and knowledge of any provision of a company’s memorandum of incorporation contemplated in section 15(2)(h) if the company’s notice of incorporation or a notice of amendment has drawn attention to the provision as contemplated in section 1(1), or of the effect of section 19(1) on a personal liability company. To this extent the doctrine of constructive notice will be applicable and still remain relevant to the consideration of the legal position of a company within this context.

Section 19(1) of the new Companies Act provides that a company has all of the legal powers and capacity of an individual, except to the extent that the company’s memorandum of incorporation provides otherwise. Thus the powers and capacity of a company may be limited in the company’s memorandum of incorporation and, to this extent, the ultra vires doctrine finds application. In contradistinction to close corporations law, the ultra vires doctrine is thus not completely abolished, consequently complicating the legal position of the company and third parties dealing with the company with the accumulated learning on this doctrine.

This seems to have been realised by the drafters, because it is sought to address some of the doctrine’s consequences, reflecting to some extent the approach followed in section 36 of the present Companies Act. In terms of section 20(1) of the new Act, if a company’s memorandum of incorporation limits, restricts or qualifies the purposes, powers or activities of that company, no action of the company is void by reason only that the action was prohibited by that limitation, restriction or qualification, or as a consequence of that limitation, restriction or qualification, the directors had no authority to execute or to authorise.

Since its inception, the MTIC strategy has consisted of a multi-faceted approach combining both criminal and civil measures to tackle the fraud. HMRC has maintained a successful prosecution policy focusing on those that orchestrate the fraud. This approach sends out the message that such criminal activity will be robustly challenged, and with the high level of successful prosecutions will offer a strong deterrent both now and in the future.

However, criminal prosecution is not the answer to everything and must be supplemented with civil strategies that tackle the economy of participation in fraud and deter those that may consider that MTIC fraud may be a profitable enterprise. With this in mind, HMRC has a range of interventions to mitigate the impact on tax receipts where evidence of abuse can be demonstrated:

- denying input tax;
- denying the zero rating of intra community transactions;
- imposing financial penalties;
- taking action to recover lost revenue.

This approach has been refined and developed as a result of case judgments emanating from the UK High Court and the European Court of Justice (ECJ). If there is such a blatant attack on the VAT system, why have not HMRC and other tax administrations found a permanent solution to the problem?

**LEGISLATIVE FRAMEWORK**

The framework for the VAT system within the EU is set out in EU Directive 2006/112/EC, known as the “Principal VAT Directive.” This is a recast of the Sixth VAT Directive of 1977, bringing together all amendments since 1977 in one single piece of legislation.

This legislation provides for a common system of VAT with a unified basis for assessment that respects the principles of proportionality, legal certainty and fiscal...
neutrality. Many tax administrations and professionals still refer to the articles of the Sixth VAT Directive.

Article 17 of the Sixth VAT Directive provides a taxable person with the fundamental right to deduct input tax, therefore declaring to the tax authority that a commercial transaction has taken place. This right to deduct must be exercised immediately in respect of all the VAT charged on the cost components (see C-62/93 BP Ipanema [1995] ECR I-1081, para 18, and joined cases C-118/98 to C-147/98 Goldflashe and Others [2000] ECR I-1177, para 45).

Tax administrations aim to ensure that the right amount of tax is paid by the right person at the right time. A business must declare all the output tax due on its sales and the input tax incurred on its supplies and pay the net amount to the tax authority.

It is reasonable that an honest taxpayer is not liable if his supplier fails to pay over any tax charged and his fundamental right to deduct tax paid on his purchases is unaffected. However, in organised criminal attacks on the VAT system, such as MTC fraud, the challenge to a tax administration is how to tackle abuse in a proportionate manner which penalises the non-compliant without penalising the honest taxpayer, or the requirement for legal certainty.

HMRC’s approach to this challenge has been to explore both operational and legislative measures which focus on the threat to the revenue whilst at the same time ensuring that legitimate businesses can operate on a level playing field.

IS TRADING IN CONTRIVED MTC FRAUD SUPPLY CHAINS A REAL ECONOMIC ACTIVITY?

In May 2002 the UK began to deny input tax claims submitted by UK exporters on the basis that, where there were circular supply chains, the goods were careless and did not conclude in sales to final consumers. There was no commercial rationale behind the transactions, ergo no economic activity. HMRC argued that where the only intention was to commit fraud then such transactions did not fall within the scope of the Sixth VAT Directive.

This approach was challenged by a number of brokers whose input tax claims had been denied, eventually reaching the ECJ (see C-354/03, C-355/03 and C-484/03, Opgun Ltd, Fletum Electronics Ltd, and Band Heusen Systems Ltd v Commission of Customs and Excise [2006] ECR I-1488).

The question put to the ECJ was whether transactions constitute part of a fraudulent scheme set up by others qualified as economic activities within the meaning of Article 4(2) of the Sixth Council Directive 77/388/EEC.

In its judgment of January 12, 2006, the ECJ found that transactions within a fraudulent trade are within the scope of the Directive: "The right to deduct input tax of a taxable person who carries on such trade cannot be affected by the fact that in the chain of supply of which those transactions form part another prior or subsequent transaction is tainted by a VAT fraud, without that taxable person knowing or having means of knowledge of the fraud" (emphasis added).

The initial reaction of fraudsters was that this was a defeat for the UK and consequently, levels of fraud increased dramatically (see figure 1). However, in giving its judgment the ECJ qualified it on the basis that the taxpayer maintained a fundamental right to deduct so long as they did not know or did not have the means to know that they were involved in transactions linked to fraud.

HMRC recognised that if they were to deny the input tax claims of those that facilitated and profited from the fraud then they would have to demonstrate that the claimant knew or should have known that they were trading in fraudulent supply chains. This came to be known as the “knowledge test”. Such an approach is highly effective, albeit resource intensive, requiring the painstaking collection and assessment of evidence to support a denial.

THE KNOWLEDGE TEST AND JOINT AND SEVERAL LIABILITY

Whilst challenging the validity of input tax claims is an important element of HMRC’s civil interventions, it is not the only one. Consideration was also given as to how to tackle the theft of VAT by the missing trader. HMRC had already gained enough evidence to show the contrived nature of transactions linked to fraud and the initial theft of the VAT by the missing trader. The question then arose as to whether traders that knowingly and consistently traded with missing traders could be made jointly and severally liable for any stolen VAT.

Joint and several liability

In the 2003 Finance Act, the UK introduced the concept of joint and several liability into the VAT Act 1994 (s 77A VATA 1994). The legislation focuses on what, at the time, were the fraudsters’ preferred commodities, namely mobile phones and computer equipment. The argument was made that a business can be made jointly and severally liable for stolen VAT if it had reasonable grounds to suspect that VAT would go unpaid anywhere in its transactions chain.

Legal challenge

As with non-economic activity HMRC’s approach was challenged in the courts, again being ultimately referred to the ECJ. The appellant in this case was a group called the Federation of Technology Innovators Ltd (FTIL) (2006) [2006] UKHL 14, Fed. of Technological Industries and others (2006) ECR I-1491) which represented some of the brokers submitting large VAT repayment claims.
The South African close corporation under the Companies Act of 2008

by J J Henning

INTRODUCTION

The purpose of the South African Close Corporations Act 69 of 1984 (the “Act”) is the provision of a simple, deregulated, personalized, inexpensive and flexible free-standing limited liability vehicle for the single entrepreneur or small number of participants, to meet their reasonable needs and expectations without the burden of legal requirements that would not be meaningful in the circumstances.

The total number of registrations, that is incorporations of new close corporations and conversions from companies to corporations, during the period 1985 to 2008 amounted to 1,494,488 close corporations compared to 387,757 companies of all kinds and types. During 2007 and 2008 a further 519,634 close corporations and 65,504 companies were incorporated. This puts the total for the period 1985 to 2008 at 2,014,122 close corporations and 453,161 companies.

In this contribution attention will be given to the far-reaching but not drastic changes to be wrought by the provisions of the Companies Act 71 of 2008 (the “new Companies Act”) when it comes into operation.

SOUTH AFRICAN CLOSE CORPORATION

Under the Act the South African close corporation is a juristic person that confers on its members all the usual advantages associated with legal personality and in which all or most members are more or less actively involved. In principle there is no separation between ownership and control. Every member is entitled to participate in the management of the business, to act as an agent for the corporation, and owes a fiduciary duty and a duty of care to the corporation. The consent of all the members is required for the admission of a new member.

It is ideally suited to small businesses. The managerial and administrative requirements for close corporations are less formal than for companies. The typical small entrepreneur will be able to complete the constituting documentation and register the corporation personally without expensive professional advice. Although a close corporation is required to have an accounting officer, a formal audit of financial statements is not required. There are no requirements for compulsory meetings, such as annual general meetings. Meetings are usually held between members on an ad hoc basis. The members do not all have to take an active role in the running of the business but are in principle entitled to do so.

The concept and development of the close corporation elicited international interest and even enthusiastic administration. A recent in-depth comparative study emphasises the importance of the continued availability of the close corporation and its potential as a role model for an eventual open markets furthering socio-economic integration within the context of SADC and the African Union. It does not only serve as a highly significant indication of the importance of the preservation and development of such legal entities but also sounds as very timely note of warning to South African law reformers to proceed with greater caution, circumspection, and more deliberation in this regard.

THE CORPORATE LAW REFORM PROCESS

The Department of Trade and Industry (the “Department”) released its policy document on corporate law reform entitled South African Company Law for the 21st Century – Guidelines for Corporate Law Reform for public comment on June 24, 2004. It suggested that only one formal business vehicle should be recognised, which should be distinguished on the basis of size of turnover, and which would in turn determine the reporting requirements. The policy document asserted that the current distinction between close corporations, private companies and public companies is artificial and does not allow an easy transition from one type to another.

Towards the end of 2004 newspaper reports suggested that close corporations would have to convert to private companies to avoid losing their corporate status. Starting with relatively low key and tentative statements, these reports eventually explicitly claimed that in May 2006, the ECJ issued its findings supporting the UK’s approach to joint and several liability.

“Member of a Member State to court to answer for the purposes of the Sixth Directive, be regarded as a single entrepreneur, notwithstanding any input tax but could reclaim any input tax previously activated if his purchase was made by his purchase, was taken in part, or is not applicable to the core activities of the fraud, they are permitted to apply to the fraud, they are permitted to apply to the fraud.

The problem is not just a fraud at the fraud, it is not just a fraud at the fraud. The solution is not just a fraud at the fraud, it is not just a fraud at the fraud. The solution is not just a fraud at the fraud, it is not just a fraud at the fraud.

In its judgment the ECJ stated that so long as a taxpayer is not a person who knows, or has reasonable grounds to suspect, that some or all of the value added tax payable in respect of any input tax but could reclaim any input tax previously activated if his purchase was made by his purchase, was taken in part, or is not applicable to the fraud, they are permitted to apply to the fraud.

The decisions in Bond House and FTI reinforced HMRC’s expectation of appropriate corporate governance, including due diligence/know your customer/supplier checks, and proper risk management. This message was reinforced in a later ECJ decision in the case of Kittel v Recolta Recycling on furthering socio-economic and administrative requirements for close corporations.

The so-called “close company” concept, accepted practice that businesses must apply corporate governance processes to protect themselves from financial exposure. The extent of any corporate governance is determined by the level of the risk.

The decisions in Bond House and FTI (joint and several liability) reinforced HMRC’s expectations of appropriate corporate governance, including due diligence/know your customer/supplier checks, and proper risk management. This message was reinforced in a later ECJ decision in the case of Kittel v Recolta Recycling. The ECJ also sent a clear message to participants in fraudulent transaction chains that they could not benefit from the fraud by relying on EU VAT rules. The decisions in Bond House and FTI reinforced HMRC’s expectations of appropriate corporate governance, including due diligence/know your customer/supplier checks, and proper risk management. This message was reinforced in a later ECJ decision in the case of Kittel v Recolta Recycling. The ECJ also sent a clear message to participants in fraudulent transaction chains that they could not benefit from the fraud by relying on EU VAT rules. The decisions in Bond House and FTI reinforced HMRC’s expectations of appropriate corporate governance, including due diligence/know your customer/supplier checks, and proper risk management. This message was reinforced in a later ECJ decision in the case of Kittel v Recolta Recycling. The ECJ also sent a clear message to participants in fraudulent transaction chains that they could not benefit from the fraud by relying on EU VAT rules.
I passed. Then, in completing the paper work for admission as an avocat à dre (
Paris), I was told that my contrat de collaboration with my colleagues in chambers had
to be revised to state a minimum monthly salary! (This may be justified to prevent young associates from falling
into slavery, but it again smacked of an unrecognized
corporalism in a profession officially opposing filthy
hires as having anything to do with its nature). But, all of
this having been finally resolved, I took the oath to become
an avocat in an impressive ceremony in the First Chamber
of the Palais de Justice’s Court of Appeal – where the trial
of Pétain had been held following the liberation of Paris
and the defeat of the Nazis.

Was it worth it? Of course. But never think that
lawyers are lacking in old fashioned territorialism – even
when it goes against there own principles. The oath of the
avocat pledges him or her not only to “dignity,”
“conscientiousness,” “independence,” and “honesty” –
but also to “humanity.” Surely “humanity” should
embrace greater appreciation of the high legal standards of
our European states in general, as well as (why not?)
the recognition that a lawyer can be a fine practitioner even if
he is not well remunerated for it.

John Warwick Montgomery
Professor Emeritus of Law and Humanities, University of Bedfordshire;
Distinguished Professor, Patrick Henry College (Virginia, USA).

was it a matter for the national court to refuse to allow the
right to deduct, when it is established, on the basis of objective
evidence, that that right is being relied on for fraudulent ends
see FiniH, para 34).”

Errol had built on the above argument first examined in the
Bond House judgment and echoed in RTI, clearly stating
what the taxpayer could expect with regard to legal
certainty and proportionality from their respective tax
administrations. However, it set out the parameters under
which taxpayers may rely on the VAT Directive to protect them.
The knowledge test has been used extensively in the
UK and across the EU and has become an important part
of the EU’s efforts to combat MTIC fraud.

IS FOCUSING ON BEHAVIOUR THE ONLY
OPTION?

The measures in this article so far have focused on the
behaviours of those perpetrating, profiting from or
facilitating the fraud. However, HMRC has also looked
across the piece at other means by which the fraud can
be tackled. In 2007, HMRC introduced legislation
which focused on the mechanism by which VAT could be
stolen.

Any change to the general rules of the VAT system is not to
be taken lightly. Member States considering such action
have to obtain a derogation from EU law supported by all
26 fellow Member States. On June 1, 2007, having
secured such a derogation, the UK introduced a domestic
reverse charge in respect of wholesale trade in computer
chips and mobile phones.

and Olahan (1998) ECR I-2841, para 20; Case C-
373/97 Diamantis [2000] ECR I-1705, paras 33, and
Case C-12/03 FiniH [2005] ECR I-1599, para 32).”

The ECJ stated that the decision to deny input tax
recovery lies squarely with the national administration:

“It is a matter for the national court to refuse to allow the
right to deduct when it is established, on the basis of objective
evidence, that that right is being relied on for fraudulent ends
see FiniH, para 34).”

HMRC does not apply it to all goods. The answer is that it
was a measure for the purpose of an effective system for collection of revenue than a
sales/purchase tax levied at the retail stage.

So what is a reverse charge, and why mobile phones and
computer chips?

A reverse charge transfers the obligation to pay output
tax from the supplier to the customer but the customer
retains its entitlement to deduct VAT on its purchases. This
means that in effect at each stage a business is in a net nil
tax situation and the opportunity to commit MTIC fraud is removed. A reverse charge only applies to business
transactions and the normal accounting rules apply on sales to final consumers. As a consequence it is no
longer possible for:

• the missing trader to disappear with the VAT paid to
him by his customer but owed to HMRC;
• traders to divert the VAT due to be paid by  their
suppliers through third-party payments; and
• the exporter to claim a VAT repayment from HMRC.

These commodities were chosen because they were the
goods most commonly used in UK carousel fraud supply
chains. The effect of this legislative change has been to stop
MTIC carousel fraud in mobile phones and computer
chips. The reverse charge and the application of the
knowledge test to tackle all MTIC style trade maintains a
downward pressure on MTIC fraud and revenue losses.

You may ask why, if the reverse charge is so effective,
HMRC does not apply it to all goods. The answer is that it
is only appropriate in specific circumstances. Under the
fractionated collection system VAT is collected on the value
added at each stage in the supply chain, mitigating the
impact of fraud at the point of sale to the final consumer.
For all its imperfections the VAT system is generally a much
effective system for collection of revenue than a
sales/purchase tax levied at the retail stage.
the European Directive with a local language requirement (French, German, and Luxembourgish!), the European Court of Justice ruled that this was contrary to the spirit of the free establishment of European workers and against the clear intent of the Directive (decision of September 19, 2006).

But a non-French EU lawyer, even when he or she successfully enters into such an arrangement, is very obviously a second-class citizen. He or she must pay the full fees to the Bar that a French avocat pays and must fulfill the same annual continuing legal education requirements that apply to the French avocat – but one’s name appears in small letters in a separate section of the Tableau des avocats (the official regional listing) or in minuscule type in the Paris Bar directory.

And if the non-French lawyer wishes to become a full-fledged avocat? Here, two paths exist. The one appears simple and non-threatening: three years of practice in France, and no examinations! This possibility, to be sure, came about not through any French efforts (quite to the contrary) but by way of a European Directive of February 16, 1998 – which did not get transposed into French law until February 11, 2004! (It now comprises Articles 89 and 90 of the revised Law of December 31, 1971.) The problem with this alternative is that the three years of required full-time practice need to be in “French law.” But, being a foreign attorney, the non-French lawyer is not supposed to be practicing French law! The text goes on to say that if there is insufficient evidence of such practice, the Bar to which he or she applies has the right to “evaluate the candidate.” This, of course, leaves open a wide area of discretion to the local Bar – even though, technically, the burden of proof in rejecting the candidate falls on the Bar, not on the applicant.

The second route for the non-French EU lawyer to become an avocat is to pass “Article 99” examinations. These are set individually for each applicant, and can consist of up to four tests, depending on how closely the candidate’s legal education and experience parallel the French model. One examination is always on the practice and ethics of the profession (déontologie). The others are specified from a list derived from the CAPA requirements; civil law is a standard – plus commercial law, administrative law, criminal law, and employment law. If four subjects are assigned, one of them (chosen by the National Council of the Bar, which sets the list for each candidate) must consist of a four-hour written examination. The other subjects are tested by oral examination before juries. Two examination periods maximum are now set each year, one in Paris, the other in Versailles, in Paris, the jury consists of three examiners (a law professor who is a specialist in the given subject, a former member of the Bar Council, and a practitioner), whereas Versailles employs five-member juries.

If the European lawyer comes from a Napoléon Code jurisdiction (e.g., Italy) or from a strongly French-speaking area (say, Belgium), he/she may be required only to do an oral in one or two subjects (déontologie is always mandatory). But all UK lawyers (solicitors, barristers, Scottish advocates), being from common-law backgrounds – after all, even the civil-law Scots end up before the common-law Supreme Court of the United Kingdom – are required to do the maximum of four subjects, and this means at least one four-hour written examination plus three oral examinations. The style of these examinations is not the “practical, problem-solving” style of the Article 100 examinations, but the academic, essay style of the French university curriculum, where, for example, in the legal area, you always divide one’s answer into two major subsections. To pass, one must average 10 out of 20 in two, and one can only sit for the examination three times.

And now, a personal word. After two years as a member of the Strasbourg Bar and three years a member of the Paris Bar – both under my foreign practising title of avocat-juridiction (England and Wales) – I applied to take the oath as a French avocat. My dossier was replete with evidence of my legal activity in France, chiefly in the area of my specialty, religious liberty litigation before the European Court of Human Rights in Strasbourg. I was informed that this was inadequate. Why? Because I could not show that my income derived principally from this practice. Of course it did not. I am a university professor and my legal work has been largely pro bono. I pointed out, using an article on the Paris Bar’s own website, that historically the French Bar has valued unremunerated service in behalf of the poor and downtrodden. Indeed, the French Bar grew out of ecclesiastical service by lawyers who were clergy. “Would a physician be less good a doctor if he treated patients for free?” I asked. I also reminded the powers-that-be that one of the differences between French lawyers and Anglo-American lawyers is that the French avocat must not engage in any form of commercial activity. Indeed, an avocat cannot simultaneously be a member of other profession (medicine, accountancy, etc) – with the exception of university teaching or a religious ministry. (A few years ago, in 2003, a young avocat was suspended for having played an accordion for money on a public street – though this was reversed on appeal. My arguments were to no avail. I withdrew my application and determined to take the tougher route.

I was therefore left with the Article 99 examinations. In spite of my possessing four earned law degrees, including the LL.D. – the higher doctorate in law – from Cardiff University, the National Council of French Bars required me to pass the maximum of four examinations. Their only concession, on the basis of my practice in France, was to substitute criminal law for civil as the four-hour written examination. The oral examinations required of me were in commercial law (with its independent Code de Commerce and separate commercial courts), administrative law...