



Brussels, 21.9.2020  
COM(2020) 585 final

Proposal for a

## **COUNCIL DECISION**

**on the position to be taken on behalf of the European Union in the 66<sup>th</sup> 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 complements the draft decision establishing the position to be taken on the Union's behalf in the 66<sup>th</sup> session of the Harmonized System Committee (HSC) of the World Customs Organization in September 2020, submitted to the Council on 21 August 2020 (COM(2020) 427).

### 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<sup>1</sup>. 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<sup>2</sup>.

#### 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.

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<sup>1</sup> 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.

<sup>2</sup> 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 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 altogether 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<sup>3</sup>, 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

<sup>3</sup> OJ L 269 of 10.10.2013, p. 1.

the interpretation of the Harmonized System under the Harmonised System Convention at each of its two annual sessions.

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<sup>4</sup> 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 was not available yet, and the organisation and format of discussions not yet known, it was 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. To this end, a first draft Council Decision was prepared and sent to the Council (COM(2020) 427).

The WCO rearranged the dates and agenda of the HSC meeting, which will be held virtually from 28/9 to 30/10, and will cover mainly the work of the virtual WCO Review Sub-Committee which ended on 21 August and some items already included in the first draft decision sent to the Council, while all other items contained in this first draft decision are postponed to a next HSC session. 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 second Council decision under Article 218(9) TFEU, which complements the first one and establishes the Union's position for the items with respect to which the HSC will be called upon to decide (i.e. Explanatory Notes, guidance or other advice on the interpretation of the Harmonized System), is necessary.

### **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.

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<sup>4</sup> COM(2020)196

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 2-7 September 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.

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'*<sup>5</sup>.

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<sup>6</sup> states that *"customs authorities shall revoke their BTI<sup>7</sup> 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

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<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> 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.

(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 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



Proposal for a

## COUNCIL DECISION

**on the position to be taken on behalf of the European Union in the 66<sup>th</sup> 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<sup>8</sup> the Union approved the International Convention on the Harmonized Commodity Description and Coding System, and the Protocol of Amendment thereto<sup>9</sup> (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.
- (5) In view of the Classification Opinions, classification decisions, amendments to the Harmonized System Explanatory Notes or other advice on the interpretation of the

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<sup>8</sup> 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).

<sup>9</sup> OJ L 198, 20.7.1987, p. 3

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 66<sup>th</sup> 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 technical changes to the position referred to in Article 1 may be agreed upon by the representatives of the Union without further decision of the Council.

*Article 3*

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council  
The President*





Brussels, 21.9.2020  
COM(2020) 585 final

ANNEX

ANNEX

to the

**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**

## ANNEX

This Annex complements the Annex to Council Decision...

### II.2. Development of correlation tables between the 2017 and 2022 versions of the Harmonized System (Doc. NC2704, NC2749 and NC2753)

Concerning the correlation table for subheadings 4407.13 and 4407.14 (mixtures of S-P-F (spruce, pine and fir) and Hem-fir (Western hemlock and fir)) the Union shall support the correlations proposed by the WCO Secretariat in paragraph 20 of document NC2753.

Concerning the correlation table for subheading 4418.83 (I beams) the Union shall support the correlations proposed by Japan in paragraph 14 of document NC2753.

Concerning the correlation table for subheading 7019.71 (veils/thin sheets of glass fibres) the Union notes that the only transfer from HS2017 would be from subheading 7019.32.

Concerning the correlation table for subheadings 8462.62 and 8462.63 (forging machines), the Union shall support keeping all the subheadings proposed for transfer mentioned under HS2017, including the ones in square brackets.

Concerning the correlation table for subheading 8519.81 (telephone answering machines) the Union shall support the proposal of the WCO Secretariat in paragraph 26 of document NC2704.

Concerning the correlation table for subheading 8539.51 (LED) the Union shall support the WCO Secretariat's conclusion in paragraph 24 of the same document.

Concerning the correlation table for new subheading 8541.51 (semiconductor-based transducers) the Union notes that there is no evidence of parts classified separately in the HS2017 version. Therefore no additional transfers are needed.

Concerning the correlation table for heading 88.06 (unmanned aircraft) the Union shall support option (i) mentioned in paragraph 25 of document NC2704.

Finally the Union shall support the correction of some editorial errors in the draft Correlation Tables I and II, as set out in the Annex to document NC2753.

### III.4. Classification in HS 2022 of certain collections and collectors' pieces of numismatic interest (Request by the Secretariat) (Doc. NC2711, NC2754)

The Union would classify the three products in the new subheading 9705.31 in HS2022. The Union notes that both Canada and the WCO Secretariat support Union's proposal to delete the mention of the "coins generally known in the trade as 'ancients' or 'ancient coins'" from the second paragraph of Item (4) of new Part (A) of HSENs to heading 97.05.

### III.5. Classification in HS 2022 of cartridges for 3D printers (Request by the Secretariat) (Doc. NC2712, NC2755)

The Union shall support the proposal for amending the HSENs which specifies that 3D printer cartridges with electronic components or mechanical mechanisms should be classified as parts of 3D printers.

The Union would classify products presented in both documents NC2712 and NC2755 in heading 84.85 in HS2022 as parts of 3D printers considering the presence of electronic components for connection to a 3D printer.

III.7 REPORT OF THE 57<sup>TH</sup> SESSION OF THE HS REVIEW SUB-COMMITTEE (Doc. NR1434)

III.8. Matters for decision. (Doc. NC2709)

- (a) Annexes C/4 and D/8 – Amendments to the Explanatory Notes (HS-2022) (Section VI)
- (b) Annexes C/5, D/9 and D/22 – Amendments to the Explanatory Notes (HS-2022) (Section VII)
- (c) Annexes C/8 and D/12 – Amendments to the Explanatory Notes consequential to the article 16 recommendation of 28 June 2019 (Section XIII)
- (d) Annexes C/13 and D/17 – Amendments to the Explanatory Notes consequential to the Article 16 Recommendation of 28 June 2019. (Section XX)
- (e) Annexes C/14 and D/18 – Possible amendments to the Explanatory Notes in respect of certain amusement park equipment (Proposal by the US)

The Union shall agree to all proposed amendments in the documents.

- (f) Annexes C/1 and D/5 – Possible amendments to the Explanatory Notes to heading 15.09 in respect of other virgin olive oils, and heading 15.15 in respect of examples of microbial fats and oils

Concerning the HSEs to heading 15.09, the Union shall support the EU proposal (option 2) and the new Canadian proposal (option 3). In item (D)(2), the Union shall support the use of “or” (option 2) instead of “and/or”.

Concerning the HSEs to heading 15.15, the Union shall support the use of the expression “single cell organism” (option 1), and the use of “or” (option 2) instead of “and/or”. In examples (a) and (b), the Union shall support the use of the expression “obtained from” (option 2).

- (g) Annexes C/3 and D/7 – Possible amendments to the Explanatory Notes in respect of “placebos” and “double-blinded clinical trial kits” in heading 30.06 (Request by Australia)

Concerning the sentence “The placebos of this heading also include [control vaccines] [controlled vaccines] [vaccines which are used as control substances and] that have been licensed for use in recognized clinical trials.”, the Union shall not support adding this sentence to the text of item (12) of the HSEs to heading 30.06, as it is not clear what kind of substances are described by it. If the other Contracting Parties decide to add it, the Union shall support “vaccines which are used as control substances” (option 3), or if flexibility is needed, “control vaccines” (option 1).

Concerning the sentence “[Active ingredients to be trialled can include herbal medicinal products [for therapeutic or prophylactic uses].]”, the Union shall remain flexible for adding it to the text, but shall not support an open list of examples as suggested by the US delegation.

- (h) Annexes C/6 and D/10 – Amendments to the Explanatory Notes Consequential to the Article 16 Recommendation of 28 June 2019 (Section IX)

The Union shall support the proposal to add Subheading Explanatory Notes to subheadings 4412.41, 4412.42 and 4412.49. The Union shall request that the proposed text needs to be further analysed and improved in order to bring it in line

with the current classification practices in the Union (for example, the orientation of the veneers).

- (i) Annexes C/7 and D/11 – Amendments to the Explanatory Notes consequential to the Article 16 Recommendation of 28 June 2019 (Sections XI and XII)

The Union shall support adding “paraseismic wall covering” and “geotextiles” to the list of examples of electronic textiles. In the text on “geotextiles”, the Union shall support the text “a sensor made of fibres or at least being fully integrated in the fibres” (option 2) as previously suggested by the Union.

The Union shall support provisionally adopting the texts approved by the RSC.

- (j) Annexes C/12 and D/16 – Amendments to the Explanatory Notes Consequential to the Article 16 Recommendation of 28 June 2019 (Section XVII)

The Union shall support adding the reference to permanently integrated cameras in paragraph 3 of the HSENs to heading 88.06, provided that the Classification Opinion classifying a drone with an integrated camera in heading 85.25 is reviewed and aligned with HS2022 and HSEN.

In relation to paragraph 4 of the HSENs to heading 88.06, the Union shall support the proposal by China with additional technical criteria introduced by the Union (second option).

- (k) Annexes C/15 and D/19 – Possible amendment to the Explanatory Notes to Chapter 97 in respect of certain cultural articles (Proposal by the United States)

The Union does not support the list of items mentioned as examples, as these are very specific and limited to explain the scope of the articles to be classified under subheading 9705.10.

The Union further notes that the definitions and examples provided would not give clarity on how to classify for example “traditional national costumes” or “old cars”.

- (l) Annexes C/16 and D/20 – Amendment to the GIR's Explanatory Notes (HS 2022)

The Union shall support the original proposal by the WCO Secretariat (option 1, using the term “merely”, but remaining flexible for the expression “not further worked than”) and shall request to align the texts in English and French.

- III.9. Possible amendment of the Explanatory Note to heading 71.04 in relation to synthetic diamonds (Proposal by the Kimberley Process) (Doc. NC2757)

The Union shall agree to the proposed modifications to the new third paragraph to heading 71.04 and to the creation of new item (3) of the subheading Explanatory Notes to subheading 7104.91.

- III.10. Classification of a micro-electro-mechanical systems (MEMS) element in HS 2022 (Proposal by the Secretariat)

The Union would classify the product in heading 85.41.