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Abbreviations

Company	the Company which challenged Customs Authority's decision
CPC	Civil procedure code
CrPC	Criminal Procedure Code
SCJ	Supreme Court of Justice
CC	Customs Code
ECtHR	European Court of Human Rights
JSRS	Justice Sector Reform Strategy for 2011-2016

Introduction

Document's Background and Purpose

The judicial system of the Republic of Moldova, which includes more than 50 courts with three levels of jurisdiction, was always under the risk of developing an inconsistent judicial practice. Despite numerous legislative levers for harmonizing the judicial practice, the situation did not improve much until 2012. The limited impact of the efforts to harmonize the judicial practice could be explained by the lack of legal traditions on following the interpretation of the law made by higher courts, a superficial reasoning of court decisions and the inconsistency of the jurisprudence of the Supreme Court of Justice (SCJ) and courts of appeal.

Given the inconsistent judicial practice, the Justice Sector Reform Strategy (JSRS), in intervention areas 1.2.4 and 4.1.3, emphasizes the need for unification of the judicial practice. This paper targets the intervention area 1.2.4 of the JSRS.

Starting with 2012, the SCJ became more active in its efforts to harmonize the judicial practice. By November 1st, 2015, the SCJ adopted more than 30 decisions of the Plenum, more than 80 recommendations and more than 30 opinions on the application of the law. In addition, the search engine for searching relevant case law on the SCJ's Web site has been improved.

This document does not offer an assessment on how efficient is the use of the mechanisms for unifying the existing judicial practice of the Republic of Moldova or their sufficiency. Instead, this analysis tries to establish, in a certain narrow area, whether the practice of the Moldovan courts is uniform. In other words, the analysis focuses on the impact of the efforts of harmonizing the judicial practice rather than on the process by which this impact has been achieved. The purpose of this analysis is to further stimulate the process of harmonizing the judicial practice.

The analysis describes, in general terms, the needs for having a consistent judicial practice, the ECtHR's standards on the harmonization of the judicial practice and the findings of our judicial practice review.

This document analyses the practice of courts on disputes between customs authorities and private companies regarding retroactive increase of customs fees following the detection of certain irregularities after the customs clearance. These irregularities usually consist in small duty quotas applied to imports or unjustified customs privileges.

The analysis refers to the application by courts of art. 181/1 para. (3) of the Customs Code (in the wording until 1 January 2014) the increase of customs fees may be disposed only if the customs regime has been applied „based on inaccurate or incomplete information", which was obtained by the customs body after customs clearance. This document reviews how the courts applied this provision.

Methodology

This document was drafted during the period of September - November 2015. It reviews the practice of courts on disputes between customs authorities and private companies regarding retroactive increase of customs fees following the detection of certain irregularities after the customs clearance.

The analysis refers to the application by courts of art. 181/1 para. (3) of the Customs Code. According to this norm as in the wording until 1 January 2014, customs authorities could increase the customs fees only if the customs regime has been applied „based on inaccurate or incomplete information", after the customs clearance. By Law No. 324/2014, Article 181^1 (3) of the Customs Code was amended to extend the grounds for which customs authorities might increase the customs fees. Taking this into account, we reviewed only the cases that referred to the decisions of the customs authorities issued before January 1, 2014.

On May 8, 2014, the SCJ adopted the Recommendation no. 65 which explained the application of Article 181^1 (3) of the Customs Code. Thus, it provided that in case of green channel import entries, the increase of custom fees may be applied even without new information. In other cases, if goods were imported on the basis of accurate and complete information, the customs authorities cannot apply regulation decisions (the decisions on increasing the customs fees), even if the duty rate for imported goods was wrong. Basically, we checked to which extent the Recommendation no. 65 was respected. Since this recommendation was adopted on May 8, 2014, we reviewed only decisions issued by the SCJ from May 10, 2014, through October 31, 2015.

We studied the entire practice of the SCJ from May 10, 2014 through October 31, 2015. For this purpose, we consulted the court decisions available on the SCJ's Web site. As a result, we did not review the cases which were not challenged by the parties. We found that during this period, the SCJ examined the merits of 14 such cases. In 12 cases, the SCJ issued a final solution, while other two cases were sent for re-examination. We also identified cases in which the appeal was rejected due to its lateness or because the litigation involved the transfer of goods imported with tax privileges. Since such cases did not allow the SCJ to express its position about the applicability of Article 181^1 (3) of the Customs Code, we did not take them into account.

The analysis is not intended to establish whether there was a right or wrong solution in the 14 reviewed cases. We only reviewed the compliance of court solutions with SCJ's Recommendation 65. We reviewed both the practice of the SCJ and the solutions issued by other courts.

Summary

Given the inconsistent judicial practice, the Justice Sector Reform Strategy, in intervention areas 1.2.4 and 4.1.3, emphasises the need for unification of the judicial practice. This paper targets the intervention area 1.2.4 of the JSRS.

This document analyses the practice of courts on disputes between customs authorities and private companies regarding retroactive increase of customs fees following the detection of certain irregularities after the customs clearance. The analysis refers to the application by courts of art. 181/1 para. (3) of the Customs Code (in the wording until 1 January 2014) and the Supreme Court of Justice (SCJ) Recommendation no. 65. According to art. 181/1 para. (3) of the Customs Code and SCJ Recommendation no. 65, the increase of customs fees may be disposed only if the customs regime has been applied „based on inaccurate or incomplete information", which was obtained by the customs body after customs clearance.

For this research the entire practice of the SCJ between 10 May 2014 and 31 October 2015 was studied. In this period, the SCJ examined on the merits 14 appeals on points of law regarding these social relations. The SCJ sent two of these cases to re-examination and on 12 cases the final solution was adopted.

The analysis established that only in three out of the 12 cases decided irrevocably, the solutions given by the district courts were upheld by the SCJ. In the remaining nine cases (75%) first instance court judgments were quashed by the appeal court or by the SCJ. The SCJ overturned the verdict of the lower courts in six out of the 12 cases decided irrevocably, that is half of the cases. These figures clearly confirm lack of uniformity of practice concerning art. 181/1 para. (3) of the Customs Code in courts of different level of jurisdiction.

The SCJ issued solutions in compliance with Recommendation no. 65 in seven (57%) of the 12 cases decided irrevocably, while in the other five cases (43%) it did not properly follow this recommendation. In those five cases, the SCJ did not address the rules set out in Recommendation no. 65, even if the companies expressly invoked provisions of art. 181/1 para. (3) of the Customs Code or Recommendation no. 65. The Supreme Court of Justice itself acknowledged on two occasions the inconsistency of the SCJ practice regarding the application of Recommendation no. 65.

The inconsistency of the SCJ's practice is also confirmed by the divergent solutions adopted in respect to imports of the same products by different companies. It was established that two companies imported a food supplement and the SCJ's solution in the cases of these companies was diametrically opposite. A similar situation happened to other two companies that imported similar glass products.

The document analyses whether the divergence in the jurisprudence of the SCJ is determined by different interpretation of the Recommendation no. 65 by some judges. We found that in some cases, being part of different panels, the same judges voted for self-excluding solutions. In none of the analysed cases separate opinions were issued. Different solutions in similar cases could be explained by different performance of the parties in the hearings. However, this can hardly explain the inconsistency of solutions in these cases.

We wanted to establish if there is a link between the value of the disputes and upholding of the actions of the companies. The value of one of the 12 disputes exceeded by several times the total amount of all other 11 cases. In that case, the Supreme Court initially dismissed the action of the company and subsequently admitted a revision and annulled the customs decision. It seems, however, that in this case the final solution of the SCJ was determined by social impact of the dispute and seriousness of the deviation from Recommendation no. 65, rather than value of the dispute. In other cases, it has not been found an apparent link between the value of the dispute and the verdict of the SCJ.

The document confirms that the SCJ's practice on the implementation of Recommendation no. 65 is very inconsistent and there is no clear prevalence of one or other position. Although Recommendation no. 65 was enacted to unify the judicial practice, in time, no tendency to strengthen the position expressed by the SCJ's Recommendation was observed. On the contrary, in one of the decisions adopted in June 2015, the Supreme Court noted that another practice diametrically opposite to that suggested by Recommendation no. 65 was already established, without annulment of Recommendation no. 65. Moreover, the SCJ either did not react to the arguments raised by companies for compliance with Recommendation no. 65, or rejected these arguments through a general statement. Such practices cannot lead to a uniform judicial practice, neither in the lower courts, nor in the SCJ. It can only lead to loss of confidence in the judiciary.

Unification of the Judicial Practice?

In the Republic of Moldova, perhaps like in all current legal systems, the society functions on the basis of rules written by the legislative or executive powers. Traditionally, in continental legal systems, the role of the judiciary is perceived as that of an arbiter in citizens' litigations with the state, who takes the side of the weak and makes justice. Through their decisions, judges from such systems have the task to ensure the rule of law, rather than to establish new rules for the society.

History constantly confirms that the legislative process lags behind the evolution of the society. Social relations become increasingly more complex and diverse and legal norms, which are general by their nature, cannot offer solutions to every situation that may arise in real life. A legal provision that is too detailed or following blindly the letter of the law may seriously impact the efficiency of state institutions and raise social discontent. Moreover, in some countries, laws passed by the executive or legislative power are aimed at suppressing human rights and sometimes they considerably limit judges' possibility to deliver justice. This is why judges cannot refuse doing justice even if the law is twisted or does not offer a solution. Thus, in the Republic of Moldova, if a law violates human rights, judges may notify the Constitutional Court,[1] disregard the provisions of the regulatory acts that are inferior to the law[2] or even directly apply the provisions of the international treaty on human rights to the detriment of the national legislation.[3] Moreover, if the civil law does not offer a solution or when such solution is not clear, the law requires judges to apply the analogy to the law or to follow law principles.[4]

Few people read laws and even fewer understand them very well. On the other hand, citizens are interested in the impact of laws on their lives rather than in the text of laws. Therefore, it is the manner in which the law is applied rather than its text that determines the perception about the exact content of the law, inspire citizens' trust in the rule of law and creates the perception that justice was served.

The law does not apply just to a predefined person or group. It must generate similar effects for all those who come within its scope irrespective of their position in the society, property, political affiliation or other aspects. Therefore, the Constitution of the Republic of Moldova, Article 16 (2), establishes that the law applies to everyone without discrimination.

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[1] Article 12[1] of the Civil Procedure Code and Article 7 (3) of the Criminal Procedure Code

[2] Article 12 (2) of the Civil Procedure Code and Article 7 (4) of the Criminal Procedure Code

[3] Article 12 (4) of the Civil Procedure Code and Article 7 (5) of the Criminal Procedure Code

[4] For example, Article 12 (3) of the Civil Procedure Code

This constitutional norm does not acknowledge only everybody's equality in the eyes of the law, but also the equality in the eyes of the authorities applying it. This equality is impossible when a judge issues diametrically opposite solutions by applying the same law text to similar situations.

Generally, the common law system, by which the interpretation provided in higher courts' decisions is mandatory in solving similar cases in lower courts, did not appear as a result of the legislator's will. Rather, it was the result of the legislator's inaction, when judges had to do justice in matters to which the law did not provide a solution. This is why the precedent cannot invalidate a legal norm and can only clarify the application of a general provision in a concrete situation.

Justice can take only one form. In a judicial system there is no room for disorder or chaos. This will create only legal insecurity and uncertainty. The task of ensuring a good organization of a judicial system usually rests with the Supreme Court. Taking into account the independence of judges, a supreme court has some levers to ensure order in the judicial system. It should be mentioned though that judges' independence represents their right to do justice without being influenced to take a certain solution in a case. However, it does not mean that judges may neglect legal provisions or interpret the law to the detriment of a well-established judicial practice.

Perhaps, the main lever for ensuring order in judicial systems is to unify the interpretation of laws by judges. It is already settled tradition in European judicial systems to follow the interpretations of the law made by the highest court in a given state, irrespective of whether this is mandatory under the law or not. Recently, this principle seems to have also extended to the courts of appeal.[5] Following the interpretation made by a higher court is a sign of respect for that court and a way of ensuring public trust in the judicial system. Moreover, the judicial solution contradicting the practice of a higher court will be inevitably quashed. This does not mean, however, that lower courts cannot establish that a certain well established practice has become obsolete in the context of social reality or that the legal matter under examination is different. In such cases, judges should be extremely convincing and their approach should not vary from case to case.

Courts will follow the interpretation of the law made by a supreme court only when the practice of that court is uniform, judges understand its solutions, and if the solutions are well reasoned. On the other hand, it is ok for the judicial practice to evolve[6] and when a supreme court changes its practice it must mention this fact explicitly. These requirements are even more important in the age of the Internet, when all decisions of a supreme court are published and everybody can view them. In this context, the European Court of Human Rights noted that it is impossible to ensure fair proceedings if the supreme court of law either develops a contradictory practice or does not contribute to the harmonization of the existing contradictory practice.[7]

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[5] ECtHR's Decision in *Tudor Tudor vs Romania*, March 24, 2009, para. 26-32

[6] ECtHR's Decision in *Atanasovski vs Former Yugoslav Republic of Macedonia*, January 14, 2010, para. 38

[7] ECtHR's Decision in *Beian vs Romania*, December 6, 2007, para. 29-40

The possibility of inconsistent court decisions is an inherent characteristic of any legal system with multiple levels of jurisdiction or with courts with distinct competences. Such divergences may arise within the same court too, especially in the systems where the judicial practice was not unified well. These divergences by themselves can be tolerated for some time since the harmonization of the judicial practice is a long-term process. But it is important to verify whether:

a) Divergences are "profound and persistent";
b) The internal legislation provides mechanisms for addressing inconsistencies; and
c) These mechanisms are applied and, if yes, what are their effects.[8]

As mentioned earlier, a uniform judicial practice offers advantages both for citizens and for the judicial system. However, the harmonization process must be sufficiently flexible to allow the case law to evolve. The ECtHR does not accept "profound and persistent" divergences that persist too long in national judicial systems.[9]

The legislation of the Republic of Moldova provides multiple tools that can ensure the uniformity of the judicial practice. These include:

a) Advisory opinions of the SCJ in civil cases (Article 122 of the Civil Procedure Code);
b) The mandatory nature of the ECtHR's case law in criminal cases (Article 7 (8) and Article 427 (1) point 16 of the Criminal Procedure Code);
c) Appeal in the interest of the law in criminal cases (Article 7 (9) and Article 465[1] of the Criminal Procedure Code);
d) Appeal of criminal sentences contravening the previous practice of the SCJ (Article 427 (1) point 16 of the Criminal Procedure Code);
e) Decisions of the SCJ's Plenum; and
f) Disciplinary sanctions for judges who do not follow the uniform judicial practice (Article 4 (1) letter b) of Law No. 178/2014 Disciplinary Liability of Judges).

However, it is important to asses to what extent these tools are used and whether they have a real impact on the unification of the judicial practice.

[8] *Mutatis mutandis*, decision in *Albu and others vs Romania*, May 10, 2012, para. 34 p. III

[9] ECtHR's Decision in *Zivic vs Serbia*, September 13, 2011, para. 44-47, in which this period was two years.

Customs Clearance and Post Clearance Audit Procedure

The entry of goods in the Republic of Moldova is allowed upon the payment of a value added tax (VAT) and other custom fees. According to Article 96 of the Fiscal Code, the standard VAT value is 20%. For some products the VAT is reduced. Moreover, according to Article 103 of the Fiscal Code and Article 28 of the Law on the Customs Duty, before the year 2013, goods imported with the aim to be included in the joint stock of a company were exempted from customs duties if their value exceeded MDL 3000 per unit and their exploitation term was longer than one year.

The customs procedure for goods consists in an examination carried out by customs authorities at the moment of the clearance. To ensure a modern customs administration and the swift customs clearance procedures, the customs control, other than unannounced, is based mainly on the risk analysis performed by processing electronically, the import entry forms.[10] The level of the customs control based on risk analysis is determined by one of the customs channels (green, red or blue). Each channel represents a control level that must be applied to an import entry depending on the risk analysis results. The color of the channel serves to determine the strictness of this control. Thus, the green channel offers a customs warrant without a documentary and physical check, whereas the red channel allows entry only after a documentary and physical check.[11]

The customs authorities regularly carry out post clearance audits to identify potential deviations in imports. Post clearance audits aim to prevent and combat tax evasions. Such audits take the form of follow-up reviews of import entry forms and inspections of the documents accompanying the imported goods and if possible, the imported goods themselves, if such goods are identifiable.[12]

Article 181[1] (3) of the Customs Code, in the wording from 2008 through 2013, established the following:

> *"(3) If a repeated review of the import entry form or a follow-up review reveals that the customs treatment was applied on the basis of inaccurate or incomplete information, the customs authorities shall take actions to regulate this situation in light of the newly acquired information."*

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[10] Article 192, Customs Code

[11] Article 1, point 62, Customs Code

[12] Article 202/3, Customs Code

The regularization implies recalculating import rights and applying penalties in favor of the customs authorities by issuing a regularization decision.[13] From the moment the decision is brought to the notice of the payer, it becomes executory and can be enforced.

On May 8, 2014, in order to unify the judicial practice, the SCJ issued Recommendation no. 65 on the application of Article 181[1] (3) of the Customs Code. The SCJ recommended courts to examine and distinguish the following aspects when the object of litigation is a regularization decision issued as a result of a follow-up control:

1. If a regularization decision refers to import entries allowed through the green customs channel, the court should analyze the fairness of the established tariff category irrespective of the newly found circumstances;
2. If a regularization decision was issued as a result of newly found information that confirms that, at the moment of the clearance, the information provided for the import entry was inaccurate or incomplete, the customs authority has the competence to regulate the situation;
3. If the regularization decision was issued in the circumstances in which the information provided for the import entry was accurate or complete, but later the customs authority considered that the tariff was wrong, the customs authorities may not issue a regularization decision.

By Law No. 324 of December 23, 2013 (effective since January 1, 2014), para. 3 of Article 181[1] of the Customs Code was amended by replacing the wording "on the basis of inaccurate or incomplete information" with the word "by mistake." This amendment allows the customs authorities to regulate any situation when they find an error in customs clearance procedure.

[13] Article 127/13, Customs Code

SCJ's Practice analysis results

a) General Aspects

Considering the changes introduced by Law No. 324, we reviewed only the cases that referred to the decisions of the customs authorities issued before January 1, 2014. We checked the compliance with Recommendation 65 of the SCJ. Since this recommendation was adopted on May 8, 2014, we reviewed only the jurisprudence from the period of May 10, 2014, through October 31, 2015, on the regularization decisions issued before December 31, 2013.

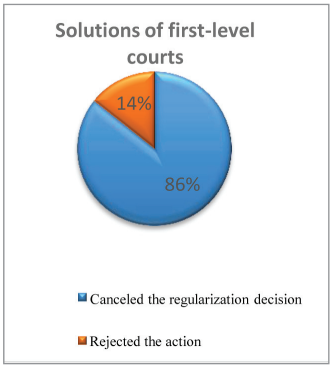
For that end, we consulted the court decisions posted on the SCJ's Web site. We found that during this period, the SCJ examined the merits of 14 cases regarding these social relations. The annex to this analysis presents the details about these cases.

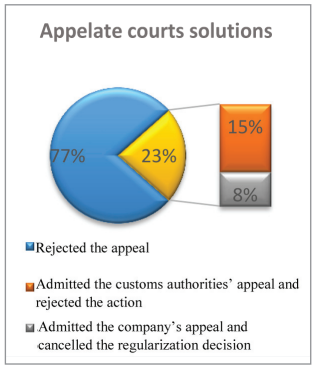
b) Solutions Issued at Each Court Level

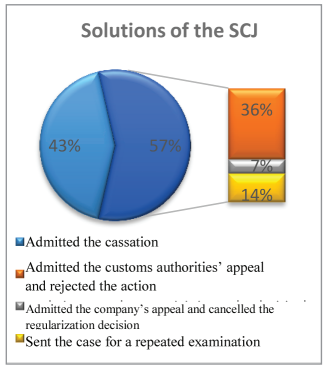
The decisions of the customs authorities can be challenged in courts. The majority of them, are examined in the following courts: examination on the merits in Botanica District Court, appeals in the Chisinau Court of Appeals, and appeals on the points of law at the SCJ. Only one case (IM Glass Container Prim SA) was examined on the merits in Chisinau Court of Appeals as a first instance, and appealed at the SCJ.

In 12 out of the 14 studied cases, the actions of claimant companies were admitted by the district courts. In most cases, the court found that the customs authorities failed to indicate what information for the clearance was inaccurate or incomplete and what other information they had obtained during post clearance audits.

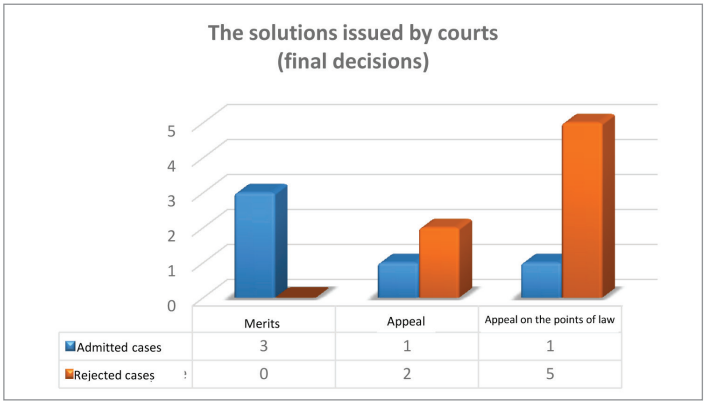
The appellate courts admitted only three appeals, one of which was filed by a company and two by the customs authorities. In its turn, the SCJ admitted six appeals of which five were filed by the customs authorities and only one by a company. These data clearly confirm the trend of the district courts to admit companies' actions and to cancel regularization decisions, and the SCJ's tend to reject companies' actions. The district courts admitted 86% of the examined actions. In its turn, the SCJ admitted the customs service appeals and rejected the action of the company in 36% of cases. The graphs below present the solutions issued by each court.







Out of the 14 examined cases, the SCJ sent two cases for a repeated examination and in 12 cases it issued a final solution. In five out of the 12 solved cases SCJ satisfied the plaintiffs and cancelled the decisions of the customs authorities, and in seven cases it found that the customs authorities' decisions were legal and the companies' actions were rejected. The graph below presents more details about these cases.



The data from above confirms that only in three cases[14] the solutions of the first-level court were upheld. The SCJ changed the solution of the first-level court in 6 out of 12 cases, that is in half of the cases on which the first-level court issued an irrevocable decision. These figures confirm the inconsistency between the judicial practices of first-level, appellate and the SCJ on the application of Article 181[1] (3) of the Customs Code.

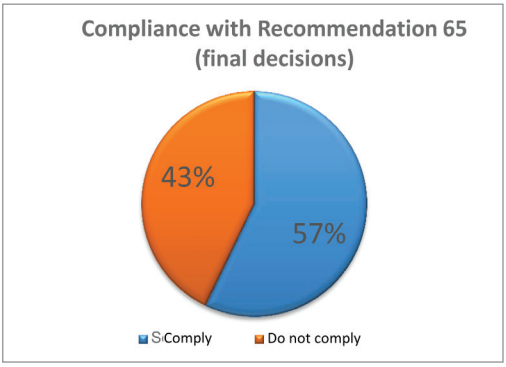
c) Compliance with the SCJ's Recommendation

On May 8, 2014, the SCJ adopted Recommendation no. 65, in which it explained how courts should apply Article 181[1] (3) of the Customs Code. Thus, if the import entry was cleared through the green channel, the tariff increase is possible even without new

[14] 3ra-605/14 ÎM Becor SRL; 3ra-1093/2014 Tetis International Co SRL; and 3ra-811/15 Taix prim SRL

information. In other cases, if the import was cleared on the basis of accurate and complete information, the customs authorities may not issue any regularization decision even if the applied tariff was wrong. As part of this study, we verified how SCJ had applied its own Recommendation no. 65.

The graph below presents if the decisions adopted in the 12 cases with final solutions are consistent with Recommendation no. 65.



The SCJ issued solutions compatible with Recommendation 65 in seven (57%) out of the 12 cases. In the remaining five cases (43%) the recommendation was not applied properly.

As for the compliance with Recommendation 65, in two cases,[15] the SCJ admitted the customs authorities' appeal and rejected the company's action, finding that the goods were cleared through the green channel and, consequently, it was not necessary to establish new circumstances for a regularization decision. In one case,[16] regularization decisions following post clearance audit were cancelled because the customs authorities did not produce evidence that the information presented for the customs clearance was inaccurate or incomplete. In one case post clearance audit revealed that the data presented by the company for the customs clearance was wrong. In other four cases[17] regularization decisions were cancelled because the customs authorities did not produce evidence confirming that the information presented for the customs clearance was incomplete or inaccurate. However, only in one case (3ra-85/15 IM Glass Container Prim SA) of the latter four, the SCJ adopted a new decision. In the remaining three cases it upheld the decisions of lower courts.

In five cases,[18] the SCJ failed to follow the provisions set forth in the Recommendation no. 65 even though in some cases companies expressly invoked Article 181[1] (3) of the Customs Code. For example, in the cases 3ra-548/14 *Adekin SRL* and 3ra-534/15 *IM VBH-Ofir SRL,* although the SCJ referred to Article 181[1] of the Customs Code, it did not express its opinion about the applicability of para. 3 even though the customs authorities had no

[15] 3ra-1327/14 Sanform-Prim SA; and 3ra-228/15, Supraten S.A.

[16] 3ra-1090/14 UBFB Trade Grup

[17] 3ra-605/14 ÎM Becor SRL; 3ra-1093/2014; Tetis International Co SRL; 3ra-811/15 Taix prim SRL; and 3ra-85/15 IM Glass Container Prim SA

[18] 3ra-548/14 Adekin SRL; 3ra-228/15 Supraten SA; 3ra-304/15 Pronectar Prim SRL; 3ra-534/15 ÎM VBH-Ofir SRL; and 3ra-833/15 IM Vinamex SRL

evidence that companies presented inaccurate or incomplete information for the customs clearance. Moreover, in the case 3ra-833/15 *IM Vinamex SRL*, the SCJ mentioned in its decision that Article 181[1] (3) of the Customs Code limits the regularization possibility. However, the SCJ confirmed the legality of the regularization decision even though the customs authorities did not produce evidence that the company presented inaccurate or incomplete information for the customs clearance. In the case 3ra-228/15 *Supraten SA*, the SCJ even made a general statement in its decision that the plaintiff's reference to Recommendation 65. is groundless.

It seems that the SCJ itself acknowledged the inconsistency of the SCJ's practice in this area, as seen in from the case *IM Glass Container Prim SA*. In this case, initially, the SCJ rejected the company's action on the grounds that the two contested regularization decisions were legal. In this dispute, the customs authorities did not produce evidence that the alleged irregularity during the customs clearance was caused by inaccurate or incomplete information offered by the company and the company's lawyers expressly invoked Article 181[1] (3) of the Customs Code and the previous judicial practice that suggested the need to cancel regularization decisions. 16 months later, the SCJ admitted the revision request from the company and cancelled the regularization decisions, invoking the provisions of Recommendation 65. The SCJ motivated the admission of the revision request by the contradiction of the initial decision with the existing practice.

In the same context, in the decision on the case *IM VBH-Ofir SRL*, the SCJ mentioned expressly that "until recently the judicial practice in this area was not uniform and clear, but now the SCJ has found a certain solution for such cases." In this case the SCJ rejected the company's action, ignoring Recommendation 65 and the final solution adopted in *IM Glass Container Prim SA*. The SCJ adopted its decision in the case *VBH-Ofir SRL* in June 2015, 13 months after the adoption of Recommendation 65. However, even after June 2015, the SCJ passed decisions that were compliant with Recommendation 65.[19]

The inconsistency of the SCJ's practice is confirmed by diverging solutions adopted for the imports of the same products. Thus, the cases *Tetis International Co SRL* and *IM Vinamex SRL* referred to the import of Vitrum supplement. In none of these cases, the customs authorities confirmed that the company had presented inaccurate or incomplete data for the customs clearance. However, the action *Tetis International Co SRL* was admitted and the action *IM Vinamex SRL* was rejected. A similar situation was with the companies *Supraten-plus SRL* and *Supraten SA,* which imported the same glass products. The action of *Supraten-plus SRL* was admitted and that of *Supraten SA* was rejected.

As part of the study we checked whether a change in the SCJ's practice during the reference period can account for divergences in the case law. A brief review of the dates on which the SCJ adopted its decisions confirms that it adopted solutions that were compatible with Recommendation 65 both in August 2014[20] and in September 2015.[21] Moreover, the

[19] The case 3ra-811/15 Taix prim SRL, solved by the SCJ on September 2, 2015
[20] The case 3ra-605/14 IM Becor SA, solved by the SCJ on August 20, 2014
[21] The case 3ra-811/15 Taix prim SRL, solved by the SCJ on September 2, 2015

decisions by which actions were admitted and rejected were regularly adopted during the entire reference period. This confirms that the SCJ's practice did not change suddenly.

Taking into account the realities of the Republic of Moldova, we also checked whether there was a connection between the admission of companies' actions and the case financial value. In one case (*IM Glass Container Prim SA*) the value of the claim exceeded several times the total value of all other 11 cases. Initially in this case, the SCJ rejected the company's action but later it admitted the company's revision request and cancelled the regularization decisions. The SCJ explained the admission of the request by the contradiction between the initially adopted solution and the established judicial practice. This approach raises questions because the contradiction with the established judicial practice may not constitute grounds for admitting a revision request.[22] A little earlier, the SCJ had rejected another revision request filed by a company and during our study we found that the judicial practice in this area is not well established. It seems, more likely, that in this case the SCJ's final solution was determined by the social impact of the dispute and the severity of the deviation from Recommendation 65[23] rather than by the value of the litigation. In the other cases we did not find any clear relation between the value of the litigation and the solution of the SCJ.

The findings above confirm that the SCJ's practice of applying Recommendation 65 is inconsistent and that the SCJ does not have a predominant approach. Although Recommendation 65 was adopted to harmonize the judicial practice, over time the SCJ's practice did not reflect a trend toward strengthening the position expressed in this recommendation. On the contrary, in one of its decisions passed in June 2015,[24] the SCJ mentioned that it had established a new practice that was diametrically opposite to the one suggested in Recommendation 65 but without repealing Recommendation 65. Moreover, often the SCJ did not react to companies' arguments regarding the application of Recommendation 65 or rejected these arguments by a general statement. All these cannot contribute to the unification of the judicial practice in lower courts and in the SCJ and only weakens the trust in the judicial system.

[22] Article 449 of the Civil Procedure Code

[23] This litigation involved an important player of the Moldovan industry, who, as a result of the regularization decisions, was forced to close its business. In this case, there is no doubt that IM Glass Container Prim SA was right and that the deviations alleged by the customs authorities were groundless.

[24] The case 3ra-1090/14 UBFB Trade Grup

Conclusions

- The data clearly confirms the trend of the district courts to admit companies' claims and to cancel regularization decisions, and the SCJ's predisposition to reject companies' actions. The district courts admitted 86% of the examined actions. In its turn, the SCJ admitted the customs service appeals and rejected the action of the company in 36% of cases.
- Only in three out of the 12 irrevocably resolved cases, the district courts' solutions remained in force through all court levels up to the SCJ. In the other 9 cases (75%), the decisions of district courts courts were quashed by the appellate courts or SCJ.
- The SCJ overruled the solution issued by lower courts in 6 out of the 12 irrevocably resolved cases that is in half of the cases. These figures clearly confirm the inconsistency of practices in applying Article 181[1] (3) of the Customs Code between courts of different levels.
- The SCJ issued solutions compatible with Recommendation 65 in seven (57%) out of the 12 irrevocably resolved cases and in the remaining five cases (43%) this recommendation was not applied properly. In these five cases, the SCJ did not express its position on the rules established in Recommendation 65 even though in some of these cases companies themselves expressly invoked Article 181[1] (3) of the Customs Code and even Recommendation 65.
- On two occasions, the SCJ itself acknowledged the inconsistency of its practice regarding the application of Recommendation 65.
- The inconsistency of the SCJ's practice is confirmed by diverging solutions adopted for the imports of the same products by different companies. Thus, the SCJ issued diametrically opposite solutions in the cases of two companies that imported the same food supplement. Similar situation happened with another two companies that imported glass products.
- The divergences in the SCJ's case law cannot be explained by some change in its practice during the reference period. A brief review of the dates on which the SCJ adopted its decisions confirms that it adopted solutions that were compatible with Recommendation 65 both in August 2014 and in September 2015. Moreover, the decisions by which actions were admitted and rejected were regularly adopted during the entire reference period. This confirms that the SCJ's practice did not change suddenly.
- We also checked whether there was a connection between the admission of companies' actions and the values of the corresponding claims. The value of one of the 12 claims exceeded

several times the total value of all other 11 cases. Initially in this case, the SCJ rejected the company's action but later it admitted the company's revision request and cancelled the contested regularization decisions. It seems, however, that in this case the SCJ's final solution was determined by the social impact of the dispute and the severity of the deviation from Recommendation 65 rather than by the value of the case. In the other cases we did not find any clear relation between the value of the litigation and the solution of the SCJ.

The findings above confirm that the SCJ's practice of applying Recommendation 65 is inconsistent and that the SCJ did not even have a predominant approach. Although Recommendation 65 was adopted to harmonize the judicial practice, over time the SCJ's practice did not reflect a trend toward strengthening the position expressed in this recommendation. On the contrary, in one of its decisions passed in June 2015, the SCJ mentioned that it had established a new practice that was diametrically opposite to the one suggested in Recommendation 65 but without repealing Recommendation 65. Moreover, often the SCJ did not react to companies' arguments regarding the application of Recommendation 65 or rejected these arguments by a general statement. All these cannot contribute to the harmonization of the judicial practice in lower courts and in the SCJ and only weakens the trust in the judicial system.

Annex: A Summary of the Examined Cases

Case				District court		Court of Appeal		Supreme Court of Justice		
case no.	Claimant	date of the customs service decision	Value of the dispute (MDL)	date	solution	date	solution	date	solution	argumentation on application of art. 181/1 para. 3 Customs code
3ra-548/14	Adekit SRL	8/11/2012	104.048	13/6/2013	admits the company claim /quashes the regularization decision	12/12/2013	rejects the Customs Service appeal	21/5/2014	admits the Customs Service Appeal/rejects the company claim as ill founded	Referring to art. 181/1 para. 1 and 5 Customs Code, the Supreme Court noted that reclassification by customs service in another tariff heading corresponds entirely to the law. SCJ did not refer to art. 181/1 para. 3 Customs Code.
3ra-605/14	IM Becor SRL	9/10/2012	849.254	27/5/2013	admits the company claim/ quashes the regularization decision	23/1/2014	rejects the Customs Service appeal	20/8/2014	rejects the appeal	Referring to art. 181/1 para. 3 Customs Code, the Supreme Court noted that the Customs had to indicate that the information submitted was inaccurate or incomplete. Customs Office did not point the information classified as inaccurate or incomplete, and established the new circumstances.
3ra-930/14	Supraten-plus SRL	22/2/2013	265.988	5/6/2013	rejects the company claim	19/2/2014	admits the company claim/ quashes the regularization decision	15/10/2014	rejects the appeal	SCJ, in examining the accuracy of appliable payments to establish customs duties on imports of chandeliers found that based on an expert report, the Customs Office faild to provide indisputable evidence submitted to the court, which whould demonstrate the company's intention to harm state budget.
3ra-1093/2014	Tetis International CO SRL	2/7/2013	2.160.896	23/10/2013	admits the company claim/ quashes the regularization decision	8/4/2014	rejects the Customs Service appeal	12/11/2014	rejects the appeal	The case concerns the import of „Vitrum" supplements. Applying the provisions of art. 181/1 para. 3 Customs Code, the Supreme Court noted that the customs authority did not point what kind of inaccurate or incomplete information was provided by the company, nor the additional information that was detected in the post clearance control or was not submitted at the customs clearance, from the company in question.
3ra-1327/14	Sanfarm-Prim SA	18/2/2013	792.406	6/12/2013	admits the company claim/ quashes the regularization decision	4/6/2014	rejects the Customs Service appeal	12/11/2014	admits the appeal and sents the case for re-examination	SCJ sent the case for re-examination, because the Court of Appeal failed to rule on an argument invoked by the participants. In regard to art. 181/1 para. 3 Customs Code, SCJ noted that on products imported, cleared in the green corridor, the correction of customs declarations can be made even in the absence of incorrect or inaccurate information.

Case				District court		Court of Appeal		Supreme Court of Justice		
case no.	Claimant	date of the customs service decision	Value of the dispute (MDL)	date	solution	date	solution	date	solution	argumentation on application of art. 181/1 para. 3 Customs code
3ra-1279/14	Lismedfarm SRL	17/10/2013	114.975	10/2/2014	admits the company claim /quashes the regularization decision	5/6/2014	rejects the Customs Service appeal	26/11/2014	admits the Customs Service Appeal/rejects the company claim as ill founded	SCJ noted that the correction of customs declarations, cleared in the green corridor, the corrections can be made even in the absence of incorrect or inaccurate information.
3ra-1090/14	UBFB Trade Grup	6/12/2011	756.197	16/7/2013	admits the company claim /quashes the regularization decision	31/1/2014	rejects the Customs Service appeal	17/12/2014	admits the Customs Service Appeal/rejects the company claim as ill founded	Applying art. 181/1, para. 3 Supreme Court found that customs authorities acted lawfully because the data submited by the company in the audit procedure did not correspond to the data presented by the company when imported products
3ra-85/15	IM Glass Container Prim SA	6/4/2012	17.909.458	N.A.	N.A.	25/2/2013	rejects the company appeal	14/8/2013	rejects the claim	The company invoked the lack circumstances provided to apply the art. 181/1 para. 3 of the Customs Code. SCJ has not ruled on this argument.
		4/5/2012	15.108.992					10/12/2014	admits the appeal for review	SCJ granted the application for review, as in four cases settled in 2011-2013, it adopted different solutions than in the appeal in question. Therefore, the revised decision was contrary to existing practice and the principle of unifying the jurisprudence.
								21/1/2015	admits the claim in the favor of the Company	Without raising art. 181/1 Customs Code or Recommendation. 65, SCJ noted that the customs authority faile to submit conclusive and relevant evidence demonstrating that the alleged error was not the fault of the applicant.
3ra-228/15	Supraten SA	22/2/2013	48.978	16/6/2014	admits the company claim/ quashes the regularization decision	29/10/2014	admits the Customs Service Appeal/rejects the company claim as ill founded	11/3/2015	rejects the appeal	SCJ, in examining the accuracy of payments to establish customs duties on imports of chandeliers, noted that the import was done through the green channel, and in this case the customs authority was competent to amend tariff position even in the absence of any incorrect or inaccurate information. Through a general statement, Supreme Court of Appeal noted that the Court of Appeal reference to Recommendation No. SCJ. 65 is groundless. CSJ refused to take into account an expert report which implicitly confirmed no intention of prejudicing the state budget. Examining a similar situation involving the company Supraten-Plus, CSJ gave an opposite solution.

Case				District court		Court of Appeal		Supreme Court of Justice		
case no.	Claimant	date of the customs service decision	Value of the dispute (MDL)	date	solution	date	solution	date	solution	argumentation on application of art. 181/1 para. 3 Customs code
3ra-304/15	Pronectar Prim SRL	1/7/2013	187.325	4/6/2014	admits the company claim/ quashes the regularization decision	30/10/2014	rejects the Customs Service appeal	1/4/2015	admits the Customs Service Appeal/rejects the company claim as ill founded	Referring to art. 181/1 para. 1 and 5 Customs Code, the Supreme Court established that the product reclassification by customs Service in another tariff heading corresponds entirely to them and is not contrary to Art. 181/1 para. 3 Customs Code. SCJ noted that imported goods used for construction of a refrigetator when other parts are used to build the refrigerator are procured from Moldova, can not benefit from tax incentives, although this was not explained at the time of import.
3ra-759/15	Bucuria-Saturn SRL	13/12/2013	591.941	10/9/2014	admits the company claim/quashes the regularization decision	27/1/2015	rejects the Customs Service appeal	3/6/2015	admits the Customs Service Appeal/rejects the company claim as ill founded	Supreme Court sent the case for re-examination because thecourt of appeal made an error in the decision, referring to another company, not a part of the dispute
3ra-534/15	IM VBH-Ofir SRL	22/9/2012	38.849	16/6/2014	admits the company claim/ quashes the regularization decision	26/11/2015	rejects the Customs Service appeal	17/6/2015	admits the Customs Service Appeal/rejects the company claim as ill founded	Art. 181/1 par. 1 Customs code allows correction of customs declarations and par. 3 refers only to amend the customs regime, which did not occur in this case. Until recently there was no uniform and clear judicial practice on this subject, but at the moment SCJ has finalized a solution already certain on this issue, concluding that the the Customs Service is entitled during the later check to recheck previous customs declarations to establish customs tariff code that was to be applied correctly to duty, to calculate and collect customs duties that were not calculated. Lower courts have said that under art. 181/1 para. 3 Customs Code, such a correction is not allowed.
3ra-843/15	IM Vinamex SRL	22/5/2012	214.124	20/6/2014	admits the company claim/ quashes the regularization decision	17/2/2015	admits the Customs Service Appeal/rejects the company claim as ill founded	8/7/2015	rejects the appeal	The case concerns the import of „Vitrum" supplements. SCJ noted that under Art. 181/1 para. 3 Customs Code, the customs declaration correction is possible only in case of incorrect or inaccurate disclosure. However SCJ concluded that this does not prevent the public authority (Customs Service) to carry out further checks on verifying the accuracy of information presented.

Case				District court		Court of Appeal		Supreme Court of Justice		
case no.	Claimant	date of the customs service decision	Value of the dispute (MDL)	date	solution	date	solution	date	solution	argumentation on application of art. 181/1 para. 3 Customs code
										➘ In this case, the Supreme Court found no violation of par. 3 although it did not explain what naccurate or incorrect information found in later audit procedure clearance. Examining a similar situation involving a company „Tethys International CoSRL", on the same product, CSJ gave an opposite solution.
3ra-811/15	Taix prim SRL	9/7/2010	403.381	30/9/2014	admits the company claim/ quashes the regulariza-tion decision	29/1/2015	rejects the Customs Ser-vice appeal	2/9/2015	rejects the appeal	SCJ noted that under Art. 181/1 para. 3 Customs Code, the customs declaration correction was possible only in the case of incorrect or inaccurate information provided at imports. The customs au-thority did not request other documents at the time of clearance in order to confirm the correctness of the customs value of imported goods. Subsequently, the customs authority failed to provide evidence that would confirm the reduction of the value of goods imported by the company.
		med. Value	**6.528.361**	**502181,60**						
		med. Value of actions admitted	**3.679.519**	**525645,51**						

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