

## APPLICATION OF SOFT LAW INSTRUMENTS IN INTERNATIONAL ECONOMIC LAW: INSIGHTS ON LITHUANIAN PRACTICE ON THE LEGAL REGULATION OF CUSTOMS DUTIES

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### Abstract

**Purpose** – the main aim of this article is to describe the legal status and purpose of soft law sources in international economic law (international customs law, regulating the taxation of international trade) and their relationship with the rules of the European Union (hereinafter EU) and national customs law.

**Design/methodology/approach** – analysis of relevant issues is based both on theoretical (analysis and synthesis, systematic, comparative) and, in particular, empirical methods (statistical analysis of data, analysis of documents, generalization of professional experience, in particular – practice of the courts of Lithuanian Republic in disputes with customs authorities as well as the practice of the CJEU. The article consists of an introduction, four chapters and conclusions.

**Finding** – the results of the research points out that currently the national courts of Lithuania, as an EU Member State, aren't fully following the constantly evolving jurisprudence of the CJEU, in particular, on issues of soft law sources applicable to the tariff classification of goods, customs valuation and their relationship with the EU customs legislation (EU Combined Nomenclature, Community Customs Code).

**Research limitations/implications** – the analysis is limited to a certain period of time (yrs. 2010 – 2015) and is based on the practice of the Lithuanian Supreme Administrative Court in cases related to the activities of customs authorities and taxation with customs duties in Lithuania as well as the practice of the CJEU, concerning the *tariff classification of goods*.

**Practical implications** – as it can be seen from the practice of national (Lithuanian) cases, related to the tariff classification of goods and their customs valuation, there are various obstacles to the efficient functioning of relevant soft law sources in coherence with the EU practice, formulated by the CJEU. These obstacles and problems includes accessibility to the certain soft law sources (HSEs) on the national level, incorrect recognition of their legal value in national judicial proceedings and, in certain cases, granting the direct effect to the WTO soft law sources, while such feature is generally not recognized by the CJEU. This implies the need to modify and adjust the rules of national law, in particular, the Law on Customs of the Republic of Lithuania.

**Originality/Value** – general questions on the status of soft law sources in the field of international economic law are considered quite widely in the legal doctrine by foreign authors (Lux, 2007; Weerth, 2007; Schaffer, Pollack, 2010; Wolfgang, Kafeero, 2014). However, the national legal doctrine (in Lithuania) examines only the general issues on application of soft law sources, recognizing the importance of the formally legally non-binding legislation, whose purpose is to ensure the uniform application of customs legislation (Medelienė, Sudavičius, 2011). On the other hand, the practical application of these sources of law (the analysis of specific examples of the national case law) is not assessed, described and / or compared to the analogous CJEU practice.

**Keywords:** international economic law, soft law, customs law, tariff classification of goods, Harmonized System Explanatory Notes (HSEs), World Customs Organization (WCO).

**Research type:** research paper.

## Introduction

The fundamental objective of global development in the modern era, which is targeted by both the international community and individual countries, is to form favorable conditions for the development of the society and its welfare and to create an environment, which would guarantee equal social and economic conditions for sustainable growth. On the other hand, the processes of globalization, as an exclusive feature of modern social and economic system (Hirst, Thompson, 1992; Jusčius, 2006), characterize social relations in the modern world. This process means the creation of a single global economy, when the globally geo-dispersed activities are linked into a coherent complex where the interdependence relations link the entities, participating in it (Linarelli, 2014). Thus, sustainable development, economic growth and development objectives of each country are related to globalization. One of the most important and dynamic global economic factors, which is influencing the globalization, is international trade. Accordingly, it is noticed both at theoretical and practical level, that in the current circumstances, no country can achieve economic growth without being present actively in international trade (Laurinavičius et al., 2014).

These processes are also crucial for the evolution of legal systems both on the international and the national levels. Specifically, the most important factor for the changes in international trade and its development in the 20th century was the abandonment to apply various national restrictions on foreign trade. After the Second World War, countries of the world have adopted the agreements on the liberalization of international trade and in 1995 established the World Trade Organization (WTO). This led to the transformation of local market specifics in individual states and to the disappearance of many national legal regulatory mechanisms, which created barriers for international trade. As it is noted by legal scholars (Herdegen, 2013) these processes have also formed a special supranational branch of public law, governing international trade, that is international economic law.

Thus, authors, who are exploring evolution of international economic law and its functioning (Folsom, Gordon, Spanogle, 2004; Herdegen, 2013; Laurinavičius et al., 2014), emphasizes that although a modern international economic order is regulated by international agreements, conventions and international organizations, such as WTO, WCO and regional international organizations, such as customs unions (to which the EU itself is attributed), that help to balance the interests of the countries concerned. On the other hand, as it is also noticed by the same authors, despite these processes, international trade operators nowadays face different legal regulations of trade relations on the level of domestic (national, internal) law. It is clear that for these reasons, at various international trade tariff regulation levels (unilateral, bilateral / regional and multilateral), both the states and individual international trade operators are faced with complex problems associated with relationship between international and national law, the binding (or non binding) legal force of individual sources of international law and with issues related to the division of competence between national and international institutions. Existing complicated regulatory system of customs duties (GATT and WTO agreements, other international treaties and conventions, such as 1983 Harmonized System Convention), the wide range of soft law sources (explanations, recommendations), which is used for their interpretation and provided by the international organizations (WTO, WCO), other sources: preferential trade agreements between different states and even the legislation of

regional international economic organizations (such as the EU), causes quite a wide range of theoretical and practical problems for the regulation of international trade using tariff regulation measures (customs duties).

Accordingly, the **purpose** of this article is to describe the legal status and objectives of soft law sources in international economic law (international customs law, regulating the taxation of international trade) and their relationship with the rules of the European Union (hereinafter - EU) and national customs law. In order to achieve it, The following **objectives** of the article were formulated: (i) to examine how the Republic of Lithuania, as an EU Member State, applies international soft law sources in the area of tariff classification and customs valuation of imported goods for customs purposes and (ii) to compare the relevant judicial practice of national courts with the practice of the Court of Justice of the European Union (hereinafter - the CJEU).

### **The status soft law instruments in international economic law: general insights and problematics**

From a legal point of view, specific public relations, arising from international trade, and regulatory areas of mutual compatibility are addressed by all global trading partners in accordance with the general principles enshrined in the WTO Agreements and, in particular, the General Agreement on Tariffs and Trade (hereinafter - GATT Agreement) and its Annexes (Law of the Lithuanian Republic on the ratification of the agreement, founding the World Trade Organization and its Annexes, 2001), which present a single regulatory framework for the international trade and establishes the generally recognized principles of free international trade and fair competition. As it is emphasized in the scientific literature (Laurinavičius et al., 2014), the direct application of these basic principles simplify negotiations between the states, giving them a clear, purposeful and common procedures for the resolution of trade disputes and resolving other related issues.

However, international trade is inextricably linked with the responsibilities of certain countries (or their groups) to ensure the protection of their internal market, which primarily are related to the establishment and application of customs duties on imported goods of foreign origin. In this respect, the basic provisions of the WTO Agreements, which Lithuanian Republic has ratified in 2001 (Agreement founding the World Trade Organization, 2001), are the objective basis for the standardization of international trade and defines quite clear rules for its taxation by imposition of customs duties (import taxes), based on the responsibilities of the states not to discriminate goods of foreign origin (Einhorn, 2012). For example, the WTO Agreement on Rules of Origin contains general provisions for determining customs origin of goods, i.e. the state, which is considered the country of origin of goods for customs purposes and which determines what type of customs duties - conventional (regular) or preferential (reduced) should be applicable to the imported goods. Accordingly, the WTO Agreement on the implementation of the Article VII of GATT regulates determination of the customs value of goods which is used as the basis for the calculation of the customs duties, since the absolute majority of the customs duties worldwide are based on the value (*ad valorem*) duty rate setting (Lux, 2002).

Therefore, according to international customs law, specific customs duty rate is usually determined by three main elements, the price, that is the customs value of

imported goods; customs origin, that is state or region in which goods originated (were produced) and classification (code), i.e. the heading or subheading of the Combined Nomenclature used to identify the goods for customs purposes (Baronaitė, 2010). Globally, the goods are classified for customs purposes under the provisions of Harmonized System, set by the Brussels convention on the tariff classification of goods (1983), to which the Republic of Lithuania joined in 1995 (International Convention *on the Harmonized Commodity Description and Coding System* (adopted in Brussels on the 14th of June, 1983), 2003; *hereinafter* - Harmonized System Convention). The EU applies its own Combined Nomenclature (Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, 1987), which is based on the Harmonized System, administered and supervised by the World Customs Organization (WCO).

The examination of relationship between international, EU and national customs law leads to the conclusion that an important issue of modern international economic law is the legal status of the so-called soft law sources (soft law international legal acts). In the doctrine of international public law, "soft law" is generally understood as the landmarks for conduct, which are formulated by international organizations and which are considered neither as strictly binding legal norm, nor a purely political statement (Akehurst, Malanczuk, 2000). It should be noted that the prevalence of so-called "soft law" sources of law, which formally have no binding legal force, but nevertheless may have practical effects, is a common characteristic feature of modern international economic and customs law (Seidl-Hohenveldern, 1979; Schaffer, Pollack, 2010; Wolfgang, Kafeero, 2014). The prevalence of soft law sources of law is most noticeable in the area of regulation of legal relations linked to the tariff classification of goods and the determination customs value (Gurevičienė, 2008; Radžiukynas, Belzus, 2008). For this reason, as a problematic aspect of this question, is the extent to which soft law sources must be taken into account in the process of application of the national and EU customs law, for example, whether, according to the Union Customs Code (Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, 2013), these legal acts would constitute the international law, the application of which cannot be affected by the Union Customs Code (Art. 1, para. 2)?

This problem becomes even more important in the assessment of the fact that the vast majority of international soft law sources are not adopted by the sovereign states (by their consensus or negotiations), but are independently and directly formulated by the relevant legislation of international organizations (WTO, WCO). Individual authors (e.g. A. Medelienė, M. Lux) state that the various international guidelines, explanations, administrative arrangements, advices, recommendations, and other legally non-binding legal acts, which aim is to ensure the uniform application of customs legislation, should also be attributed to the group of customs law sources (Medelienė, Sudavičius, 2011; Lux, 2007). In this regard, it is noted that although their legal effect is only indicative, however, both customs authorities of individual countries, as well as institutions, which settles disputes with them, actually follows them in their practice (Medelienė, Sudavičius, 2011). In order to assess the validity of this position, the article analyzes the practice, followed in the Republic of Lithuania on the practical application of the soft law sources in customs law, and identifies its main trends in the judicial practice.

**Application of the soft law instruments for the tariff classification goods: the practice of the CJEU**

It should be noted that the use of soft law instruments is especially important for the tariff classification of goods for customs purposes, first of all, for the reason that soft law sources are used to describe proper application of the Harmonized System Convention, which is used to unify and simplify the classification of goods and setting of particular customs tariffs in international trade. It should be emphasized that the Harmonized System Convention itself only provides the general provisions, which provide the basis of Harmonized Commodity Description and Coding System. At the same time, a multipurpose goods nomenclature, where the position of each product (commodity) is encoded in a six-digit format using a special digital code, is described in the Harmonized System Explanatory Notes (hereinafter - HSEs), prepared by the WCO. While these explanations (explanatory notes) are not legally binding, but they are applied by the WTO, as an instrument for the legal interpretation in settling of trade disputes between states. On the other hand, the WCO regularly revises and updates the Harmonized Commodity Description and Coding System, as well as take measures to ensure a uniform interpretation, for example, itself has the right to settle disputes concerning the proper tariff classification of goods ((Einhorn, 2012).

This means that although the HSEs, according to their legal nature, are the soft law source, it is generally recognized that they are binding to the countries, acceding to the Harmonized System Convention, including the EU (Wolfgang, Ovie, 2008). On the other hand, the attention is often drawn to the issue of their compatibility with EU law. In particular, in accordance with the Harmonized System Convention, the EU has set up and is using its own Combined nomenclature of customs tariffs and statistics of foreign trade (hereinafter - Combined Nomenclature), which is enshrined in Council Regulation No. 2658/87 and its subsequent supplements. Although the Combined Nomenclature of the EU was prepared according to the Harmonized System Convention and Harmonized Commodity Description and Coding System, which is based on this Convention, incorporating the rules of the Harmonized System into EU law, but in practical terms there still remains discrepancies between these two systems (Weerth, 2007).

Accordingly, the Court of Justice of the European Union (hereinafter - the CJEU) had to deal with such situations in its practice and has repeatedly pointed out that it is not allowed for the rules of EU Combined Nomenclature to change the content of basic positions for the tariff classification of goods, which are described in the Harmonized System and its explanatory notes (HSEs), whereas the Community is committed to the obligations, enshrined in the Harmonized System Convention (France v. Commission, 1995; Holz Geenen GmbH v. Oberfinanzdirektion Munchen, 2000; Kawasaki Motors Europe NV v. Inspecteur van de Belastingdienst/Douane district Rotterdam, 2006; Hewlett-Packard Europe BV v. Inspecteur van de Belastingdienst/Douane West, kantoor Hoofddorp, 2013). This means that in general the Combined Nomenclature of the EU may not give a different descriptions of commodity items than the descriptions, provided by the HSEs, and, in case of doubt, the provisions of the Combined Nomenclature of the EU should be interpreted according to the rules, established in the HSEs (Kloosterboer Services v. Inspecteur van de Belastingdienst/Douane Rotterdam, 2009; Agroferm A/S v. Ministeriet for Fødevarer, 2013). Consequently, according to the assessments, provided by the CJEU,

HSEs have the interpretative nature and therefore they lack formal binding force (*Mineralquelle Zurzach AG v. Hauptzollamt Singen*, 2014). On the other hand, despite the interpretative nature of the HSEs and its status as the soft law instrument, the CJEU in parallel has pointed out that, in order to resolve questions concerning the tariff classification of goods, the HSEs, however, must be directly taken into account in the case if Community provisions does not contain any particular rules (*Matisa Maschinen GmbH v. Hauptzollamt Berlin Packhof*, 1975; *ROSE Elektrotechnik GmbH & Co. KG v. Oberfinanzdirektion Köln*, 1999; *Commissioners of Customs & Excise v SmithKline Beecham plc.*, 2005 and etc.).

A relevant case law, formulated by the CJEU, leads to the conclusion that although HSEs are not formally recognized as binding source of law, which has the same legal value as other rules of international and EU customs law, but the CJEU applies them in solving the disputes and, what is most important, actually follows them in the specific situations, for example, in order to eliminate regulatory gaps (*lacuna legis*). This basically means that the tariff classification of goods in the EU Member States, must be guided by the HSEs, which are applicable by national courts of the Member States in individual cases, at least as a general interpretation guidelines (Rovetta, 2010).

#### **Application of the soft law instruments for the tariff classification goods: the national judicial practice**

In this context, the attention is drawn to the fact that the issues on the application of these rules has been also resolved by the national courts in the Republic of Lithuania (Lithuanian Supreme Administrative Court (hereinafter - the Court) as the highest judicial instance in dealing with this kind of disputes), but the national case law has not yet formulated a clear conclusion on the application of the HSEs, their legal value and status in the national legal system. It should be noted that the case law on the national level remains very controversial and since 2010 can be generalized into three directions of practice: 1) HSEs are directly applicable; 2) in case of conflict between the HSEs and Combined Nomenclature of the EU, the EU law is applicable; 3) in solving the disputes, concerning the tariff classification of goods, the national court is not obliged to give a detailed evaluation of the HSEs at all. It is obvious that such positions (especially the first and the third) are not be compatible with each other, as in first case the binding legal force is provided to the HSEs (a soft law source by its nature), and according to the last position the legal value of the HSEs (even as the source of law of recommendatory nature) is questioned in general.

For example, while developing the first direction, the Lithuanian Supreme Administrative Court (in administrative cases No. A<sup>442</sup>-1156/2013 and No. A<sup>261</sup>-1408/2010) essentially agreed with the arguments of the court of first instance and the litigants, that the tariff classification of imported goods should be carried out in accordance with the HSEs (The Supreme Administrative Court of Lithuania, 7 October 2013 ruling in the administrative case No. A<sup>442</sup>-1156/2013, 2013; The Supreme Administrative Court of Lithuania, 4 October 2010 ruling of the panel of judges in the administrative case No. A<sup>261</sup>-1408/2010, 2010). Specifically, in the abovementioned administrative case No. A<sup>261</sup>-1408/2010, the Court has analyzed the question of the tariff classification of nuclear reactor components imported by the applicant to the

Republic of Lithuania. The assignment of these goods specifically to the tariff classification subheading No. 8401 40 00, was based directly on the explanations of HSEs, which clarified definition of general heading 8401, as the sole and primary source (see section II, paras. 4-5 and section IV, para. 4, of the Court's decision). Thus, it can be concluded that the Lithuanian judicial practice has formulated the tendency to apply and recognize the HSEs as directly applicable source of law. It must be noted that this provision is not fully in line with the case law of the CJEU, which was cited above. According to it, the scope and the purpose of the application of the HSEs is to explain the existing sources of the EU law, such as the Combined Nomenclature, while the HSEs itself could be treated as directly applicable only in exceptional cases (when there are no relevant EU law which regulates tariff classification of specific goods). Meanwhile, in the cases cited, the Court has applied the provisions of HSEs and based its final decisions on them altogether without establishing whether there is a relevant EU law, which regulates tariff classification of specific goods (case No. A<sup>261</sup>-1408/2010), as well as disregarding the fact that the classification of disputed goods were regulated by the EU Combined Nomenclature in detail (case A<sup>442</sup>-1156/2013).

Secondly, it is debatable on the nature of second direction of the national case law, stating that in case of conflict between the HSEs and the Combined Nomenclature, the EU law is applicable (without any exemptions). For example, in one of the cases (administrative case No. A<sup>575</sup>-1238/2012), the applicant, who was challenging the tariff classification of disputed goods, which has been set by the customs authorities, raised the question that the content of description of goods (pressed sunflower seed husk briquettes), described in the provisions of HSEs, may be different from the same description, provided in the rules of EU Combined Nomenclature. However, the Court has not applied the HSEs, but instead has followed the rules defined in the EU law (descriptions of chapter 23 of the Combined Nomenclature) and hasn't revealed any details of the relationship between these two sources of law (the Supreme Administrative Court of Lithuania, 3 February 2012 ruling of the panel of judges in the administrative case No. A<sup>575</sup>-1238/2012, 2012). Thus, it can be concluded that even in giving priority to EU law, Lithuanian national judicial authorities do not analyze all the circumstances, which, according to the practice of the CJEU, are essential in order to make the final decision on the relationship between the HSEs and the Combined Nomenclature of the EU and, finally, to determine the applicable law in a particular case. For example, the Court has declined to investigate whether the content of Combined Nomenclature hasn't changed the meaning of the tariff classification positions, provided in the HSEs and whether in such situation EU law, defining the position of goods classification, should not be interpreted in a manner that is consistent with the provisions of the HSEs (such practice was formulated by the CJEU in cases *British Sky Broadcasting Group plc v. The Commissioners for Her Majesty's Revenue & Customs* and *Pace plc v. The Commissioners for Her Majesty's Revenue & Customs*, 2011). In this regard, it should be emphasized that in the present case No. A<sup>575</sup>-1238/2012, as well as in other cases relating to the tariff classification of goods, which was discussed above, the national court, arguing its position on the interpretation and application of the EU law (the Combined Nomenclature of the EU), generally omitted any reference to the practice of the CJEU and did not follow it<sup>1</sup>.

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<sup>1</sup> As an exception to this general practice of national courts, only one case could be specified in which the Court has analyzed the comparative aspects of the HSEs and the provisions of the EU Combined

The existence of these problems is supported by other examples of national judicial practice, such as for example the practice formulated in the administrative case *UAB “Plungės kooperatinė prekyba” v. Customs Department under the Ministry of Finance of Lithuanian Republic* (the Supreme Administrative Court of Lithuania, 23 May 2013 ruling of the panel of judges in the administrative case No. A<sup>261</sup>-718/2013, 2013), where the Court has stated that in order to solve the dispute on the tariff classification of goods, the court is not obliged to “investigate the general rules for the interpretation of the CN, including a detailed evaluation of the interpretations of the Harmonized Commodity Description and Coding System Convention (HS)”. Such position is highly debatable with the position of the CJEU to which the court withheld in a number of cases, namely *Kloosterboer Services v. Inspecteur van de Belastingdienst/Douane Rotterdam*, 2009, and *Agroferm A/S v. Ministeriet for Fødevarer*, 2013. Finally, such practice of the national court seems as incompatible with the judicial precedents, formulated by the Court himself in other cases, mentioned above, in particular with those, which treated the HSEs as the directly applicable source of law (administrative case No. A<sup>261</sup>-1408/2010 and administrative case No. A<sup>442</sup>-1156/2013) and a commitment of the Republic of Lithuania to comply with its international obligations under the Harmonized System Convention (the Article 35, para. 1 of the Law on Customs of the Republic of Lithuania (2004) states that the goods are classified *inter alia* according to the International Convention on the Harmonized Commodity Description).

The practical examples, which were specified above, support the fact that so far the system for the classification of goods in Lithuania has some unsolved problems, which diminish its efficiency and objectivity. So far, the national courts are not formulated a clear practice on what legal status should be granted to the HSEs, as the main international soft law source, used for the tariff classification of goods, and the existing interpretations are inconsistent, incompatible with each other and do not seem to follow the judicial practice of the CJEU. However at the theoretical level (Laurinavičius et al. 2014) it is noted that advances in technology, appearance of new unknown products, makes it difficult to determine the correct classification code and often requires special expertise, additional laboratory tests, access to manufacturing procedures of goods and their functioning. According to the same authors (Laurinavičius et al. 2014) and official data of the Lithuanian judicial information system “LITEKO” (2016) a number of disputes, concerning the tariff classification of goods, is increasing, for example, over the past five years, their number has grown quite rapidly: if in 2011 Lithuanian Supreme Administrative Court had examined just one case on the tariff classification of goods, in 2015 it examined ten such cases.

Accordingly, in order to ensure the proper application of the HSEs in the Republic of Lithuania and to ensure the uniformity of tariff classification of goods throughout the EU (which is required by the practice and case-law of the CJEU), it is absolutely necessary to solve the above mentioned problems. This may include the legislative review of the rules, entrenched in the Law on Customs of the Republic of Lithuania (2004), in particular the Article 35 (“Classification of goods”), directly describing the possibilities for the application of the HSEs in the national legal system, for example, by stating that products are classified according to the

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Nomenclature before reaching a final conclusion on the assignment of tariff classification code (the Supreme Administrative Court of Lithuania, 29 June 2015 ruling of the panel of judges in the administrative case No. A<sup>1269</sup>-442/2015, 2015).

International Harmonized Commodity Description and Coding System Convention and the European Community customs legislation as well as according to the explanations of World Customs Organization (HSEs).

**Application of the soft law instruments for the regulation of customs value of goods: comparative aspects**

The remaining significant part of soft law sources in international customs law consist of the WTO and the WCO interpretations on the customs valuation methods. In this context, attention is drawn to the fact that, in accordance with the WTO Customs Valuation Agreement, the WTO Customs Valuation Committee adopt the relevant decisions and the WCO Technical Committee on Customs Valuation provides relevant explanations, advice, comments, as well as study materials (Customs valuation. WTO Agreement and texts of the technical committee on customs valuation, 1998). As it is noted in the scientific literature (Radziukynas, 2003; Gormley, 2009), these sources are taken into account, firstly, in the development of national and EU customs valuation legislation, secondly, while the customs authorities are making decisions on customs valuation in specific import cases (i.e. when the specific types of goods (e.g. used motor vehicles/cars) are imported) or when the customs value of goods couldn't be set out according to the routine customs valuation methods defined in the legislation.

On the other hand, it may be noted, that the CJEU traditionally takes quite a tough stance on the effect and application of the WTO law within the EU legal system, unlike, for example, applying the Harmonized System Convention and related legislation. Therefore the sources of law, provided by the WTO or included into its legal system (*inter alia* legal sources on the customs valuation issues), regardless of their nature, such as whether it is a soft law sources or not, aren't provided with the capability to be directly applied or to have a direct effect in the EU legal system. In this regard it may be noted that already in the case Portugal v. Council, 1999, the CJEU has explained, that the states which are among the most important trading partners of the Community have concluded that the rules of the WTO are not applicable by their judicial organs reviewing the legality of their domestic law. Therefore the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions (see also case Germany v. Council, 1994). The same cautious approach is applied to the interpretations (commentaries) on the customs value of goods, which, as the sources of soft law, are provided by the WCO: here the decisions of the CJEU are generally not based directly on them and their direct application or the referral to the WCO commentaries is avoided, applying the rules of the EU law instead (Gaston Schul BV v. Staatssecretaris van Financiën, 2010).

It should be noted that the national courts are widely guided by the WTO and the WCO interpretations on the determination of customs value, and, on the practical level, are using them not only in the specific cases of imports, but also to define the general rights and obligations of the participants (importers) of customs legal relations. For example, the Lithuanian Supreme Administrative Court directly on the basis of the decision of WTO Customs Valuation Technical Committee has pointed out that in cases where the customs authorities has a reasonable doubt on the veracity and accuracy of the declared value of imported goods, the burden to prove an exact

customs value is shifted to the importer (the Supreme Administrative Court of Lithuania, 31 December 2008 ruling of the panel of judges in the administrative case No. A<sup>756</sup>-140/2008, 2008)<sup>1</sup>. In other case (No. A<sup>442</sup>-709/2013) the Court has ruled, that although the WCO guidelines for the determination of the risk on accuracy of the declared value of imported goods are not mandatory in nature, assessing the membership of the EU Member States and the EU membership in the WCO, they can be taken into account (the Supreme Administrative Court of Lithuania, 5 March 2013 ruling of the panel of judges in the administrative case No. A<sup>442</sup>-709/2013, 2013). Thus, it can be stated that in the area of the determination of the customs value of imported goods, the use of international soft law legal sources (instruments) and the relevant national case law is not coordinated with the position of the CJEU. To address this issue, one of the options to be considered is the opportunity to directly define (specify) rules for the application of these sources in the Law on Customs of the Lithuanian Republic (2004).

### Conclusions

1. It can be noted that the fundamental feature of modern international economic law (*inter alia* international customs law) is that on the practical level the soft law instruments has become an integral structural part of this law system (WTO and WCO interpretations on tariff classification of goods and customs valuation). Their legal effects at the regional (EU) and on the national level is recognized directly by the CJEU, national case law and the legal doctrine.

2. However currently the national courts of Lithuania, as an EU Member State, aren't fully following the constantly evolving jurisprudence of the CJEU, in particular, on issues of soft law sources applicable to the tariff classification of goods, customs valuation and their relationship with the EU customs legislation (EU Combined Nomenclature and Community Customs Code).

3. In the practice of the CJEU, soft law sources of international economic law, which are used for the tariff classification of goods, such as HSEs (Harmonized System Explanatory Notes), are not formally recognized as a binding source of law, which has the same legal value as other rules of international and EU customs law. However the CJEU applies them in solving the disputes on the calculation of customs duties and, what is most important, actually follows them in the specific situations, for example, on order to eliminate regulatory gaps (*lacuna legis*). Therefore the tariff classification of goods in the EU Member States must be guided by the HSEs, which should also be applicable by the national courts of the Member States in individual cases, at least as general interpretation guidelines.

4. However, the national case law has not yet formulated a clear conclusion on the application of the HSEs, their legal value and status in the national legal system. The case law on the national level remains very controversial and since 2010 can be generalized into three directions of practice: 1) HSEs are directly applicable; 2) in case of conflict between the HSEs and Combined Nomenclature of the EU, the EU law is applicable; 3) in solving the disputes, concerning the tariff classification of goods, the national court is not obliged to give a detailed evaluation of the HSEs at all.

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<sup>1</sup> This practice, citing it literally, was repeated in other subsequent cases in the Supreme Administrative Court of Lithuania, such as administrative cases No. A<sup>575</sup>-144/2011; Nr. A<sup>575</sup>-1340/10 and No. A<sup>3</sup>- 1709/2009

5. Under the practice of the CJEU, the sources of law, provided by the World Trade Organization (WTO) or included into its legal system (*inter alia* legal sources on the customs valuation issues), regardless of their nature, such as whether it is a soft law sources or not, aren't recognized as having the capability to be directly applied or to have a direct effect in the EU legal system. Notwithstanding the national courts in Lithuania are widely applying the WTO and the WCO interpretations on the determination of customs value, and, on the practical level, are using them not only for solving the questions on the regulation of specific cases of imports, but also to define the general rights and obligations of the subjects of customs legal relations (importers).

6. Solving of these problems on the national level (according to the standards set by the CJEU) may include the legislative review of the rules, entrenched in the Law on Customs of the Republic of Lithuania (2004), in particular the Article 35 ("Classification of goods"), directly describing the possibilities for the application of the HSEs in the national legal system, and direct definition of special rules for the cases of application of the WTO and WCO interpretations on the determination of customs value (establishing specific, exceptional cases of application, such, as for example, determination of customs value of used motor vehicles/cars).

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