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PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	15 May 2020
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union within the World Customs Organization (WCO) with regard to the adoption of Explanatory Notes, Classification Opinions or other advice on the interpretation of the Harmonized System and recommendations to secure uniformity in the interpretation of the Harmonized System under the Harmonised System Convention

Delegations will find attached document COM(2020) 196 final.

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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union within the World Customs Organization (WCO) with regard to the adoption of Explanatory Notes, Classification Opinions or other advice on the interpretation of the Harmonized System and recommendations to secure uniformity in the interpretation of the Harmonized System under the Harmonised System Convention

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns a framework decision establishing the position to be taken on the Union's behalf at meetings within the World Customs Organisations (WCO) concerning the preparation and adoption of Explanatory Notes, Classification Opinions, other advice on the interpretation of the Harmonized System and recommendations to secure uniformity in the interpretation and application of the Harmonized System under the Harmonised System Convention (HS Convention).

2. CONTEXT OF THE PROPOSAL

2.1. The International Convention on the Harmonized Commodity Description and Coding System

The International Convention on the Harmonized Commodity Description and Coding System ('the HS Convention') aims to facilitate international trade and the collection, comparison and analysis of statistics, in particular those on international trade. It includes as an Annex the HS Nomenclature which is an international harmonized system enabling participating countries to classify traded goods on a common basis for customs purposes. In particular, the HS Nomenclature includes the description of the goods, which appear as headings and subheadings, and their related numerical codes, based on a 6-digit code system. The HS Nomenclature is revised every five years[1]. It is applied by more than 190 administrations worldwide; consequently, more than 98% of all goods traded in the world are classified according to it.

The HS Convention entered into force on 1 January 1988.

The European Union and all Member States are parties to the Agreement[2].

2.2. The World Customs Organization (WCO)

The World Customs Organization (WCO), established in 1952 as the Customs Co-operation Council, is an independent intergovernmental body whose mission is to enhance the effectiveness and efficiency of Customs administrations. It represents 183 Customs administrations across the globe. The WCO's governing body is the Council. Each Member of the Council has one vote. The decisions of the Council are taken by a majority of two-thirds of the Members present and entitled to vote. The Union exercises rights and obligations akin to membership ad interim in the WCO pending the entry into force of the amendment of the Convention establishing a Customs Co-operation Council.

The Harmonised System Committee (HSC) is a technical committee in charge of preparatory work related to the HS Convention. The main tasks of the HSC are the following:

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[1] Since it was introduced, in 1988, the HS Nomenclature has been revised six times. These revisions entered into force in 1996, 2002, 2007, 2012, and 2017. The sixth revision will enter into force in 2022.

[2] Council Decision 87/369 of 7 April 1987 concerning the conclusion of the International Convention on the Harmonized Commodity Description and Coding System and of the Protocol of Amendment thereto (OJ L 198 of 20.7.1987, p.1).

- To prepare Explanatory Notes, Classification Opinions or other advices as guidance to the interpretation of the Harmonized System, and exercising such other powers and functions in relation to the Harmonized System as the WCO Council or the Contracting Parties may deem necessary. It can set up preparatory bodies such as Sub-Committees or Working Parties.

- To prepare recommendations to secure uniformity in the interpretation and application of the Harmonized System legal texts, including by settling classification disputes between Contracting Parties, thus facilitating trade;

- To propose amendments and updates to the Harmonized System to reflect developments in technology and changes in trade patterns as well as other needs of Harmonized System users;

- To promote widespread application of the Harmonized System and examine general questions and policy matters relating to it.

The Union and its Member States alltogether have only one vote in the HSC. HSC decisions concerning matters covered by this framework decision are taken by simple majority.

Pursuant to Article 8(2) of the HS Convention, Explanatory Notes, Classification Opinions, other advice on the interpretation of the Harmonized System and recommendations to secure uniformity in the interpretation and application of the Harmonized System, prepared during a session of the HSC, are deemed to be approved by the WCO Council if, not later than the end of the second month following the month during which the session at which they were adopted was closed, no Contracting Party to the HS Convention has notified the WCO Secretary General that it requests that such matter be referred to the WCO Council.

Pursuant to Article 8(3) of the HS Convention, where a matter is referred to the Council under the provisions of paragraph 2 of this Article, the Council shall approve such Explanatory Notes, Classification Opinions, other advice or recommendations, unless any Council Member which is a Contracting Party to this Convention requests that they be referred in whole or part to the Committee for re-examination.

2.3. The envisaged acts

In accordance with Article 6(2) of the HS Convention, the HSC normally meets twice a year. In practice, HSC meetings take place in March and September.

The proposed framework decision concerns the following acts, which are considered and provisionally adopted by the HSC, subject to approval by the WCO Council through a "silence procedure":

(a) Explanatory Notes, that clarify the interpretation of the notes, headings and subheadings of the HS Nomenclature,

(b) Classification Opinions, that reflect the decisions taken by the HSC as regards the classification of specific products,

(c) Other advice and recommendations concerning the classification of goods in the HS Nomenclature, such as classification decisions or other guidance adopted by the HSC.

In accordance with Article 34 7.(a)(iii) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code[3], the customs authorities of the Member States shall revoke their BTI decisions where they are no longer compatible with the interpretation of the HS Nomenclature resulting from classification decisions, classification opinions or amendments of the explanatory notes to the HS Nomenclature, with effect from the date of publication of the Commission Communication in the 'C' series of the *Official Journal of the European Union*.

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

3.1. Practical constraints in forming the preparation and adoption of EU positions

At each of its two yearly meetings the HSC deals with a considerable number of highly technical issues. Table 1 shows, for the last three years, the volume of decisions taken by the HSC, by type of decision.

Table 1 HSC Decisions by type

Meeting	**HSC/59**	**HSC/60**	**HSC/61**	**HSC/62**	**HSC/63**[4]	**HSC/64**
Date[5]	13-24/3/2017	25/9-6/10/2017	1-16/3/2018	13-28/9/2018	14-29/3/2019	16-27/9/2019
HS Amendments[6]	13	9	9	29	44	2
Explanatory Notes	10	21	7	14	16	8
Classification Opinions	22	19	26	13	21	7
Classification Decisions	48	35	38	37	29	39
Sub-total	**80**	**75**	**71**	**64**	**66**	**54**
Total	**93**	**84**	**80**	**93**	**110**	**56**

The Union is one of the major contributors to the work of the HSC, as it submits a large amount of proposals and topics (classification questions or disputes with third countries, proposals for amendments to the HS Explanatory Notes) which are regularly incorporated in the HSC agenda.

[3] OJ L 269 of 10.10.2013, p. 1.
[4] Provisional adoption of the HS 2022 Recommendation
[5] Including the HS Pre-sessional Working Party
[6] Amendments to the HS Nomenclature follow a separate decision making procedure and are not covered by this proposal.

A flexible and pragmatic approach has been followed to date in order to guarantee optimal preparation, presentation and effective defence of the Union positions in the WCO. First, the Commission classification experts systematically analyse the issues, review the classification practice of Member States and prepare draft positions. These are then discussed with experts from Member States in the Customs Expert Group and adapted, as needed, with a view to establishing a coordinated position (before the HSC pre-sessional Working Party). This is complemented, when needed, with external consultations (with European trade associations or other stakeholders) and/or on-the-spot coordination.

Effective Union participation in the HSC requires an intensified and efficient cooperation between the Institutions. This is particularly so, because of the high volume and highly technical character of the issues dealt with by the HSC. In addition, the time-frame between the availability of documents and the actual discussion at the HSC meetings is very limited.

The rules of procedure of the HSC (Rule 10) state that items submitted by Members have to be received by the Secretariat at least eight weeks before that session opens. If not, they are entered on an additional list and it is for the HSC to decide whether to include them or not on the agenda. This rule is respected. However, for the availability of working documents prepared by the WCO Secretariat, the same rules of procedure state that "in principle, all basic working documents should be dispatched to the Members of the Committee at least 30 days before the opening date of the session." Practice shows that very often this rule is not respected, despite reiterated invitations to the WCO Secretariat. Furthermore, and if respected insofar as basic documents are made available in the aforementioned deadline, complementary documents may be made available at a posterior date. Such new documents may provide important additional technical information, legal interpretation, or position paper presented by Contracting Parties or other stakeholders such as International organisations, on their own initiative or on the invitation of the WCO Secretariat.

Table 2 shows the current situation as regards the availability of working documents for the HSC for the past three years.

Table 2 Availability of working documents

HSC (2 meetings/year)

Meeting	**Date**[7]	**Items for decision**	**Availability of documents**					
			>30d/meeting		**30d-15d/meeting**		**<15d/meeting**	
			Number	***%***	**Number**	***%***	**Number**	***%***
HSC/59	13-24/3/2017	74	22	30	46	***62***	6	*8*
HSC/60	25/9-6/10/2017	78	63	81	14	***18***	1	*1*
HSC/61	1-16/3/2018	69	3	4	61	***89***	5	*7*
HSC/62	13-28/9/2018	70	50	71	16	***23***	4	*6*
HSC/63	14-29/3/2019	64	34	*53*	28	***44***	2	*3*
HSC/64	16-27/9/2019	56	49	*87*	5	*9*	2	*4*

[7] Including the HS Pre-sessional Working Party

Total		**411**	**221**	***54***	**170**	***41***	**20**	***5***

The meetings of the HSC always take place immediately after its pre-sessional working party (which lasts 2 to 3 days). Documents for HSC meetings are generally available between 30 and 15 days before the meeting.

3.2. Purpose and content of the proposal

The decisions at issue prepared by the HSC are capable of decisively influencing the content of Union law, namely, Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, and the Combined Nomenclature (CN) annexed thereto. Classification decisions, classification opinions or amendments of the explanatory notes to the HS Nomenclature are used in support of the classification provided for in Commission Implementing Regulations concerning the classification of goods in the CN, in the explanatory notes to the CN and in the classification decisions issued by the customs authorities of the Member States. Customs authorities of the Member States are required to revoke their classification decisions where they are no longer compatible with the interpretation of the HS Nomenclature resulting from these classification decisions, classification opinions, or amendments to the HS Explanatory Notes.

In view of the number of items for which the HSC is asked to take a decision at each of its meetings, their highly technical nature, and the limited time for preparation of the Union position, due to the short notice at which working documents are made available, it is considered that a framework Council decision under Article 218(9) TFEU, which establishes the Union's position based on guiding principles and criteria for the vast majority of the items with respect to which the HSC is called upon to decide (i.e. Explanatory Notes, classification opinions and classification decisions, guidance or other advice on the interpretation of the Harmonized System), is necessary since the adoption of individual decisions pursuant to Article 218(9) TFEU would not allow for efficient and timely functioning in this policy domain.

It is therefore appropriate that the position to be taken on the Union's behalf in the WCO on the basis of guiding principles and criteria, as well as the necessary steps for the specification of the Union's position for each meeting are established by a Council Decision adopted under Article 218(9) TFEU on the basis of a Commission proposal.

For this purpose, the proposal establishes a framework whereby it enumerates principles and criteria according to which the Union position is established. Those principles and criteria are in line with established customs policy and the case-law of the Court of Justice of the European Union to classify goods at importation according to their objective characteristics and properties.

The positions to be taken on the Union's behalf should respect the principles of simplification and facilitation of customs classification, of consistency with the general rules for the interpretation of the HS in the interest of legal certainty, and of promotion of the best practices elaborated by the Union in that respect.

The establishment of such positions should be guided by the general criteria defined by the HS Convention (the general rules for the interpretation of the HS) and the objective characteristics and properties of the goods. Specific criteria should also be taken into account where applicable, resultings from the case law of the Court of Justice of the European Union related to the classification of goods, as well as from any guidance related to customs classification elaborated by the WCO (HS nomenclature and interpretation thereof provided for by the HS Explanatory Notes, Classification Opinions and classification decisions adopted by the HSC) or by the Union (Combined Nomenclature and interpretation thereof provided for by the CN explanatory notes, classification Regulations or Decisions adopted by the Council or the Commission or conclusions reached by the Customs Code Committee, Tariff and Statistical Nomenclature Section).

The proposal for a framework decision further provides that:

- The Commission informs the Council (or its preparatory bodies) sufficiently in advance of any meeting of the relevant WCO body at which a decision covered by the framework decision may be taken.

- The Council may within 5 working days of the date when the Commission has informed the Council, or its preparatory bodies, express its disagreement with the position proposed for one or more of the individual HS decisions to be taken.

- To preserve the Union's rights and avoid that a decision on a matter, on which the Council is unable to reach a position before the expiry of the deadline foreseen under Article 8(2) of the HS Convention, is adopted in the WCO, the Commission can request on behalf of the Union that the matter is referred to the WCO Council and referred to the HSC for re-examination.

- In cases where the Union's position on a matter substantially differs from the decision adopted by the HSC, the Commission provides the Council with its assessment whether the HSC decision at issue can be accepted or if the matter should be referred to the WCO Council and referred to the HSC for re-examination, before the expiry of the deadline foreseen under Article 8(2) of the HS Convention. The Council may express its disagreement with the position proposed for one or more of the individual HS decisions concerned.

Consistent with Article 218(10) TFEU, the European Parliament will be immediately and fully informed.

4. LEGAL BASIS

4.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing '*the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement*.'

The concept of '*acts having legal effects*' includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do

not have a binding effect under international law, but that are '*capable of decisively influencing the content of the legislation adopted by the EU legislature*'[8].

Therefore, the procedural legal basis for the proposed decision establishing the position to be taken on behalf of the Union within the WCO, with regard to the adoption of Explanatory Notes, Classification Opinions or other advices as guidance to the interpretation of the HS under the HS Convention is Article 218(9) TFEU.

4.2. Application *to the present case*

The Harmonized System Committee and Council are bodies set up by an agreement, namely the International Convention on the Harmonized Commodity Description and Coding System.

The acts which the HSC is called upon to prepare constitute acts having legal effects. The envisaged acts, once approved by the Council, are capable of decisively influencing the content of EU legislation, namely: Annex 1 to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff. This is because Article 34.7.(a)(iii) of the Union Customs Code[9] states that "*customs authorities shall revoke their BTI[10] decisions… where they are no longer compatible with the interpretation…resulting from…classification decisions, classification opinions or amendments of the explanatory notes to the Nomenclature of the Harmonized Commodity Description and Coding System adopted by the HS Committee;"*. Furthermore, such decisions prepared by the HSC (classification decisions, classification opinions or amendments of the explanatory notes to the HS Nomenclature) are used in support of the classification provided for in Commission Implementing Regulations concerning the classification of goods in the Combined Nomenclature (CN), in the explanatory notes to the CN and in the classification decisions issued by the customs authorities of the Member States.The envisaged act does not supplement or amend the institutional framework of the Agreement.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

4.3. Substantive legal basis

4.3.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union's behalf. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

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8 Judgment of the Court of Justice of 7 October 2014, Germany v Council, Case C-399/12, ECLI:EU:C:2014:2258, paragraphs 61to 64.

9 Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, OJEU L 269 of 10.10.2013, p. 1.

10 Binding tariff information: classification decisions delivered in advance by customs administrations to economic operators, to ensure legal certainty about the classification and tariff treatment applicable to goods subject to importation or exportation.

4.3.2. Application to the present case

As the main objective and content of the envisaged act relate to the interpretation of the tariff and conclusion of an international agreement in the common commercial policy and implementation of the HS nomenclature and of the EU Combined Nomenclature, the substantive legal basis of the proposed decision is Articles 31, 43(2) and 207(4) first subparagraph TFEU.

4.4. Conclusion

The legal basis of the proposed decision should be Articles 31, 43(2) and 207(4) first subparagraph TFEU, in conjunction with Article 218(9) TFEU.

5. BUDGETARY IMPLICATIONS

The proposal has no implication for the European Union budget.

6. PUBLICATION OF THE ENVISAGED ACT

Yes

2020/0080 (NLE)

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on the position to be taken on behalf of the European Union within the World Customs Organization (WCO) with regard to the adoption of Explanatory Notes, Classification Opinions or other advice on the interpretation of the Harmonized System and recommendations to secure uniformity in the interpretation of the Harmonized System under the Harmonised System Convention

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 31, 43(2) and the first sub-paragraph of Article 207(4), in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) By Council Decision 87/369/EEC[11] the Union approved the International Convention on the Harmonized Commodity Description and Coding System, and the Protocol of Amendment thereto[12] (HS Convention), which established the Harmonized System Committee (HSC).

(2) Pursuant to Article 7(1) of the HS Convention, the HSC is, inter alia, responsible for preparing Explanatory Notes, Classification Opinions, other advice on the interpretation of the Harmonized System and recommendations to secure uniformity in the interpretation and application of the Harmonized System.

(3) Pursuant to Article 8(2) of the HS Convention, Explanatory Notes, Classification Opinions, other advice on the interpretation of the Harmonized System and recommendations to secure uniformity in the interpretation and application of the Harmonized System, prepared during a session of the HSC (hereinafter "HSC decisions"), are deemed to be approved by the WCO Council if, not later than the end of the second month following the month during which the session at which they were adopted was closed, no Contracting Party to the HS Convention has notified the WCO Secretary General that it requests that such matter be referred to the WCO Council.

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[11] Council Decision 87/369/EEC of 7 April 1987 concerning the conclusion of the International Convention on the Harmonized Commodity Description and Coding System and of the Protocol of Amendment thereto (OJ L 198, 20.7.1987, p. 1).

[12] OJ L 198, 20.7.1987, p. 3

(4) Pursuant to Article 8(3) of the HS Convention, where a matter is referred to the Council under the provisions of paragraph 2 of this Article, the Council approves such Explanatory Notes, Classification Opinions, other advice or recommendations, unless any Council Member which is a Contracting Party to this Convention requests that they be referred in whole or part to the Committee for re-examination.

(5) It is appropriate to establish the position to be taken on the Union's behalf in the WCO with regard to the adoption of Explanatory Notes, Classification Opinions or other advice on the interpretation of the Harmonized System and recommendations to secure uniformity in the interpretation of the HS Convention, as the decisions at issue prepared by the HSC will be capable of decisively influencing the content of Union law, namely, Council Regulation (EEC) No 2658/87.

(6) It is in the interest of the Union that the positions expressed by the Union in the HSC are established according to principles, criteria and orientation governing the tariff classification of goods. It is also in the interest of the Union that such positions are established in an expeditious manner to allow the Union to exercise its rights in the HSC.

(7) To preserve the Union's rights the Commission should also be able to request on behalf of the Union that a matter is referred to the WCO Council and referred to the HSC for re-examination pursuant to Article 8(3) of the HS Convention, in order to avoid that a decision is adopted on a matter on which the Council is either unable to reach a position before the expiry of the deadline foreseen under Article 8(2) of the HS Convention, or reached a position which substantially differs from the decision that was adopted by the HSC.

(8) In view of the evolving and highly technical nature of the classification of goods under the HS Convention, the high volume of questions dealt with in the two HSC meetings taking place twice each year, and the short time available to consider documents issued by the WCO Secretariat and/or Contracting Parties in preparation of the HSC meetings and the consequent need for the position of the Union to take account of new developments, including new technical and other relevant information presented before or during the meetings of the HSC, necessary steps should be established, in line with the principle of sincere cooperation among the Union institutions enshrined in Article 13(2) of the Treaty on European Union, for the specification of the Union position,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf on the approval of Explanatory Notes, Classification Opinions or other advice on the interpretation of the Harmonized System and recommendations to secure uniformity in the interpretation of the Harmonized System under the Harmonised System Convention, and on the preparation of such acts in the World Customs Organisation, is set out in Annex I.

Article 2

The specification of the Union's position to be taken under Article 1 shall be conducted in accordance with Annex II.

Article 3

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President