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Proposal for a

COUNCIL DECISION

**on the position to be taken on behalf of the European Union in the World Customs
Organization in relation to the Harmonised System**

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 Council of the World Customs Organization in connection with the envisaged adoption of an amendment to the HS Nomenclature for novel tobacco products¹.

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 Agreement') 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 years². 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 Agreement³.

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. The WCO offers its Members a range of Conventions and other international instruments, as well as technical assistance and training services. Today, the WCO represents 182 Customs administrations across the globe.

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

The technical Committee, in the WCO, which is in charge of the preparatory work related to the Agreement is the HS Committee. The main tasks of the HS Committee are the following:

- To ensure uniform interpretation and application of the Harmonized System legal texts, including by settling classification disputes between Contracting Parties, thus facilitating trade;

¹ "Novel" tobacco products in the context of the HS discussion are not necessarily identical to those which are covered by the definition of "novel tobacco products" provided in Article 2 (14) of Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, (OJ L 127 29.4.2014, p. 1.)

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

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).

- 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 WCO Council examines proposals for amendments to the Agreement, prepared by the HS Committee, and may recommend them to the Contracting Parties. Amendments recommended by the WCO Council are deemed to be accepted if no Contracting Party enters an objection within a period of six months after notification to them.

The positions to be taken by the Union in the WCO on the HS are coordinated with the Member States. The Union and its Member States have together only one vote in the WCO Council.

2.3. The envisaged act of the WCO Council

On 27-29 June 2019, the WCO Council is to adopt the HS Convention Article 16 Recommendation concerning amendments to the Harmonized System Nomenclature. This would include, inter alia, an amendment concerning certain novel tobacco products ('the envisaged act').

For the preparation of the Recommendation, on 19-29 March 2019, during its sixty-third session, the HS Committee is to prepare a draft proposal for an amendment to the HS Nomenclature concerning those products. This amendment is to be incorporated in a draft Recommendation to the WCO Council putting together all proposed amendments to the Annex to the Agreement (those adopted at the March meeting and those adopted at previous HS Committee meetings) to be decided by the WCO Council at its meeting in June. The revised HS Nomenclature will enter into force in 2022.

The draft amendment at issue is the result of the work carried out by the WCO HS Review Sub-Committee (RSC). The RSC discussed the proposal at its 55th session which took place in November 2018. At that time, the EU was not able to express a position. The result of the work of the RSC is presented to the HS Committee for finalising the draft proposed amendment on the parts remaining open for discussion.

The purpose of the envisaged act is to amend the structure of the HS Nomenclature with a view to classifying novel tobacco products intended for inhalation through heated delivery or other means, in a new heading 24.04 "Products containing tobacco, reconstituted tobacco, nicotine, or tobacco or nicotine substitutes, intended for inhalation without combustion; other nicotine containing products intended for the intake of nicotine into the human body".

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

The proposed position aims at expressing support for the draft amendment to the HS Nomenclature with respect to novel tobacco products. It also aims at expressing a preference with respect to some wording to be included in the Additional Notes to the HS Nomenclature, which are currently left in brackets in the draft amendment, as a decision still needs to be taken.

Under the current HS Nomenclature most of the Contracting Parties, including the European Union, prefer to classify certain novel tobacco products under HS subheading 2403.99 as "other manufactured tobacco". At the moment there is no finalised WCO classification decision on those products.

It is important for the EU that such novel tobacco products are identified in a separate heading in the revised HS Nomenclature which will enter into force in 2022 to facilitate their classification. It is also important to express some preferences as to the choice of the wording to be included in the new Notes to Chapter 24 to clarify the dividing line between the different headings of this Chapter. Note has been taken of the WCO Secretariat's comments and suggestions in document NC2591E1a (HSC/63).

The proposed position is therefore as follows:

- On the classification of new tobacco products, the Union should recall its initial position in favour of the WHO/WCO proposal expressed in September 2018, of grouping novel heated tobacco products with other tobacco products under heading 24.03, and defining them objectively via their mode of consumption which involves a heating process, as the preferred option, instead of referring to the absence of a combustion process which is contested. However, in a spirit of cooperation and after further consideration, the Union can now accept the option resulting from the majority vote in the WCO HS Committee and the consecutive work of the WCO RSC of including those products in a new heading 24.04. This, pending the assessment of the properties and emissions of these products, following the decision on novel and emerging tobacco products adopted, with the support of the Union, at the 8th Conference of the Parties of the WHO Framework Convention on Tobacco Control (FCTC)⁴.
- On the new Note 2 to Chapter 24: the Union should support the first option reading "2.- Heading 24.04 does not cover the products specified in headings 24.02 and 24.03⁵". Contrary to the WCO Secretariat opinion expressed in the above-mentioned document, the Union should not support ensuring priority to heading 24.04 for the classification of certain novel tobacco products. It is indeed more appropriate to restrict the scope of that heading to products that are unequivocally classified in it, so that tobacco products that may be classified in that heading but also in another heading of Chapter 24 (24.02 or 24.03) would be redirected to those other headings.
- On the new Note 3 to Chapter 24: the Union should not support the inclusion of the text between brackets "whether or not smoke is produced". The reference to smoke may give rise to confusion as regards the distinction between products of headings 24.02 (and 24.03) and 24.04, as the initial objective and purpose for the creation of the new heading 24.04 is to cover products that are not smoked in the traditional manner. However, the properties and emissions of these products are currently being evaluated in the context of a decision on novel and emerging tobacco products adopted at the 8th Conference of Parties to the WHO Framework Convention on Tobacco Control. It is thus deemed more appropriate to wait for the results of this assessment and to revisit the issue if there is new evidence relevant for customs classification.

The proposed EU position is 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 WCO Council. The same position will be expressed during preparatory work, and in

⁴ Decision FCTC/COP8(22)

⁵ Heading 24.02 covers "Cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes". Heading 24.03 covers "Other manufactured tobacco and manufactured tobacco substitutes; 'homogenised' or 'reconstituted' tobacco; tobacco extracts and essences".

particular at the HS Committee meeting with the understanding that, at the time of the Harmonised System Committee's meeting, the EU will support the drafting of the Committee's proposal when it is in line with the majority view of the Contracting Parties.

4. LEGAL BASIS

4.1.1. 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.

Therefore, the procedural legal basis for the proposed decision establishing the position to be adopted on the Union's behalf and concerning the envisaged act is Article 218(9) TFEU.

4.1.2. Application to the present case

The WCO Council is a body set up by an agreement, namely the Convention Establishing a Customs Cooperation Council of 15 December 1950. It is the body responsible, under the International Convention on the Harmonized Commodity Description and Coding System, for issuing recommendations to the Contracting Parties for amending this Convention.

The WCO Council is expected to recommend to HS Contracting Parties an amendment of the Annex to the said Convention (the HS Nomenclature) at its June meeting, that will be deemed to be accepted within six months unless a Contracting Party objects. Once accepted, the Recommendation will be incorporated in the 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 2. (a) of the said Regulation states "*2. The combined nomenclature shall comprise: (a) the harmonized system nomenclature;*"

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.

4.2. Substantive legal basis

4.2.1. 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.

⁶ Judgment of the Court of Justice of 7 October 2014, Germany v Council, Case C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

4.2.2. Application to the present case

As the main objective and content of the envisaged act relate to the Customs Union, the substantive legal basis of the proposed decision is Article 28(1) TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 28(1) 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

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the World Customs Organization in relation to the Harmonised System

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 28(1), in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The International Convention on the Harmonized Commodity Description and Coding System ('the Agreement') was concluded by the Union by Council Decision 87/369 of 7 April 1987⁷ and entered into force on 1 January 1988.
- (2) Pursuant to Article 7 of the Agreement, the Harmonized System Committee may prepare for the WCO Council proposals for amendments to the HS Nomenclature. Under Article 16 of the Agreement, the WCO Council may recommend this amendment to the Contracting Parties.
- (3) The WCO Council is expected to decide on a recommendation to the Contracting Parties for an amendment to the HS Nomenclature on Chapter 24 at its June session. Such a recommendation will be adopted on the basis of a proposal for an amendment prepared by the Harmonized System Committee, that should be finalised during its 63rd session/meeting on 19-29 March 2019.
- (4) The 8th Conference of the Parties of the WHO Framework Convention on Tobacco Control (FCTC) adopted decision FCTC/COP8(22) on novel and emerging tobacco products to obtain further scientific data on these products and in particular, to receive clarification on the properties and emissions of these products.
- (5) 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.
- (6) In view of the recommendation for an amendment to the HS Nomenclature to be adopted by the WCO Council, it is appropriate to establish the position to be taken on the Union's behalf, as, once accepted under Article 16 of the Agreement, the recommendation will be capable of decisively influencing the content of Union law, namely Annex 1 to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff. The position will be expressed at

⁷ OJ L 198, 20.7.1987, p. 1.

the preparatory stages of the WCO Council, including the Harmonised System Committee.

- (7) It is appropriate to support the draft amendment to the HS Nomenclature concerning Chapter 24 and to express the Union's views and preferences for the texts that still need to be decided upon, with the understanding that, at the time of the Harmonised System Committee's meeting the EU will support the drafting of the Committee's proposal when it is in line with the majority view of the Contracting Parties.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the WCO Council is set out in the Annex.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*



Brussels, 1.3.2019
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ANNEX

ANNEX

to the

Proposal for a Council Decision

**on the position to be taken on behalf of the European Union in the World Customs
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ANNEX

The EU should restate its original position in favour of the dismissed joint WHO/WCO proposal, of grouping novel heated tobacco products with other tobacco products under heading 24.03, and defining them objectively via their mode of consumption which involves a heating process¹, as the best possible option.

The EU recalls the WHO Framework Convention on Tobacco Control – to which the EU and all of the Member States are a full Party – and its decision FCTC/COP8(22) on novel and emerging tobacco products. The EU recalls that work is currently carried out by the WHO Framework Convention on Tobacco Control regarding inter alia the nature of emissions produced by novel tobacco products, and that these developments may need to be addressed at a later stage - in the HS2027 review cycle - if there is new evidence relevant for the assessment of the objective characteristics and properties of such products for customs purposes.

The EU, however, should acknowledge that work in the HS 2022 cycle has moved on in a direction different from the WCO/WHO proposal. In light of the above, and in order not to block the decision-making process, the EU:

- by following the majority of the Contracting Parties to the HS Convention, **can accept the draft amendment**, resulting from the work of the WCO HS Revision Sub-Committee, and
- should express its position as to the choice of wording in two occurrences that remain for decision between brackets:
 - (1) New Note 2 to Chapter 24: **support the first option** reading "2.- Heading 24.04 does not cover the products specified in headings 24.02 and 24.03.". The Union should not support ensuring priority to heading 24.04² for the classification of novel tobacco products. It is more appropriate to restrict the scope of that heading to products that are unequivocally classified in it, so that tobacco products that may be classified in that heading but also in another heading of Chapter 24 (24.02³ or 24.03⁴) would be redirected to those other headings.
 - (2) New Note 3 to Chapter 24: **not support the inclusion of the text** "whether or not smoke is produced". The reference to smoke may give rise to confusion as regards the distinction between products of headings 24.02 (and 24.03) and 24.04, as the initial objective and purpose for the creation of the new heading 24.04 is to cover products that are not smoked in the traditional manner.

¹ Doc. WCO NC2513B1a (Annex)

² New heading 24.04 should cover "Products containing tobacco, reconstituted tobacco, nicotine, or tobacco or nicotine substitutes, intended for inhalation without combustion; other nicotine containing products intended for the intake of nicotine into the human body".

³ Heading 24.02 covers "Cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes".

⁴ Heading 24.03 covers "Other manufactured tobacco and manufactured tobacco substitutes; 'homogenised' or 'reconstituted' tobacco; tobacco extracts and essences".