EUROPEAN
COMMISSION

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2023/0286 (NLE)

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.

It aims at replacing Council Decision (EU) 2020/1707 of 13 november 2020[1], which expires on 31 December 2023.

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 (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[2]. 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[3].

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 185 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.

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1 Council Decision (EU) 2020/1707 of 13 November 2020 on the position to be taken on behalf of the European Union within the World Customs Organization 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 HS Convention (OJ L 385 of 17.11.2020, p. 11).

2 Since it was introduced, in 1988, the HS Nomenclature has been revised six times. These revisions entered into force in 1996, 2002, 2007, 2012, 2017 and 2022.

3 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).

The Harmonised System Committee (HSC) is a technical committee of the WCO which is 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 advice 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.

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

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(3) 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, as of the end of the second month following the month during which that session at which they were adopted was closed, no Contracting Party to the HS Convention has notified the WCO Secretary-General that it enters a request for re-examination by the HSC or referral to the Council.

Pursuant to Article 8(4) of the HS Convention, once a matter has been 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 in part to the HSC for re-examination.

2.3. The envisaged acts

The proposed framework decision concerns the following acts, referred to in article 7(1)(b) and (c) of the HS Convention, which are considered and provisionally adopted by the HSC, subject to approval by the WCO Council through a "silence procedure":

- Explanatory Notes, that clarify the interpretation of the notes, headings and subheadings of the HS Nomenclature,
- Classification Opinions, that reflect the decisions taken by the HSC as regards the classification of specific products,
- 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[4], the customs authorities of the Member States shall revoke their classification 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

Effective Union participation in the HSC requires an intensified and efficient cooperation between the Institutions due to practical constrains in the preparation and adoption of EU positions.

First, at each of its two yearly meetings the HSC deals with a considerable number of highly technical issues. Table 1 shows that, for the last five meetings (2021 - 2023), the volume of technical agenda items examined by the HSC remained very high, as well as the number of decisions having legal effect to be taken.

Table 1 HSC Decisions by type

1	Meeting	HSC/67	HSC/68	HSC/69	HSC/70	HSC/71
2	**Date[5]**	8-30/4/2021	30/8-28/9/2021	23/2-25/3/2022	1-23/9/2022	13-24/3/2023
3	**Technical items**	**122**	**68**	**96**	**96**	**81**
4	Explanatory Notes	40	8	18	17	16
5	Classification Opinions	21	29	22	10	18
6	Classification decisions/guidance	53	27	44	63	46
7	**Total 4+5+6**	**114**	**64**	**84**	**90**	**80**

Second, the Union continues to be 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. Four of the HSC/67 agenda items were submitted by the EU, three for the HSC/68, six for the HSC/69, twelve for the HSC/70 and sixteen for the HSC/71.

Third, the availability of working documents and their annexes is still challenging, although a general improvement of the situation can be noted, with reiterated invitations by the Union and other Contracting Parties to the WCO Secretariat to address this question. The rules of procedure of the HSC (Rule 10) 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 this rule is not respected in all cases, and that several documents and their annexes, as well as complementary documents, are made available at a posterior date, with important additional technical information, legal interpretation, or

4 OJ L 269 of 10.10.2013, p. 1.

5 Including the HSC Pre-sessional Working Party

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 situation as regards the availability of HSC working documents and their annexes for the past two years.

Table 2 Availability of working documents and their annexes

Meeting	**Availability of documents and annexes**		
	>30d/meeting	**30d-15d/meeting**	**<15d/meeting**
HSC/67	31	16	4
HSC/68	44	9	10
HSC/69	42	41	8
HSC/70	95	15	2
HSC/71	46	64	3

Lastly, since the Covid-19 pandemic, WCO meetings are usually organised in a hybrid format. In order to better prepare and streamline discussions during meetings, a discussion forum allowing delegates to express their positions is organised by the WCO Secretariat in advance of HSC Pre-sessional Working Party or HSC meetings. This also impacts substantially the time allocated for the establishment of EU positions. It is deemed important though to ensure that EU positions are expressed in those preliminary fora to obtain support from other delegations as well as to detect, examine and address potential difficulties when defending EU positions during discussions in HSC (or HSC pre-sessional Working Party) meetings.

Those constrains, which were already identified when the Commission made the proposal leading to the adoption of Council Decision 2020/1707, remain relevant.

3.2. Assessment of the functioning of the new framework created by Council Decision 2020/1707

With Council decision 2020/1707, a flexible and pragmatic framework was established to guarantee a smooth and efficient preparation and adoption of Union positions so that the Union's interests in the WCO can be effectively defended.

First, the Commission classification experts systematically analysed all agenda items, reviewed the classification practice of Member States and prepared draft positions, complemented, when needed, with external consultations with European trade associations or other stakeholders. These draft positions were then discussed with experts from Member States in the Customs Expert Group. After adoption by the Commission, those draft positions were transmitted to the Council for discussion and endorsement.

With such an intensified cooperation between the Institutions, despite the high volume and highly technical character of the issues dealt with by the HSC, and the very limited timeframe between the availability of documents and the actual discussion at HSC meetings, positions were established smoothly, efficiently and in an expedited manner, allowing in all cases the EU to establish, express and defend actively its positions and interests in the WCO.

Council Decision 2020/1707 expires on 31 December 2023, in accordance with its article 3.

3.3. Purpose and content of the proposal

This proposal is aimed at replacing Council Decision 2020/1707 with a Council Decision applicable for the same duration (three years, until 31 December 2026). Considering the rather novel framework put in place in 2020, an expiry date is still proposed, and the functioning of the framework created by this new Council Decision will be reviewed before a potential new extension.

It is proposed to replace Council Decision 2020/1707 without major changes. The only changes of this draft Decision concern the adaptations in relation to changes made to Article 8 of the Convention, and the integration in the Decision of Annexes previously published in Council document ST 11651/20.

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 generally made available, it is considered that a new 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 to replace Council decision 2020/1707 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 new 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 Commission or conclusions reached by the Customs Code Committee, Tariff and Statistical Nomenclature Section).

In line with Council decision 2020/1707, this proposal for a framework decision further provides that:

- The Commission informs the Council 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 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(3) 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 or 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 HSC for re-examination, before the expiry of the deadline foreseen under Article 8(3) 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*'[6].

[6] 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.

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[7] states that "*customs authorities shall revoke their BTI[8] 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.

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.

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7 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.

8 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.

4.4. 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

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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 Article 31, Article 43(2) and Article 207(4), first subparagraph, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) By means of Council Decision 87/369/EEC[9] the Union approved the International Convention on the Harmonized Commodity Description and Coding System[10], and the Protocol of Amendment thereto[11] (HS Convention), which, inter alia, established the Harmonized System Committee (HSC).

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

(3) Pursuant to Article 8(3) 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 (‘HSC decisions’) are to be deemed to be approved by the World Customs Organization (WCO) Council if, as of 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 enters a request for re-examination by the HSC or referral to the WCO Council.

(4) Pursuant to Article 8(4) of the HS Convention, once a matter has been 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,

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9 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).

10 OJ L 198, 20.7.1987, p.3.

11 OJ L 198, 20.7.1987, p. 11.

unless any Council Member which is a Contracting Party to this Convention requests that they be referred in whole or in part to the HSC 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[12].

(6) It is in the interest of the Union that the positions expressed by the Union in the HSC be established according to principles, criteria and orientations governing the tariff classification of goods. It is also in the interest of the Union that such positions be 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 be referred to the WCO Council or to the HSC for re-examination pursuant to Article 8(2) of the HS Convention, in order to avoid that a decision is adopted on a matter on which the Council either is unable to reach a position before the expiry of the deadline provided for in Article 8(3) of the HS Convention, or has reached a position which differs in substance 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 each year, and the short time available to consider documents issued by the WCO Secretariat and Contracting Parties in preparation of the HSC meetings and the consequent need for the position of the Union to take into account and to effectively act upon the new information presented before or during such meetings, 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 (TEU), for the specification of the position of the Union.

(9) Council Decision 2020/1707 set up an efficient and expedited procedure for the establishment of 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. As it shall expire on 31 December 2023, it is appropriate to replace it with a new Decision.

(10) In view of the recurrent late availability of working documents before HSC meetings, and in order to preserve the Union's rights and interests within the WCO, the Commission should strive to call on the WCO Secretariat to ensure the availability of working documents in conformity with the rules of procedure of the HSC, so that such documents are dispatched at least 30 days before the opening of the relevant session.

(11) To ensure that the Council is able to assess and, where appropriate, revise the policy in this Decision on a regular basis, and in the spirit of the sincere cooperation among the Union institutions enshrined in Article 13(2) of the TEU, the validity of this Decision should be limited in time.

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[12] Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ L 256, 7.9.1987, p. 1).

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, shall be established in accordance with the principles, criteria and orientations laid down in Section I of the Annex to this Decision.

Article 2

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

Article 3

This Decision shall enter into force on the date of its adoption.

It shall expire on 31 December 2026.

Article 4

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President