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## CUSTOMS LAW

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## МИТНЕ ПРАВО

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### CONFLICTS OF INTERNATIONAL AND NATIONAL CUSTOMS LAW WITH EU CUSTOMS LAW: THE EXAMPLE OF THE REPUBLIC OF LITHUANIA

### КОНФЛІКТИ МІЖНАРОДНОГО ТА НАЦІОНАЛЬНОГО МИТНОГО ПРАВА З МИТНИМ ПРАВОМ ЄС: ПРИКЛАД ЛИТОВСЬКОЇ РЕСПУБЛІКИ

#### ABSTRACT

The article examines the functioning of the modern customs regulatory environment for the EU Member States, which is composed of three levels of sources: international legal instruments, EU primary and secondary legislation and national legislation of individual Member States. However, the practical application of these

provisions is related to conflicts between the sources of national and international law and even the different sources of international law itself. It should be noted that at the present time, individual states have not yet formed a unified approach on whether the WTO Agreements should have a direct effect in their national legal system, as most of the states are following the doctrine of dualism and deny this possibility, although the practices followed by the national courts of the Republic of Lithuania have shown the elements of a monistic approach to this problem. The increasing use of international preferential trade agreements and the prevalence of agreements, which establish the customs unions, could also be regarded as a challenge to the development of international economic law and international trade system. Moreover, analysis of the judicial practices of national courts (in the Republic of Lithuania) and the case-law of the Court of Justice of the European Union has confirmed that an explicit approach to the relationship existing between international, EU and national customs law has not yet materialized.

**The key words:** international trade, international customs law, World Trade Organization Agreements, Union Customs Code, Republic of Lithuania.

## **Introduction**

The modern system of customs regulations is deeply globalized within the frameworks of supranational international economic organizations, such as the World Trade Organization (WTO), the World Customs Organization (WCO), as well as within regional international organizations, such as the European Union (EU). For these reasons, the various levels of customs regulations in international trade (unilateral, bilateral, regional and multilateral) face complex issues in the relationship between international and national law, the binding nature of individual sources of international law and the division of competences between national and international institutions (Leal-Arcas, 2011, p. 35-36).

The Republic of Lithuania became a full member of the WCO in 1993, joined the WTO in 2001 and the EU in 2004. Therefore, Lithuania, as an EU Member State, faces complex legal problems of the due application of the sources of international customs law.

In this context, it is crucial to identify how effective interaction of different levels of the customs law sources should be ensured by applying respective rules in practice (for example, in resolving tax disputes). In practical terms, in current conditions, the Republic of Lithuania, as a member of the WTO and the EU, sets strategic goals to pursue a stable and credible foreign trade policy, in line with the EU's common trade policy and WTO obligations, and to diversify the structure of foreign trade due to potentially unstable existing traditional trading partners (see e. g.

Order of Ministry of Economy on the Approval of the guidelines for the development of Lithuanian Exports in 2014–2020, 2014).

Therefore, from a practical point of view, the question of challenges the national legal system faces in applying international sources of customs law remains important for the regulation of international trade in Lithuania and demands clear answers that can be applied both by the courts and the public administration authorities.

### **Methodology**

The article examines, in particular, the peculiarities of the national regulatory environment for customs duties and the specific features of the sources of international environment as its integral part. To identify regulatory problems and suggest solutions the focus is made both on the legal doctrine and the emerging practice of international and national courts and other dispute settlement bodies, including WTO dispute settlement institutions and their decisions, decisions of the European Court of Justice (ECJ) and Supreme Administrative Court of the Republic of Lithuania. Within the analyses of the above-mentioned case-law, special attention is paid to the adopted approach to the relationship between international and EU and national Lithuanian customs law.

### **1. The Relationship Between EU Customs Law and Member States' National Customs Law**

As it is observed in the doctrine of international trade and customs law (Herdegen, 2013, p. 269, Lyons, 2008, p. 14-16), the realization of the economic sovereignty of states in the field of legal regulation of foreign trade in modern conditions raises the fundamental question, what is the relationship between international economic (customs) law and national law regulating customs issues and how is it realized? This problem is further complicated by the existence of customs unions, as in such case as the EU comprises several levels of regulation, i.e. WTO agreements, other international agreements on customs matters (such as the Harmonized System Convention, i.e. at the multilateral level), the Union Customs Code (Regulation (EU) 952/2013) and EU legislation implementing it as well as national law. Besides, the possibility of applying sources of “soft law” and, in individual cases, the obligation to take them into account, is also explicitly recognized, both in the case-law of the ECJ (*France*, 1995), (*Kawasaki Motors Europe NV*, 2006), in the case-law of the Supreme

Administrative Court of the Republic of Lithuania (*UAB Kustodija v. Customs Department of the Ministry of Finance*, 2013), (*UAB Kauno MTA v. Customs Department under the Ministry of Finance*, 2011) and in legal doctrines (Wolffgang & Ovie, 2008, p. 4-5, Lux, 2007, p. 26).

Thus, the Republic of Lithuania, as EU Member State, faces the issue of simultaneous application of international sources of customs law (WTO agreements, preferential trade agreements, other international agreements on customs matters), sources of international soft law and rules enshrined therein in compatibility with EU customs legislation and national legislation in the event of their conflicts. In this respect, it should be noted that the Article 28 (1) (a) of the Treaty on the Functioning of the European Union (TFEU) provides the exclusive competence of the EU, as the customs union, to regulate customs duties in international trade (Terra & Wattel, 2012, p. 255-256). The functioning of the customs union thus falls within the exclusive competence of the EU, i.e. it is the EU that has the competence to adopt binding legislation in this area, and the Member States themselves can only do so under a Union mandate or if necessary to implement Union legislation.

It should be noted that the case-law of the ECJ, which is quite extensive in this respect, provides a detailed determination of the relationship between national and EU customs law. Thus, it raises relatively fewer issues of debate. In defining this relationship, it is assumed that the application of the Union Customs Code is mandatory in all cases where customs duties arise and that the principle of the primacy of the Code must, therefore, be observed (*Skoma Lux*, 2007). In addition, the ECJ has further noted that national administrations act on behalf of the EU in administering customs duties and ensuring the taxation of imported goods and must strictly comply with EU customs law (Denmark, 2004). It should be noted that this principle has been consistently followed in the Republic of Lithuania by national courts that have clarified that the rules established in the Union Customs Code always take precedence over national law. For example, such approach was stipulated in the decisions of the Supreme Administrative Court of Lithuania concerning the application of the Law on Tax Administration of the Republic of Lithuania (*R.V. individuali imone v. Vilnius territorial customs*, 2008; *L.O. komercine firma v. Customs Department of the Ministry of Finance*, 2012).

All this means that, throughout the European Union, the Union Customs Code takes precedence over any conflicting provision of national law, and

national law currently has only a complementary function in the field of customs regulation (Wolffgang, 2007, p. 6).

On the other hand, the legal framework and its practice of implementation do not preclude the right of Member States to adopt national customs legislation, but following the basic rules of ECJ case law (*Van Gend & Loos*, 1963; *Costa*, 1964; *Internacionale Handelsgesellschaft GmbH*, 1970), the scope of national customs legislation is to be determined by respective provisions of EU legislation and cannot conflict with them.

However, as it is recognized in legal doctrine (Medeliene & Sudavicius, 2011, p. 596, Laurinavicius et al., 2014, p. 79), national legislation may regulate matters not covered by EU law and may further define the practical provisions of EU customs legislation, taking into account national socio-economic aspects and cultural traditions (Hojnik, 2012, p. 137-138). For example, the Law on Customs of the Republic of Lithuania establishes the competence of national customs offices in the field of application of customs legislation (Law on Customs of the Republic of Lithuania, 2004). It should be emphasized that on a practical level in the Republic of Lithuania, legal disputes also raised issues regarding the compliance of various norms of national law applicable to customs legal relations (for example, defining their administration and recovery procedures) with EU law (*UAB "Energetikos tiekimo bazė" v. Customs Department of the Ministry of Finance*, 2008; (*L.O. komercine firma v. Customs Department of the Ministry of Finance*, 2012).

Although in the above-mentioned cases the national courts did not find a direct contradiction of the legal acts of the Republic of Lithuania with the EU law, due to the insights of several authors, there are still specific areas in the national customs law whose compliance with the EU law could be questioned in the future. Such problematic aspects include, for example, the application of specific rules for determining the customs value of used cars in Lithuania (Radziukynas & Belzus, 2008, p.8) or separate dispute resolution procedures with customs authorities that are not harmonized with EU law (Valantiejus, 2013).

## **2. Application of International Customs Instruments by Individual EU Member States**

A much more complex and fundamental issue concerns the relationship between international agreements on customs matters and EU and national legislation and the power of these agreements at EU and EU Member State levels. In this respect, it should be noted that the Lisbon Treaty has

significantly enhanced the EU's role in this area (see Article 217 TFEU) by limiting the scope of the mixed agreement in this area of legal relations and extending the EU Parliament's powers in the common commercial policy and EU trade agreements with third countries (Leal-Arcas, 2010, p. 495). At the same time, it should be emphasized that the ECJ has clarified in its case law that it is the EU that has replaced Member States in fulfilling their obligations under the WTO multilateral trade agreements and other major international agreements on customs matters, such as different WCO instruments (*International Fruit Company*, 1972; *Douaneagent der NV Nederlandse Spoorwegen*, 1975).

As recognized in the doctrine of EU law (Terra, 2012, p. 257), the basic conflict-of-law rule in EU law, which ensures that EU customs law complies with international agreements in the field of customs regulation, was laid down in Article 1 (2) of the Union Customs Code, which states, that “without prejudice to international law and conventions and Union legislation in other fields, the Code shall apply uniformly throughout the customs territory of the Union”. According to individual authors (Heijmann & Mulder, 2005, p.14), this provision means that in cases where an international agreement regulates a particular issue in detail or contains stricter provisions than the EU Customs Code or other customs-related legislation or directives, the rules of the respective international agreement shall apply. It is debatable to what extent this formula, and in general the rules set out in Article 2 of the Community Customs Code (which was replaced by the Article 1 para. 1 of the Union Customs Code), can contribute to resolving this conflict and to define precisely the relationship between EU and international sources of customs law. Some authors (Medeliene, 2011, p. 594–595), place all international agreements in the hierarchy of sources of customs legislation at a higher level in the hierarchy of sources of EU customs legislation than directly applicable EU secondary legislation (Community Customs Code (currently – Union Customs Code) and other implementing legislation). On the other hand, there are some authors (Lux, 2007, p. 19) who have analyzed the relationship between EU customs law and international law have pointed to its complexity and the fact that the implementation of international customs law in EU law respects both monistic and dualistic principles. approach to international law, which appears to be the general approach to EU law.

For example, from a monistic point of view, the mere fact of acceding to an international agreement is considered sufficient for its provisions to be directly applicable in the EU if the agreements are sufficiently clear

and precise. This is generally the case for preferential trade agreements, what is stipulated in a series of ECJ decisions (*Kupferberg*, 1982; *Deutsche Shell*, 1993; *Brita*, 2010). Also, we can point out the opinion of Advocate General Kokott in the ECJ case C-366/10 (*The Air Transport Association of America and Others*, 2011, paras 57, 62).

On the other hand, the delegated EU institutions may link the conclusion of the relevant international agreement to the adoption of the relevant specific EU legislation (dual approach), as has been done, for example, in the Uruguay Round and currently in force WTO agreements (Council Decision 94/800/EC). Accordingly, the doctrine, in line with the case-law of the ECJ, quite broadly emphasizes the distinction between the application of WTO agreements in the field of customs law and all other international agreements, as WTO agreements are not recognized *in corpore* as directly applicable agreements, except for individual provisions (*Vokietija*, 1994; *OGT Fruchthandelsgesellschaft GmbH*, 2001; *IKEA Wholesale Ltd*, 2007). This debate stemmed primarily from the application of WTO law to ECJ cases challenging the legality of EU secondary legislation restricting international trade (Bronckers, 2008, p. 895-896). It should be noted that the jurisprudence of the ECJ has not provided, so far, any clarification that would recognize the right of a particular applicant to directly substantiate his claims during the dispute under the provisions of the WTO agreements, i. y. it has not been recognized that any of the rights enshrined in these agreements have the character of direct effect (Lyons, 2008, p.17), (Herdegen, 2013, p. 271). This approach is reflected in the case-law of national courts in the EU Member States (De Santa Cruz Oliveira, 2015, p. 173), as well as in part in the Republic of Lithuania, where national courts, although quite widely assessing the applicability of WTO agreements (*UAB "Transchema" v. Customs Department of the Ministry of Finance*, 2013), do not equate them with bilateral preferential trade agreements or other similar agreements on administrative cooperation in customs matters, which are always directly applicable (*UAB "Urvilava" v. Customs Department of the Ministry of Finance*, 2013).

On the other hand, some authors also distinguish in this group of international agreements separate international agreements (for example, the Harmonized System Convention), the implementation of which requires the transposition of the relevant provisions into EU law, i.e. the application of these agreements is not direct (Lux, 2007, p. 23-24). However, neither the Community Customs Code nor legal doctrine or the case-law of the ECJ and national courts (*Racke*, 1998) have so far provided

completely clear criteria which international customs agreements do not have the character of direct application (Lyons, 2008, p. 222-223). It is clear that this rather complex conflict-of-laws relationship would, in principle, require more detailed legal regulation in the Union Customs Code. At the level of legal regulation, the issue of application of soft-law sources remains unresolved, which is still solved only at the level of ECJ case law, although legal doctrine emphasizes the need to legally define their application cases (binding criteria), especially in the field of tariff classification of goods (Rovetta, 2010, p. 130).

This means that there is currently no clear relationship between the international, EU and national customs legal systems, and in many cases this relationship needs to be addressed on an ad hoc basis, depending on the specific nature of the applicable legislation. In any matter relating to customs legislation falling within the EU's competence, following Article 1 (2) of the Union Customs Code, EU countries should first and foremost apply the provisions of the Union Customs Code, which must prevail over national law in all cases. If a specific (more detailed, stricter) rule (*lex specialis*) is enshrined in an international agreement, the rules of that agreement should apply, with the exception of WTO agreements (their customs provisions) if they are not sufficiently specific and international agreements not directly applicable.

### **Conclusion**

Conflicts between national and EU sources of customs law in their application are resolved on the basis of the principle of the supremacy of EU law (Union Customs Code), which is recognized and applied inter alia in the case-law of Lithuania. It means that national legislation cannot duplicate or convey the provisions of directly applicable EU law and cannot contradict them. However, the Union Customs Code (Article 1) does not currently lay down specific conflict-of-law rules, which should be used to resolve conflicts between applicable sources of EU customs law and international customs law. It is dealt with individually in the case law of national courts and the ECJ, distinguishing between international agreements with direct application characteristics (eg preferential (free trade) agreements between the EU and third countries) and non-international agreements (eg WTO agreements, Harmonized System Convention) on customs matters. To address this issue, it is proposed to define in the Union Customs Code specific rules for resolving these conflicts applicable to certain categories of sources of international customs law.

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## АНОТАЦІЯ

**Валантієюс Г. Конфлікти міжнародного та національного митного права з митним правом ЄС: приклад Литовської Республіки. – Стаття.**

У статті розглядається функціонування сучасного митного регуляторного середовища для держав-членів ЄС, яке складається з трьох рівнів джерел: міжнародно-правові інструменти, первинне та вторинне законодавство ЄС і національне законодавство окремих держав-членів. Однак практичне застосування цих положень пов'язане з конфліктами між джерелами національного та міжнародного права і навіть різними джерелами міжнародного права. Слід зазначити, що на теперішній час окремі держави ще не сформували єдиного підходу щодо того, чи повинні Угоди СОТ мати безпосередній вплив у їх національній правовій системі, оскільки більшість держав дотримуються доктрини дуалізму і заперечують таку можливість, хоча практика національних судів Литовської Республіки показала елементи моністичного підходу до цієї проблеми. Посилення використання міжнародних пільгових торговельних угод та поширеність угод, які встановлюють митні союзи, також можуть розглядатися як виклик розвитку міжнародного економічного права та міжнародної торговельної системи. Крім того, аналіз судової практики національних судів (у Литовській Республіці) та прецедентної практики Суду ЄС підтвердив, що чіткий підхід до відносин, які існують між міжнародним, європейським та національним митним законодавством, ще не матеріалізувався. Автор резюмує, що конфлікти між національними та європейськими джерелами митного права при їх застосуванні вирішуються на основі принципу верховенства права ЄС, який визнається і застосовується, зокрема, у прецедентній практиці Литовської Республіки. Це означає, що національне законодавство не може дублювати або передавати положення прямо застосовуваного права ЄС і не може суперечити їм. Однак Митний кодекс ЄС наразі не встановлює конкретних колізійних норм, які слід використовувати для вирішення колізій між чинними джерелами митного права ЄС та міжнародним митним правом. У статті пропонується визначити у Митному кодексі ЄС конкретні правила вирішення таких конфліктів, що застосовуватимуться до певних категорій джерел міжнародного митного права.

**Ключові слова:** міжнародна торгівля, міжнародне митне право, угоди СОТ, Митний кодекс ЄС, Литовська Республіка.

**АННОТАЦИЯ**

**Валантиеюс Г. Конфликты международного и национального таможенного права с таможенным правом ЕС: пример Литовской Республики. – Статья.**

В статье рассматривается функционирование современной таможенной регуляторной среды для государств-членов ЕС, которая состоит из трех уровней источников: международно-правовые инструменты, первичное и вторичное законодательство ЕС и национальное законодательство отдельных государств-членов. Однако практическое применение этих положений связано с конфликтами между источниками национального и международного права и даже разными источниками международного права. Следует отметить, что в настоящее время отдельные государства еще не сформировали единого подхода относительно того, должны ли Соглашения ВТО иметь непосредственное влияние в их национальной правовой системе, поскольку большинство государств придерживаются доктрины дуализма и отрицают такую возможность, хотя практика национальных судов Литовской Республики показывает элементы монистического подхода к этой проблеме. Усиление использования международных льготных торговых соглашений и распространенность соглашений, учреждающих таможенные союзы, также могут рассматриваться как вызов развитию международного экономического права и международной торговой системы. Кроме того, анализ судебной практики национальных судов (в Литовской Республике) и практики Суда ЕС подтвердил, что четкий подход к отношениям, существующим между международным, европейским и национальным таможенным законодательством, еще не материализовался. Автор резюмирует, что конфликты между национальными и европейскими источниками таможенного права при их применении решаются на основе принципа верховенства права ЕС, который признается и применяется, в частности, в прецедентной практике Литовской Республики. Это означает, что национальное законодательство не может дублировать или передавать положения прямо применимого права ЕС и не может противоречить им. Однако Таможенный кодекс ЕС пока не устанавливает конкретных коллизионных норм, которые следует использовать для разрешения коллизий между действующими источниками таможенного права ЕС и международным таможенным правом. В статье предлагается определить в Таможенном кодексе ЕС конкретные правила разрешения таких конфликтов, которые будут применяться к определенным категориям источников международного таможенного права.

**Ключевые слова:** международная торговля, международное таможенное право, соглашения ВТО, Таможенный кодекс ЕС, Литовская Республика.

