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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the 66th session of the Harmonized System Committee of the World Customs Organization in relation to the envisaged adoption of Classification Opinions, classification decisions, amendments to the Harmonized System Explanatory Notes or other advice on the interpretation of the Harmonized System and recommendations to secure uniformity in the interpretation of the Harmonized System under the Harmonized System Convention

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf in the 66th session of the Harmonized System Committee (HSC) of the World Customs Organization in September 2020.

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 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 Agreement 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. 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 WCO's governing body is the WCO Council, which relies on the competence and skills of a Secretariat and a range of technical and advisory committees to accomplish its mission.

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:

- To prepare Explanatory Notes, Classification Opinions or other advices as guidance to the interpretation of the Harmonized System, and exercising such other functions in relation to the Harmonized System as the WCO Council or the Contracting Parties may deem necessary.
- 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;

[1] Since when 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 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.

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 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 decisions relating to binding tariff information (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 the preparation and adoption of EU positions

The WCO Harmonized System Committee adopts Classification Opinions, classification decisions, amendments to the Harmonized System Explanatory Notes (HSEN) 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 at each of its two annual sessions.

[3] OJ L 269 of 10.10.2013, p. 1.

From a practical point of view, there is normally not sufficient time for the Union to formally adopt a position under Article 218(9) TFEU before each meeting of the HSC. Therefore, a proposal for a framework Council Decision on the position to be taken on the Union's behalf in the WCO for HS matters[4] has been submitted by the Commission and is currently pending in the Council.

However, because of the COVID – 19 outbreaks, the WCO Secretariat has informed that the meeting of September 2020 will be held via written online discussions. Despite the fact that the agenda of this meeting is not available yet, and the organisation and format of discussions are not yet known, it is expected that the items on the agenda of the preceding meeting (HSC/65 – March 2020), that was cancelled by the WCO due to global pandemic situation, will most likely be included in the agenda of the September meeting.

In view of the number of items for which the HSC will be asked to take a decision at this meeting, and their binding legal effects on Union law, it is considered that a Council decision under Article 218(9) TFEU, which establishes the Union's position for the items with respect to which it is already known that the HSC will be 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.

Other items that may be included later on in the agenda of the HSC will be dealt with at a later stage.

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.

It is therefore appropriate that the position to be taken on the Union's behalf in the WCO are established by a Council Decision adopted under Article 218(9) TFEU on the basis of a Commission proposal.

The establishment of such positions has been 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.

The proposed position aims at expressing the position of the Union with respect to the classification of goods in the HS Nomenclature. It also aims at expressing a position with respect to Classification Opinions and HS Explanatory Notes prepared by the HSC.

Consultation of technical experts from Member States was carried out in the Customs Expert Group on 3-5 March 2020. The conclusions of the CEG are in line with the suggested positions, which can be found in the Annex to the draft proposal for a Council Decision.

[4] COM(2020)196

The proposed EU position is also in line with the 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 proposed position is necessary so that the EU is able to express a position at the next HSC meeting.

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*'[5].

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 WCO 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 WCO 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[6] states that "*customs authorities shall revoke their BTI[7] 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.

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5 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.

6 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.

7 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.

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.

4.3.2. Application to the present case

As the main objective and content of the envisaged act relate to the Common Customs Tariff, the substantive legal basis of the proposed decision is Articles 31, 43(2) and 207(4) TFEU.

4.4. Conclusion

The legal basis of the proposed decision should be Articles 31, 43(2) and 207(4) 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

None

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on the position to be taken on behalf of the European Union in the 66th session of the Harmonized System Committee of the World Customs Organization in relation to the envisaged adoption of Classification Opinions, classification decisions, amendments to the Harmonized System Explanatory Notes or other advice on the interpretation of the Harmonized System and recommendations to secure uniformity in the interpretation of the Harmonized System under the Harmonized 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) TFEU, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) By Council Decision 87/369/EEC[8] the Union approved the International Convention on the Harmonized Commodity Description and Coding System, and the Protocol of Amendment thereto[9] (HS Convention), which established the Harmonized System Committee (HSC).

(2) Pursuant to Article 7(1) b) and c) 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) The Harmonized System Committee is expected to decide on Classification Opinions, classification decisions, amendments to the Harmonized System Explanatory Notes 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 at its September session.

(4) It is important to recall that according to the settled case law of the Court of Justice of the European Union, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the customs nomenclature and the relative section and chapter notes.

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8 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).

9 OJ L 198, 20.7.1987, p. 3

(5) In view of the Classification Opinions, classification decisions, amendments to the Harmonized System Explanatory Notes 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, it is appropriate to establish the position to be taken on the Union's behalf, as, once accepted, the Classification Opinions, certain classification decisions and amendments to HS Explanatory Notes will be published in the Commission Communication under article 34 paragraph 7 a) iii) of Regulation (EU) 952/2013 of the European Parliament and of the Council of 9th October 2013, and become applicable to all Member States. The position will be expressed at the Harmonized System Committee.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the 66th session of the Harmonized System Committee of the World Customs Organization 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, is set out in the Annex.

Article 2

Minor changes to the position referred to in Article 1 may be agreed upon without further decision of the Council.

Article 3

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President