Missing trader intra-community (MTIC) fraud has received a lot of domestic enforcement attention.1 True cross border enforcement (joint or coordinated multi-Member State audit) has been limited.2 There are signs that this is changing as the Member States become more aggressive in their search for revenue.3 Domestic rules designed to prevent losses in neighboring States are being adopted and enforced.4 It appears that the Commission’s urgings are being heeded.5

1 There are many descriptions of missing trader intra-community fraud (MTIC). Sometimes it is a simple linear fraud (acquisition fraud), while at other times the supply (goods or service) circles round-and-round (carousel fraud), and yet other times there are highly complex pattern of contra-trading where transactions are structured to disguise trading patterns. David Demack, Tribunal Judge for the UK’s First-Tier Tribunal (Tax Chamber) recently provided the following description in a contra-trading case:

The basic structure of MTIC fraud takes the following form. A “missing trader”, i.e. a UK VAT registered trader, or one who uses another’s VAT registration, purchases goods from abroad and imports them into the UK. The importation bears no VAT. The trader sells the goods intra UK, charging VAT at the standard rate on the sale to an intermediary known as a “buffer”. The goods then pass along a chain of purchase and sale transactions intra UK through a series of other buffers. Each buffer properly charges and reclaim VAT. The final buffer in the chain then sells the goods to a “broker” – in the present case the appellant traders were the brokers in most of the chains concerned - who, as the last link in the chain, sells the goods abroad in a zero-rated transaction and proceeds to reclaim the input tax he paid to the final buffer. Consistently with his name, the missing trader then disappears having failed to account for the VAT he charged the first buffer.

In the more complex form of MTIC trading known as contra-trading, the broker in the chain of transactions described in the last preceding paragraph himself purchases goods from abroad of equal value to the goods he sells, and sells them along a second chain of transactions before a second broker sells the goods abroad. The first broker has a net liability to VAT of nil, and so declares in his VAT return. (The claim for input tax in the first chain is cancelled out by the output tax in the second chain). The second broker again in this case the appellant traders were the brokers in the chains other than those at [12] above - who has no apparent connection with the fraudulent VAT loss in the first chain, then proceeds to claim repayment of the input tax on his purchase.

(Joined appeal) Haroon Younas t/a Micromedia v. Commissioner and Triton Communications Co. UK Ltd. v. Commissioners, [2012] UKFTT (TC) at ¶¶ 13 & 14 (23 January 2012).

2 Court of Auditors, Special Report No 8/2007 concerning administrative cooperation in the field of value added tax, together with the Commission’s replies (2008/C 20/01).


4 For example, Jochen Meyer-Burow & Oeka Stumm, Recent Developments in German Criminal Law and their Impact on VAT Compliance, INT. VAT MONITOR (May/June 2011) 161, 163 indicate:

With effect from 1 January 2011, Sec. 370(6) of the Abgabenordnung provides that evasion of VAT payable in one of the other EU Member States can also be prosecuted in Germany. Prior to that date, prosecution of evasion of foreign VAT was only possible on the basis of reciprocity, i.e. if evasion of German VAT was a criminal offence in the other Member State.

5 The EC Treaty requires mutual enforcement. See Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, concerning the need to develop a coordinated strategy to improve the fight against fiscal fraud, COM (2006) 254, at 6.
Along with this shift in enforcement focus, triangulation analysis has moved from being an interesting aspect of the MTIC fraud structure to the central element in a larger understanding of how a fraudster thinks and how he carries out his fraud. We are coming to understand that triangulations are not only the mechanism of how the fraud is carried out; they are a cloak of invisibility that the fraudster casts upon his fraud to hide it from the authorities.

This should not come as a surprise. In 2007 the House of Lords heard testimony that pointed directly at triangular manipulations as the tool that fraudsters would use to disguise movements of goods in aid of their frauds throughout the EU. The accuracy of the 2007 forecast is now more than a little apparent.

Germany for example, is currently engaged in a multi-billion euro fraud investigation involving the triangulation of consumer goods and CO2 certificates. The Augsburg District Court is overseeing the investigation.6

It is helpful to revisit the House of Lords 2007 warning. That warning uses a hypothetical transaction involving a French trader (A) selling to a UK middleman (B). The goods are delivered directly to the middleman’s buyer in Germany (C). The testimonial was as follows:

What is so important to understand about Reverse Charging (RC) is an anomaly of the VAT system called "Triangulation" or Article 22(8). [It] means that goods can actually pass from the Missing Traders in France,

Article 10 of the EC Treaty obliges Member States to take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising from Community acts, which include administrative cooperation, and that Article 280 obliges Member States to co-ordinate their actions in order to protect the financial interests of the Community.

The European Parliament has called on all Member States to remove any legal barriers that would impede cross-border enforcement. See European Parliament resolution of 4 December 2008 on the European Court of Auditors’ Special Report No. 8/2007 concerning administrative cooperation in the field of value added tax (2008/2151(INI)) (2010/C 21 E/03), at ¶33.

Stepping up cooperation between judicial authorities
[The EU Parliament] Calls on Member States to remove legal obstacles in national law which hamper cross-border prosecution, in particular in cases where the VAT losses occur in another Member State;

The VIES system is premised on cooperation. See: Council Regulation (EC) No. 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No. 218/92. In addition, the VIES has been recast to make cooperation an explicit requirement – each Member State is obligated to protect the revenue of other Member States. Council Regulation (EU) No. 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (recast). O.J. (L-268) 1, at prefatory statements “whereas 4.” Art 7 states (emphasis added):
For the purposes of collecting the tax owed, Member States should cooperate to help ensure that VAT is correctly assessed. They must therefore not only monitor the correct application of tax owed in their own territory, but should also provide assistance to other Member States for ensuring the correct application of tax relating to activity carried out on their own territory but owed in another Member State.

directly to [traders] in Germany. There is no need for the goods to come to the UK. [T]he UK simply handles the paperwork (invoices) and the payments. Article 22(8) is a perfectly correct and normal trading system that will be exploited by those who will come to the UK to mastermind the fraud in other member states from here.7

The Augsburg investigation is not only uncovering triangulations that “hide the goods,” but it is also uncovering sophisticated payment platforms that “hide the money transfers.” The intent of these structures is to make the fraud fully invisible to the authorities (goods and funds) until after the trader has disappeared. All twenty-seven Member States are involved, but most notable is a virtual thicket of triangles involving Belgian, German, and Austrian companies (with some of the German companies controlled from the UK and others controlled from Belgium). The payment platforms (internet banks) are controlled through firms based in Scandinavia.8

The breadth of the German investigation is breathtaking, but with the Mutual Assistance for the Recovery of Claims (MARC) Directive, in effect as of January 1, 2012,9 this kind of comprehensive multi-jurisdictional MTIC investigation may be becoming the new norm. If so, triangulations will most certainly be at its core.

This paper focuses on the developing law. It explains triangulation, triangulation simplification, and then considers several recent court decisions where fraudsters manipulated the VAT system with triangular trades. The cases illustrate both the enforcement problems with triangular trades, and highlight how the courts’ examination of triangular frauds is leading to significant developments in the VAT law. Three cases are drawn from the Court of Justice of the European Union (CJEU),10 and three are from national courts.11

8 Payment platforms are internet banking operations that allow huge fund transfer among members of a conspiracy undetected by banking regulators. In the Augsburg case these platforms include Swebline AB (Denmark), Swebline AS (Norway), ZI Enterprises Ltd. (Turkey), Express Office A/B (Sweden), Etrade Factoring (Denmark), Skan Finans (Sweden), ICI Global OU (UK), Black Eagle Capital Inc. (UK), Base Trade Financials Ltd. (UK), and ZI Enterprises Teknolojik (Turkey). These platforms had been the subject of investigative reports in the Danish press. See: John Mynderup, Two Directors Extradited to Germany (To Direktorer Udleveret til Tyskland), EKSTRA BLADET (August 1, 2012) available at: http://ekstrabladet.dk/kup/dinepenge/article1800848.cec (in Danish); Bo Elkjaer & John Mynderup, Quota Scammer Snyder Still with VAT: Oops, that 300 million has straight disappeared, (KVOTE SVINDLERE SNYDER STADIG MED MOMSEN: Hovsa, der forsvandt sgu lige 300 millioner til) EKSTRA BLADET (December 6, 2010); Bo Elkjaer & John Mynderup, Danish Quota Scammers in Luxury in Dubai – Disclosure: Extensive tax fraud with CO2 quotas controlled by Danish-owned shadow banks (Dansk kvotesvindler i luksus i Dubai - Afsløring: Omfattende momssvindel med CO2-quoter styres via danskejede skygge-banker), EKSTRA BLADET (December 6, 2010) available at: http://ekstrabladet.dk/nyheder/samfund/article1464516.cec (in Danish).
10 They are (1) Teleos plc and Others v. Commissioner of Customs and Excise, Case C-409/04 (September 27, 2007); (2) the Joined Cases of Staatssecretaris van Financiën v. X and Facet BV, C-536/08 and C-
TRIANGULATION

In a basic triangular transaction (A) sells to (B) who re-sells to (C). Two contracts (invoices and payments) are involved: (A) to (B), and then (B) to (C). The goods are delivered (A) to (C). Additional intermediate parties are possible (B-1, B-2, B-3 etc.) but the critical elements remain the same – the contracts follow the buy/sell chain, but the goods go directly from the first party (A) to the last party (C).

Triangulation becomes complicated when a supplier’s customer resides in another Member State. Article 138 of the VAT Directive requires suppliers to zero-rate their supplies of goods (dispatched or transported) to a taxable person in another Member State. The destination must be outside the supplier’s territory (but within the EU) and the transport must be to a Member State other than the State where the transport begins. A classic triangulation fact pattern would involve (A) in Member State 1 (Italy) selling to (B) in Member State 2 (Germany) with the goods delivered directly from (A) to (B’s) customer (C) in Member State 3 (Austria).

Because there are two successive contracts for the sale of the same goods, and only one dispatch or transport, the dispatch will be associated with only one of the two supplies. This supply is zero-rated. The other supply is deemed made either in the Member State of departure or the Member State of arrival (depending on the facts of the case). Thus, if (A) transports the goods to (C) it is the (A)/(B) transaction that is zero-rated, and the (B)/(C) transaction is deemed to occur in Member State 3 (Austria).

Article 40 indicates that the place of supply for intra-community acquisitions is the Member State where dispatch of the goods ends. This means (in this example) that

539/08 (April 22, 2010); and (3) Mecsek-Gabona Kft v. Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága, Case C-273/11 (September 6, 2012).
11 The primary case is (1) a First Tier Tribunal decision from the UK, Mexcom Ltd. v. HMRC, [2010] UKFTT 163 (TC) (December 4, 2009). The others are from the Bundesfinanzhof (German Supreme Tax Court) are: (2) V R 39/08 of January 26, 2011; (3) XI R 40/08 also of January 26, 2011 and are referenced infra note 37.
13 The location of the customer and the destination of the goods do not need to be in the same member state. The critical requirement is that the destination must not be in the seller’s Member State. For example if a UK established business makes a supply to a French established business, it is just as acceptable for the goods to be dispatched from the UK to Germany, as it would be for the goods to be dispatched from the UK to France. Both scenarios would qualify as a zero-rated intra-community supply.
14 EMAG Handel Eder OHG v. Finanzlandesdirektion für Kärnten (Berufungssenat II) Case C-245/04 (April 6, 2006).
15 Euro Tyre Holding v. Staatssecretaris van Financiën, Case C-430/09 (December 16, 2010). If C transports the goods, it would be the B/C transaction that would be zero-rated, and the A/C transaction would be deemed to occur in Member State 1. The most difficult attribution of transportation with a particular contract arises when B transports the goods under an “ex works” contract with A. In this case B is associated with both the buy (A/B) and the sell (B/C) transactions. It takes a careful “facts and circumstances” analysis to determine whether the A/B or the B/C transaction is properly zero-rated.
(B) must register and account for acquisition VAT in Member State 3. It also means that (B) makes a domestic supply to (C) in Member State 3.\textsuperscript{16}

But, what if (B) does not register and account for VAT in Member State 3? Article 41 is designed to provide assurance that (B) will do so. Article 41 states that acquisition VAT is also due on the same transaction in the Member State that issued (B’s) VAT ID (the number under which (B’s) intra-community acquisition was made). This “safety net” provision essentially results in double taxation. However, it does not apply if (B) has already accounted for VAT in Member State 3.

If the safety net applies, then (B) must account for VAT in Member State 2 (Germany). It may not deduct this amount even if (B) eventually registers and accounts for VAT in Member State 3 (Austria). The rules indicate that instead of being permitted to take an immediate deduction for VAT paid on the same return on which the acquisition is reported, (B) is required to apply for a refund in Member State 2. At this time (B) will need to supply proof that it has accounted for VAT in Member State 3. Absent this proof, the transaction will be double taxed.

The intention is to make triangular transactions secure by relying on taxpayer self-interest. Taxpayers should want to avoid the safety net by accounting for VAT in Member State 3 in advance of the filing requirements in Member State 2.

\textbf{SIMPLIFICATION TRIANGULATION}

The single market makes the VAT treatment of cross-border triangulations complex. Recognizing this, when the single market was established (January 1, 1993) a simplification mechanism was included that would handle (simplify the compliance and reporting requirements of) the most common triangulation patterns.\textsuperscript{17} Simplification was considered necessary because of the volume of commercial activity involving middlemen. Extremely complex VAT treatment for very common triangulation transactions would hurt the single market. The critical provisions dealing with this issue are found at Articles 41,\textsuperscript{18} 42,\textsuperscript{19} and 141.\textsuperscript{20}

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\textsuperscript{16} If the example is changed so that (C) performs the transport, then the (B)/(C) transaction is zero-rated (because the transport will be associated with the B/C contract) and B will now register, pay, and account for VAT in Member State 1. If (B) performs the transport then facts and circumstances will determine which contract the transport will be associated with.


\textsuperscript{18} VAT Directive, \textit{supra} note 12, or Article 28b(A)(2), first and second subparagraphs under the prior \textbf{SIXTH COUNCIL DIRECTIVE} of 17 May 1977 on the harmonization of the laws of the Member States.
The focus of these provisions is to mitigate costly registration requirements that fall on the middleman’s shoulders in a triangular transaction. If we use the prior example, this would mean that – under simplified rules (B), established in Germany, would not need to register in the Member State of arrival of the goods (Austria), nor would (B) need to account for acquisition VAT (in Austria). In addition, simplification will relieve (B) from accounting for acquisition VAT in Germany under the “safety net” provisions.

The simplification framework accomplishes its work by deeming (B’s) acquisition of goods (dispatched by A from Italy) to have already been subject to VAT in Austria. But this is not all. Because (B) would still need to register for VAT in Austria to report the onward sale to (C), this requirement is also removed. Under simplification all (B) needs to do is to “designate” (C) as the party to report VAT under the reverse charge mechanism.

There is one caveat. Simplification does not extinguish (B’s) acquisition of the goods; simplification simply deems (B’s) acquisition to have already been subject to VAT. The distinction is important. The deeming structure leaves open (B’s) obligation to file a recapitulative statement. In fact, Article 42(b) expressly conditions simplification on (B) fulfillment of this requirement.

**OBSCURING MTIC WITH TRIANGULATION**

MTIC fraudsters triangulate the movement of goods to hide their frauds from authorities. Cross-border triangular structures can be difficult to analyze when there is a single triangle, but when a fraudster chains together a number of triangles in a series of back-to-back (or even overlapping) transactions, the truth of what happened can quickly evaporate. The whole fabric of the trade becomes obscure without a considerable amount of multi-jurisdictional cooperation in putting the pieces together.

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19 VAT Directive, supra note 12, or Article 28b(B)(2), third sub-paragraph first and second indents under the prior SIXTH COUNCIL DIRECTIVE, supra note 19.

20 VAT Directive, supra note 12, or Article 28c(E), point 3 at first through fifth indents under the prior SIXTH COUNCIL DIRECTIVE, supra note 19.

21 Article 42 indicates (in part, emphasis added):

The first paragraph of Article 41 shall not apply and VAT shall be deemed to have been applied to the intra-Community acquisition of goods in accordance with Article 40 …

22 Article 42(a) indicates (emphasis added in italics; references to the example added in [ ]):

the person acquiring the goods [B] establishes that he has made the intra-Community acquisition for the purposes of a subsequent supply [to C], within the territory of the Member State identified [Austria] in accordance with Article 40, for which the person to whom the supply is made [C] has been designated in accordance with Article 197 as liable for payment of VAT;

23 Article 42(b) indicates (reference to the example added in [ ]):

the person acquiring the goods [B] has satisfied the obligations laid down in Article 265 relating to submission of the recapitulative statement.
However, as a broader perspective on MTIC has taken hold, as more cases have developed and moved through the court system, the law around triangulation and what needs to be done to prevent MTIC has become clearer. The next four sections examine these developments.

(1) Teleos plc and Others v. Commissioner of Customs and Excise. Teleos is an early MTIC triangulation case. It considers the fraud solely from the perspective of the UK as Teleos plc is (A) in the ABC transaction. The facts date from 2003, and the CJEU’s decision is rendered in 2007.

Teleos involves fourteen UK wholesale traders, each of whom sold large quantities of mobile phones to the same foreign party, Total Telecom Espana SA/Ercosys Mobile SA (TT). TT is VAT registered and resident of Malaga, Spain. Almost all of the mobile phone contracts are “ex works.” The requirement is to place the phones with Euro-Cellers Ltd., a UK freight forwarder operating a secure warehouse in London. After doing this, Teleos and the others are contractually absolved from any delivery requirements. Removal from the UK is entirely the responsibility of TT.

Teleos received notification that delivery had been completed in another Member State when stamped and signed originals of the CMR consignment notes were returned by post. The CMRs described the goods, stated the delivery address, the carrier’s name and vehicle registration number. Signed by TT, these notes are the only objective evidence available to Teleos that the mobile phones reached their destination. The CMRs supported the taxpayer’s claim for zero-rating. The CMRs were presented to representatives of HMRC, and HMRC deemed them to be sufficient.

The overall design of the Teleos transaction is triangular – (A) Teleos, in the UK sells to (B) TT, in Spain who then re-sells to (C) an unspecified businesses, in France. Delivery is allegedly direct from (A) to (C). In support of this design TT (B) files Spanish returns. TT reports both the intra-community acquisitions from Teleos (A), and onward intra-community supplies to French buyers (C) for each allotment of mobile phones. With input VAT matching output VAT, TT reported no VAT due in Spain.

The Teleos triangles appear to have hidden a large MTIC carousel fraud. HMRC (Mr. Stone in particular) conducted a detailed investigation. Mr. Stone is convinced that the mobile phones in this case never left the UK. He reports:

24 Case C-409/04 (September 27, 2007).
26 If an investigator wanted to follow the goods in this case they might first look in Spain, but they would later see that they were in France. However, if the fraud is a true carousel it is likely that the French buyer turned around and re-sold these same phones to different buyers in the UK. This is in fact what Mr. Stone found. If not for the errors in the Teleos/TT CMR documents it would be easy to conclude that the cell phones in this case physically left the UK, and then actually returned on another transaction. The fraudsters
… the CMRs were false in two material particulars. The destination shown in France was false. The vehicles identified by the registration number did not exist or were not suitable for carrying mobile phones. Finally, the transporter identified either did not transport the mobile phones or was not engaged in the trade of transport.  

Mr. Stone’s further investigation revealed that instead of being delivered to French buyers (per the CMRs and the Spanish tax returns) the Teleos mobile phones were in fact re-sold to buyers within the UK.

Mr. Stone’s investigations revealed that TT had on the same day purchased the mobiles from … [(C) in France] and supplied them to one of three UK VAT registered traders. Those traders had sold the mobile phones to five other UK VAT registered traders who themselves had supplied them to five different UK VAT registered traders. Those five traders had sold them on, on the same day to six further UK VAT registered traders, which paid TT for the phones.

**The Teleos’ Holding**

*Teleos* is focused narrowly on the right to zero-rate an intra-community supply when the only evidence that goods have crossed the frontier is the CMR note. *Teleos* is complicated by two other factors (a) the fact that the tax authorities initially accepted the CMR notes as adequate proof of the taxpayer’s qualification for exemption, even though the notes later turn out to be fraudulent, and (b) the fact that the taxpayer neither knows nor has the mean to know of the fraud.

Although not at the heart of the decision, triangulation directly factors in the decision. *Teleos* argues that TT is a middleman (B) in a traditional triangulation. As such, the returns filed by TT in Spain should be regarded as “conclusive proof” for the purposes of the exemption from VAT of the intra-Community supply made by Teleos. The court noted:

The order for reference states that there was evidence that TT had made tax returns to the competent Spanish authorities relating to the intra-

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28 *Teleos*, at ¶108.

29 *Teleos*, *supra* note 24, at ¶ 16.

30 *Teleos* at ¶18 the CJEU indicated:

The national court considers it proven that there was no reason for Teleos and Others to doubt the information contained in the CMR consignment notes or their authenticity, and that those companies were not party to any fraud and were unaware that the mobile phones had not left the United Kingdom. It also concluded that, after Teleos and Others had made serious and detailed inquiries as regards both TT and Euro-Cellars Ltd to establish the legitimacy of the purchaser, they had no other real means of establishing the falsity of the statements contained in those notes. Moreover, no additional evidence, other than the CMR notes, could reasonably have been obtained, having regard to the nature of the trade in question.
Community acquisition of mobile telephones. TT had also declared the onward supply of the goods as exempt intra-Community supplies and claimed refunds of input VAT.  

The court turns this argument aside. The returns are objective evidence, but not conclusive proof. The court indicates that the “… presentation by the purchaser of a tax return relating to an intra-Community acquisition may be evidence of the actual transfer of goods out of the Member State of supply, such a return does not however constitute conclusive evidence for the purpose of proof of an exempt intra-Community supply of goods.”

Thus, in addition to the common encapsulation of the Teleos holding – that goods must physically leave the territory of the Member State of supply to qualify for zero-rating – Teleos also stands for the proposition that the zero-rating of (A’s) intra-community supply cannot be “conclusively proven” by documenting that the middleman (B) has reported the related intra-community acquisition (A) to (B) on its return, along with an onward intra-community supply (B) to (C) of the same goods.

What’s Missing in Teleos?

There should have been more to the Teleos case. TT’s Spanish return is probably wrong. Mr. Stone’s investigation in the UK should have supported a liability for Spanish VAT under the safety net provisions of Article 41.

TT clearly considers itself to be a middleman (B) in a triangulation where Teleos (A) is required to deliver cell phones directly to its customer (C) in France. TT does not claim that it qualifies for triangulation simplification under Article 141. If it did then it would not be filing Spanish returns that imposed and then deducted VAT. Article 41 therefore requires that TT should be accounting for “safety net” acquisition VAT.

Safety net acquisition VAT is not deductible (even though that is what TT did). The Spanish VAT must be “reduced accordingly” as TT presents proof that French VAT has been “applied in accordance with the first paragraph [of Article 41].” However, French VAT was never imposed. The phones never left the UK (according to Mr. Stone).

But Teleos is even more complex. If pressed TT might produce evidence that French acquisition VAT was imposed on the (B) to (C) transaction, but that it was immediately deducted (offset by another set of transactions) where the phones were sold on to another middleman (that Mr. Stone indicates is also TT). (C) would now be [A] in the second triangulation of the same mobile phones. TT would once again be [B], and the requirement would be for [A] to deliver the phones to various [Cs] in the UK.

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31 Teleos, at ¶17.
32 Teleos, at ¶71.
33 See for example: Ben Terra & Julie Kajus, EUROPEAN VAT DIRECTIVES – INTRODUCTION TO EUROPEAN VAT 2012, at 941-46.
This is not a difficult task for [A]. The French buyer, (C) from the first triangle, who is also [A] in the second triangle, has ownership of the phones in the Euro-Cellers Ltd. warehouse in London where they have not departed. It is then, a simple matter for the French buyer/seller to effect delivery in the UK (perhaps through an “ex works” contract where the new UK buyers will show up and remove the phones). This is exactly what Mr. Stone’s investigation uncovered.

What is most intriguing about Teleos is that even though the UK investigation may not have lead to a UK liability (because HMRC had approved Teleos’ zero rate based on the CMR documents) the same evidence would have produced a double VAT assessment in another jurisdiction – Spain. As the middleman in two transactions dealing with the same mobile phones, the “safety net” provisions of Article 41 should have imposed non-deductable acquisition VAT on TT twice (pending proof that French VAT was paid on the first triangulation, and UK VAT on the second).

(2) Mexcom Limited v. HMRC.34 This triangulation is based on facts developed only one year after the transactions in Teleos arose. However, rather than mobile phones, the goods at issue are rolls of toilet paper.

In Mexcom an Italian company (ORAN Spa) (A) supplies rolls of toilet paper to (B) a UK company (Mexcom Ltd.). The toilet paper is re-sold by (B) and delivery is required to be made directly by (A) to (C) in Spain. (C) is a British Virgin Islands company (Amerix) with an alleged Spanish location (Mar de Luna SL).35

However, no evidence is offered that Amerix is a VAT registered taxpayer in Spain (or any other EU jurisdiction). In addition, Mexcom does not file a recapitulative statement (EC Sales List) in the UK, and as a result HMRC is never forewarned of Mexcom’s onward sale to Amerix.36

Mexcom argues that triangulation simplification (Article 141) applies on its facts, and as a result, it should be relieved of any obligation to remit acquisition VAT in the UK. The “safety net” provisions of Article 41 should not apply. HMRC responds (and the court agrees) that Mexcom has not met the conditions for applying simplification, notably:

- It has not shown that Amerix (C) is identified for VAT purposes in Spain;
- It has not shown that Amerix (C) has been designated as liable for payment of VAT on the domestic supply (that is taking place in Spain) by Mexcom;

35 HMRC asked the Spanish VAT authorities for assistance at this point, and they reported that Mar de Luna Invest SL was a registered VAT taxpayer, but declared no revenue for 2003-06, and was deregistered in 2007. However the address of this firm was not the address on the CMRs. When that address was visited the tax agents found a pub and prior to the pub there had been an agency that was unrelated to any of the parties in the case. Mexcom Ltd., at ¶18.
36 At the appeal, Mexcom’s legal counsel indicated that the recapitulative statement (EC Sales List) was filed in Italy (in error) where Mexcom is also registered for VAT. However, a copy of this filing was not presented to HMRC or the court. Mexcom Ltd., at ¶¶11-14.
Mexcom has not complied with its obligation to file the recapitulative statement (EC Sales List) that Article 42(b) sets as a pre-condition to triangulation simplification.

The outcome is inescapable. The safety net provisions of Article 41 apply to Mexcom. Mexcom can only reduce the UK VAT that is due by demonstrating that “VAT has been applied to that acquisition [by Amerix] in accordance with Article 40.” This is an impossible task Mexcom. Amerix is not a registered taxpayer.

**Mexcom’s Second Triangulation**

Much like *Teleos*, where a detailed investigation by Mr. Stone revealed a second (back-to-back) triangle immediately following the primary triangle, so too in *Mexcom* are there back-to-back triangles. In *Mexcom* it is the taxpayer (not the government) that outlines the second triangle for the court. Mexcom offers the second triangle as proof that the UK has suffered “no loss of VAT overall,” because another party should have collected UK VAT on the same rolls of toilet paper.

The taxpayer explains that the toilet paper that was shipped from Italy to Spain in the first triangle (via Mexcom as a UK intermediary) was in fact returned to Italy (via a different UK intermediary) in a second triangle. Amerix it turns out, has on-sold the toilet paper to Comexco, another UK firm. Comexco in turn, has re-sold the toilet paper to an unspecified Italian firm.

Comexco is the [B] in the second triangle. Comexco [B] required Amerix [A] to deliver the toilet paper to an Italian buyer [C]. Thus, much like the mobile phones in *Teleos*, the toilet paper in *Mexcom* returns to the jurisdiction it came from, and one might suspect that (in reality) it never left the local warehouse where it allegedly began its journey in the first place.

If this is the case, then in *Mexcom* the jurisdiction where the real VAT loss was to occur is Italy. There is no detail on this in the case, but one can imagine either that the toilet paper was destined to be sold on the local (Italian) market without VAT, or that it

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37 On January 26, 2011 the two VAT senates of the Bundesfinanzhof (German Supreme Tax Court) each decided a case that reached the same conclusion (VR 39/08 and XI R 40/08). Both cases involve the sale of mobile phones between Italy and Austria. In each case the Austrian buyer uses his German VAT ID (rather than his Austrian VAT ID) to secure a zero-rate on the sale out of Italy. Effectively, the buyer was triangulating the sales into Austria (through Germany) in a manner that would obscure their movement. However, Germany demanded VAT under the “safety net” provisions. In neither case could the taxpayer demonstrate that the Austrian VAT was ever “accounted for,” and as a result the taxable amount could never be “reduced accordingly.” German acquisition VAT was due, even though the mobile phones never entered Germany. Italian VAT fraud was highly suspected in both cases. In both cases it was never clear whether or not the mobile phones actually left Italy, or if they did whether they stayed in Austria and did not return almost immediately to Italy. The strong suspicion in both of these cases is that the mobile phones were sold on the Italian domestic market without VAT, or if VAT was collected then it was not reported.

38 This argument functions similar to the argument the taxpayer made in *Teleos* – that the Spanish returns of TT were “conclusive proof” that the safety net provisions in the UK were fully satisfied.

39 *Mexcom Ltd.*, at ¶23.
was to be sold with VAT, but with the tax not remitted. As in Teleos, it appears that the fraudsters used back-to-back triangulations to slough off the VAT, and then disguise the flow of goods from the tax authorities. Also, as in Teleos, there is most likely double acquisition VAT due on the two sales of toilet paper through UK intermediaries – Mexcom (B) in the first triangle and Comexco [B] in the second triangle.

Mexcom is a classic example of a case (like Teleos) where a cooperative, multi-Member State audit would have assisted a number of jurisdictions to counter MTIC fraud within their borders. The Italian tax authority was “missing in action” in Mexcom (as were the Spanish and French tax authorities in Teleos).

(3) The Joined cases of Staatssecretaris van Financiën v. X and Facet BV. X and Facet are Dutch companies that conduct business as intermediaries in the EU computer and computer accessories market. In both cases the Inspecteur van de Belastingdienst determines that acquisition VAT is due under the “safety net” provision of Article 41.

Facts of X. X purchases computers and computer accessories from various EU suppliers (none of whom are located in the Netherlands or Spain) and sells them to customers in Spain. The invoices to X do not include VAT. They reference X’s Netherlands VAT ID number. The invoice X issues to its customers reference the triangulation simplification rules of Article 141. However X is not able to establish that the goods are dispatched or transported directly to the customers in Spain, (A) to (C).

X takes two different filing positions during the eighteen-month period under audit. From January 1, through September 30, 1998 X does not include VAT due from intra-community acquisitions nor does it deduct VAT with respect to these acquisitions. In addition, X files no recapitulative statements (EC Sales Lists) with respect to these transactions (Article 262).

For the next period, October 1, 1998 through June 30, 1999 X does just the opposite. This time X includes VAT due from its intra-community acquisitions, and then deducts the same VAT. In addition, X files recapitulative statements with respect to these transactions.

40 See the discussion of the German cases VR 39/08 and XI R 40/08 supra, note 37.
41 It is interesting to recall the House of Lords warning. Mexcom is a case that precisely fits the prediction that:

There is no need for the goods to come to the UK. [T]he UK simply handles the paperwork (invoices) and the payments. Mexcom is also an example of how the UK is used as a staging area for fraud carried out elsewhere in the EU. Mexcom is one of a number of UK companies owned by a Frenchman, M. Luc Sommeyre, who did not appear in court, but who lives in Thailand and has a small staff in Singapore and Monte Carlo where he is “engaged in buying and selling goods across international borders.” Mexcom Ltd., at ¶13.
42 Joined cases C-536/08 and C-539/08 (April 22, 2010).
43 X and Facet BV at ¶15.
44 X and Facet BV at ¶17.
45 X and Facet BV at ¶16.
46 X and Facet BV at ¶17.
Facts of Facet BV. Facet is also established in the Netherlands. It purchases computer parts from Germany and Italy and sells them to customers in Cyprus. Most customers have a tax representative in Greece. The computer parts are transferred directly from Germany or Italy to Spain.47

Mentioning Facet’s Netherlands VAT ID the suppliers do not include VAT on invoices to Facet. In addition, Facet does not include VAT on invoices to the Cypriot customers. Facet mentions the Greek VAT ID of the representative. On its tax return Facet includes the VAT due on its intra-community acquisitions and deducts the same amount. It also mentions the transactions on its recapitulative statements.48 On its Dutch return Facet claimed simplified triangulation (Article 141), but failed to mention this on the invoices they issued.49

Neither the Cypriot customers, nor their Greek representatives file intra-community acquisitions. In addition they do not provide notification of further intra-community supplies, or recapitulative statements with respect to the supplies from Facet. Further, these customers are not registered for VAT purposes in Spain, and do not file intra-community acquisitions in Spain.50

Although both $X$ and Facet involve simplification triangulations, it is Facet that reveals most about how fraudsters exploit this mechanism. $X$ may have filed inaccurate returns because it misunderstood requirements. Facet however is a different story. Facet initially made a good faith effort to file properly, but demands from the Cyprus buyers that came in later stretched the (ABC) triangle into a fourth Member State (ABCD). This forced the collapse of Facet’s filing position.

Incomplete & Collapsed Simplification

Both $X$ and Facet file simplification triangulations with the Dutch authorities. Both indicate that they are in the (B) position of an ABC transaction. Regardless of the transaction to which the transportation is ascribed, simplification would allow X or Facet to:

(a) receive zero-rated supplies (intra-Community acquisitions) from their suppliers;

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47 X and Facet BV at ¶21.
48 X and Facet BV at ¶23.
49 The CJEU seems to suggest that Facet should have done was to use Spanish VAT numbers of the Cypriot companies (although at the time Spain would not allow companies not established in Spain to register) or in the alternative, Facet itself should file itself for an intra-community acquisition in Spain, (but Facet would face the same registration prohibition in Spain). The CJEU suggests that Facet would then sell-on to the Cypriot customers, who would eventually enter into transaction with the Spanish end-customer. A similar problem is considered by Peter Hughes, EU VAT Aspects of Longer Chains of Triangular Transactions, 23 INT. VAT MONITOR, 2012 (published on line July 9, 2012) at ¶5. Hughes’ solution is for the party in Facet’s position to register in Germany and Italy thereby making the first transaction a domestic sale and the remainder an acceptable triangular transaction.
50 X and Facet BV at ¶23.
(b) be absolved from accounting for VAT in the Netherlands on the intra-Community acquisitions;
(c) be absolved from accounting for VAT in Spain or Cyprus on their subsequent intra-Community supplies; and
(d) be absolved from registering and charging VAT to their customers in Spain or Cyprus.

_X’s incomplete filing._ X appears unsure about the rules for simplified triangulation. X files in two different ways, neither of which fulfills the requirements of Article 141. If we ascribe naïve innocence to X (it could be otherwise), then X is a middleman so anxious to make a sale (and reduce costs) that he agrees to have (C) in Spain transport the computer parts, and never secures the proof he needs under Article 141(c) to support simplification. X is pushed into Article 41’s safety net – it must report acquisition VAT, register in Spain, collect Spanish VAT, and only then can it reduce the Dutch taxable amount as the Spanish VAT is applied.

There is nothing in the CJEU decision, or in the Gerechtshof’s-Gravenhage (Appeals Court) decision to suggest that the buyers in Spain (C) were “missing traders,” or that X knew or should have known that its customers were fraudsters. However, this is precisely how a “missing trader” would take advantage of an anxious middleman. It is the reason for the safety net (Article 41), and the reason that simplification requires middlemen to have proof of direct (A) to (C) transport.

Then again, if X is not naïve, and is aware of a possible fraud, then filing “as if” simplified triangulation applies (without a recapitulative statement) functions to hide the fraud.

_Facet’s collapsed simplification._ Facet also files as (B) in an ABC simplification. Facet regularly buys from German and Italian suppliers (A), and occasionally takes delivery in the Netherlands. In this instance however buyers from Cyprus (some of whom have tax representatives in Greece) step forward (C). Facet expects that computer parts will be shipped directly from (A) in Germany or Italy to (C) in Cyprus.

The buyers in Cyprus however also have an ABC simplification in mind. They request that Facet ship instead to its customers in Spain (D). Rather than take delivery in the Netherlands and then re-ship to Spain, Facet instead instructs the German and Italian sellers to ship directly to Spain. The ABC transaction becomes ABCD.

To compound difficulties neither the Cypriot businesses nor their Greek tax representative:
… filled out declarations of intra-Community acquisitions … Nor was any notification given of intra-Community supplies or any recapitulative statement … submitted. Furthermore, the customers were not registered in Spain for VAT purposes and did not fill out any declarations of intra-Community acquisitions in that country.\textsuperscript{51}

\textsuperscript{51} _X and Facet BV_, at ¶23.
This description distinguishes Facet from X. These facts suggest that the Cypriot/Greeks traders are acting like fraudsters – people who plan on becoming “missing traders.” They may have even set-up Facet for this fraud.

In Facet two sets of triangles overlap. The Cypriot/Greek business is both (C) in the first triangle and [B] in the second. In this respect Facet resembles both Teleos and Mexcom where a similar overlapping occurred. This pattern of overlapping triangles is suggestive of missing trader fraud. The plan in Facet seems to be for the Cypriot/Greek buyers to disappear after the computer parts are delivered to unknown parties in Spain without VAT.

The difference between Teleos and Facet is the Dutch insistence that Facet, like X, should remit acquisition VAT in the Netherlands under Article 41’s “safety net” until such time as the Spanish VAT is paid. No similar demand was made of TT in Teleos, but in Mexcom the UK tax authority did make this demand.

(4) Mecsek-Gabona Kft v. Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága. Mecsek-Gabona represents the most recent twist in missing trader/triangulation simplification enforcement. Mecsek-Gabona replicates the Teleos fact patterns, but with a far harsher outcome.

Like Teleos, Mecsek-Gabona is concerned with (A) in an ABC transaction. Unlike Teleos however, Mecsek-Gabona allows the tax authority to deny (A’s) zero-rate on the first leg of the ABC transaction if it is determined that (A) knew or should have known that by its sale to (B) that it was a participant in fraud. Incidentally, Mecsek-Gabona applies equally to deny (A’s) zero-rate if it is demonstrated that (A), in a case where (A) was making the delivery to (C), knew or should have known that this delivery was part of a fraud.

Mecsek-Gabona is a Hungarian company engaged in the wholesale supply of cereals, tobacco, seeds and fodder. In August 2009 Mecsek-Gabona sells 1,000 tons of

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52 In Teleos the French end-buyers in the first triangle (C) turned around and became the first-sellers in the second triangle (A). The dual triangulation served to obscure the audit trail and formally get the mobile phones in the case back into the UK (where they had physically never left the warehouse that Teleos had placed them). In Mexcom it was the unregistered Amerix that served as both the end-buyer in the first triangle (C) and the first-seller in the second triangle (A). Once again the dual triangles were set up to obscure the fact that the toilet paper that was the subject of this fraud had never left the Italian warehouses. In Facet the dual triangle pattern is condensed. The Cypriot/Greek buyers have placed themselves as end-buyer in the first triangle (C), but also the middleman (B) in the second triangle. Facet may be an innocent party that was too anxious to make a sale. It may have been tricked into being both the middleman (B) in the first triangle and the first-seller in the second triangle (A). If so, then Facet will pay dearly for its lack of attention to detail. It owes VAT in the Netherlands under that safety net provision of Article 41, because the first triangle it was involved in does not qualify as a simplification. Facet will only be able to “reduce this tax accordingly” as the end-buyers in Spain are found and required to pay acquisition VAT.

53 Case C-273/11 (September 6, 2012).
rapeseed to an Italian trader in agricultural products (Agro-Trade). As in Teleos, the contract is “ex-works.” Agro-Trade is obligated to remove the rapeseed from the Mecsek-Gabona premises.

Like TT in Teleos, Agro-Trade is a middleman (B). Argo-Trade re-sells the rapeseed to unspecified buyers (C) in other Member States. These trades do not appear in Italian tax records. The reason for this omission (which is not detailed in the case) appears to be that Argo-Trade has adopted the same reporting position with respect to triangulation simplifications that X adopted (during the first nine months of its audit). X believed that in a triangulation simplification it did not need to include in its domestic returns the VAT due from intra-community acquisitions nor did it need to deduct VAT. In addition X believed that no recapitulative statement with respect to these transactions was needed under Article 262, as the entire transaction is a wash. If Argo-Trade agreed with X’s filing position there would be no VAT to report in Italy on its asserted simplification triangulations.

As in Teleos, Mecsek-Gabona received signed CMRs in the mail soon after delivery, and as in Teleos the CMRs are questioned for completeness and accuracy. In addition, Mecsek-Gabona issues two invoices to Argo-Trade, one for HUF 34,638,175, and the other for HUF 34,555,235. Only the first is paid. The second (which was to be settled within eight months) remained unpaid at the time of trial three years later.

Kittel and Mecsek-Gabona

Mecsek-Gabona adopts the same “known or should have known” standard for determining a connection with fraud that was advanced in the Joined cases of Kittel v. Belgium and Belgium v. Recolta Recycling SPRL (Kittel). In Kittel it is the right of deduction that is denied based on a purchaser’s knowledge that his supply chain is tainted. If a buyer knows or should know that a contemplated purchase is connected with fraud, then that buyer’s right to deduct VAT on these purchases can be denied.

Mecsek-Gabona applies Kittel’s reasoning to sales. It holds that the right to zero-rate an intra-Community supply can be denied if it is determined that the seller knew or should have known that the sale was connected with fraud in the customer chain. The CJEU listed a number of factors that might indicate that Mecsek-Gabona had the

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54 Mecsek-Gabona, at ¶¶14-15 & 20 Argo-Trade had a valid VAT ID at the time of the contract (August 2009), although on January 14, 2010 it was removed from the register with retroactive effect from April 17, 2009.
55 Mecsek-Gabona, at ¶16.
56 Mecsek-Gabona, at ¶20 (indicating that Argo-Trade never paid Italian VAT).
57 Text at supra note 45.
58 Approximately $157,886.06 and $157,481.32.
60 Mecsek-Gabona and Kittel are linked indirectly. At ¶47 of the Mecsek-Gabona decision the Kittel standard is explored, but the citations therein are not to Kittel, but rather to ¶41 in another recent Hungarian decision which also discusses the known/should have known principle. (Mahagében kft v. Nemzeti Adó-és Vámhivatal Dél-dunántúli Regionális Adó Fölgazgatósága and Péter Dávid v. Nemzeti Adó-és Vámhivatal Dél-dunántúli Regionális Adó Fölgazgatósága, C-80/11 and C-142/11). It is Mahagében/Dávid in turn that expressly references Kittel.
requisite knowledge of fraud (although a final determination of knowledge is left up to the national courts):

... in its written and oral submissions before the Court, the Hungarian Government claims that several factors not mentioned in the order for reference prove, in its opinion, that Mecsek-Gabona acted in bad faith. To that effect, the Hungarian Government argues that, even though Mecsek-Gabona was not familiar with the purchaser of the goods at issue in the main proceedings, it had not requested any guarantees from the purchaser; it did not check the purchaser’s VAT identification number until after the transaction; it did not collect any additional information on the purchaser; it had transferred the right to dispose of the goods as owner to the purchaser, while accepting that payment of the original sale price could be deferred; and it had presented the CMRs returned by the purchaser even though they were incomplete. 61

As a result, more severe arguments could have been raised in both *Facet* and *X*. The Dutch government only asserted that the “safety net” of Article 41 required that these companies account for acquisition VAT in the Netherlands. This accounting might be temporary in both cases (as the tax might be reduced accordingly) if the Spanish buyer was identified and he accounted for VAT.

However, under *Mecsek-Gabona* it is the zero-rate that both Facet and *X* applied on their onward sales that can be denied. The denial would be absolute (without the possibility of relief), if the tax authority could demonstrate that Facet or *X* knew or should have known that their buyers were engage in fraud. Facet would appear to be more vulnerable than *X* because of the unusual shift in delivery instructions from the Cyprus/Greek buyer to a non-registered buyer in a fourth Member State (although these instructions could have been to simply deposit the computer parts at a designated warehouse).

The same outcome could be replicated in *Mexcom*. Rather than simply enforce the safety net provisions (Article 41), HMRC could argue that the zero-rate on Mexcom’s sale to Amerix should be denied.

HMRC would only need to argue that Mexcom should have known that there was a fraud possible by setting itself up as a middleman (B) between an Italian firm (A) and Amerix (C), a British Virgin Islands company alleged to have a Spanish business location, but without a Spanish VAT registration (or a registration in any other EU jurisdiction). The status of Amerix is something that could have been determined with even the most cursory due diligence inquiry. This suggests that Mexcom had reason to believe that its intra-Community sale was connected with fraud.

HMRC’s argument could be further buttressing by showing that Mexcom and Comexco were related parties. From this larger perspective it is reasonably easy to

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61 *Mecsek-Gabona*, at ¶52.
determine that this is a toilet paper carousel fraud that is controlled by Mexcom’s and Comexco’s simplified triangulations – all pivoting on the Amerix enterprise.

CONCLUSION

Fraudsters have found that simplified triangulations under Article 141 disguises the flow of goods involved in MTIC frauds. They have also found that when multiple and overlapping triangles are used, then the movement of goods becomes even more obscure. As a result, as enforcement becomes more cooperative among the member States there has been a heightened focus on triangular structures.

Case law is moving forward. New tools are being crafted for cross-border enforcement at every turn, and the Member States are becoming more inclination to use these tools, even when the immediate beneficiary is the fisc of a neighboring jurisdiction, not their own. These enforcement actions are creating problems for businesses that take a casual approach to triangular trade.

There is a considerable difference in the cooperative enforcement in Teleos, and the information sharing in Mecsek-Gabona. In Mecsek-Gabona the Hungarian tax authority submitted a request for information to the Italian tax authority under Article 5(1) of Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of VAT and repealing Regulation (EEC) No 218/92. From this request it learned that:

- Argo-Trade could not be found;
- The address used as Argo-Trade’s registered office was a private home;
- No company named Argo-Trade had ever been registered at that address;
- Argo-Trade had never paid VAT; and
- Argo-Trade was otherwise unknown to the Italian tax authority.

This kind of information sharing and cooperative enforcement is mild in comparison to what is coming next – Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties, and other measures (MARC). The new MARC, a central component of the Commission’s short term action plan was set out in a January 12, 2008 Communication. It is designed to keep pace with the rising tide of MTIC requests. It became effective January 1, 2012.

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62 HMRC asked for information from the Spanish tax authorities in Mexcom Ltd. and learned through this means that there were irregularities in the business address of Amerix in Spain, as well as the fact that Amerix was not registered for VAT in Spain. See supra note 35.
64 O.J. (L 84) 1 (2010).
65 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee, On a coordinated strategy to improve the fight against VAT Fraud in the European Union, COM(2008) 807. The long term action plan contained in the same document presented measures that in “… ensuing discussions in the Council … [were] regarded as more radical and could not be introduced in the short run.” EU Commission, Proposal for a Council Regulation on administrative cooperation and combating fraud in the field of value added tax (Recast), COM (2009) 427 (August 18, 2009) at 2. Other elements of the short term action plan included (listed at page 13): timeframe reductions,
In 2003 there were 3,355 MARC requests. By 2007 these requests had quadrupled to 11,794. By 2007 VAT claims related to MTIC fraud accounted for 57.5% of all MARC requests. Facilitating cross-border MTIC enforcement is the heart of the new MARC.

The sweep of the new MARC is broad, and mandatory. The requested tax authority “… shall provide any information which is foreseeably relevant to the applicant authority in the recovery of its claims.” The requested tax authority must comply, and cannot decline to supply information “… solely because this information is held by a bank, other financial institution, nominee, or person acting in an agency or a fiduciary capacity.”

There are three main parts to MARC: rules on exchange of information; standardization of notification documentation; mechanisms for assistance in the recovery of claims, and precautionary measures. Considerable effort has gone into making instruments uniform and encouraging uniform practices.

With the new MARC in place, and very helpful decisions of the CJEU dealing with simplified triangulation and the “safety net” (X and Facet), as well as the ability to deny a claimed zero-rate in an intra-Community supply (Mecsek-Gabona) based on Kittel-type tests of knowledge of fraud (known or should have known), it is very likely that we are at the beginnings of a new round of MTIC enforcement actions.

Triangulation will be at the center of the perfect storm. The Augsburg investigation of hundreds of triangulated sales of goods and services throughout the EU, involving most of the 27 Member States, is just the beginning.