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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 Council in relation to a WCO Article 16 Recommendation amending 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 a draft Recommendation concerning the amendment of the Harmonized System (HS) Nomenclature.

### **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 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. 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;
- 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;

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<sup>1</sup> 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.

<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 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 its 133<sup>rd</sup>/134<sup>th</sup> sessions (27-29 June 2019), the WCO Council is to adopt the HS Convention Article 16 Recommendation concerning amendments to the HS Nomenclature ('the envisaged act'). The revised HS Nomenclature will enter into force in 2022.

The preparation of the Recommendation was conducted on 19-29 March 2019, during the sixty-third session of the HS Committee.

The draft Recommendation includes 355 sets of amendments to the HS Nomenclature which are aimed at reflecting the evolution of trade patterns, the development of new technologies and the need to modernise or adapt the nomenclature to its environment. In particular, the proposed amendments:

- Simplify the Nomenclature by deleting headings and subheading with a low volume of trade, hence keeping the HS up to date and in line with the evolution of products.
- Facilitate the classification in coherence with the international standards applicable, or by taking into account new products or the evolution of the composition of products (cell therapy products, 3D printers, flat panel displays, yoghourts, insect food products, virgin olive oil, novel tobacco products, drones, semiconductors and transducers, etc.).
- Better align the French and English versions of the Nomenclature in order to ensure uniform application and reduce existing or potential divergences in classification.
- Facilitate the fight against fraud and illegal trade and the protection of health and environment by creating headings and subheadings in various areas (synthetic diamonds, chemicals, cultural goods, fentanyl, waste, etc.).

Proposals were presented by International Organisations (Kimberley Process, FAO, Basel and Rotterdam Conventions, International Olive Oil Council, etc.), Contracting parties and the WCO Secretariat. Among those amendments are several proposals presented by the EU (photo- and thermosensitive plates, laminated fabrics, inflatable boats, electronic textiles, glass fibres, 3D printers, refractory ceramics, forging machines, yoghurt, Note 3 to Chapter 27, bendy pencils, for example).

The draft Recommendation is included as Annex R to the report of the 63<sup>rd</sup> meeting of the HS Committee in March 2019 (Doc. NC2626B1b-HSC/63/March 2019).

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

The proposed position aims at expressing support for the draft Recommendation concerning the amendment of the HS Nomenclature.

It is important for the EU that such Recommendation is adopted as it aims at updating and modernising the HS Nomenclature and at simplifying and facilitating the classification of products. It is also important to note that the EU was one of the major contributors to this modernisation exercise as it submitted a large part of proposals in that respect in this review cycle.

Consultations were constantly carried out with the Member States within the Customs Expert Group – HS/WCO Coordination, and within the Council, and, where needed, with Commission services.

In relation to the amendment concerning novel tobacco products, the EU position was established by a Council Decision before the above HS Committee session<sup>3</sup>. As the Council Decision deviated from the Commission proposal, a declaration was made by the Commission<sup>4</sup> recalling the work currently carried out by the WHO Framework Convention on Tobacco Control regarding the nature of emissions produced by novel tobacco products, and that the results may need to be addressed at a later stage if there is new evidence relevant for the assessment of the objective characteristics and properties of such products for customs purposes.

The proposed position is therefore as follows:

- On the Recommendation, the Union should support the adoption of the Recommendation.
- As the case may arise, the Union should also support further editorial amendments that may be proposed by the WCO Secretariat.

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.

### 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

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<sup>3</sup> ST 7138 2019 INIT, Council Decision on the position to be taken on behalf of the European Union in the World Customs Organization in relation to the Harmonized System.

<sup>4</sup> ST 7208 2019 ADD 1, 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 – Adoption – Statement by the Commission.

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 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, in accordance with Article 16 of the HS Convention, 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. Accepted amendments are binding under international law on all Contracting Parties once entered into force and the tariff/statistical nomenclature of each Contracting Party has to be brought into conformity with the amended Harmonized System. Once accepted, the Recommendation will thus 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.

### *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.

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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.

**6. PUBLICATION OF THE ENVISAGED ACT**

None

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## **COUNCIL DECISION**

### **on the position to be taken on behalf of the European Union in the World Customs Organization Council in relation to a WCO Article 16 Recommendation amending 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'), concluded by the Union by Council Decision 87/369<sup>1</sup>, 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 amendment 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 at its June sessions. Such a Recommendation will be adopted on the basis of a proposal prepared by the Harmonized System Committee and finalised during its 63<sup>rd</sup> meeting on 19-29 March 2019. It will enter into force on 1 January 2022.
- (4) It is of utmost importance that the HS Nomenclature is kept up-to-date and in line with the evolution of trade patterns, the development of new technologies and reflect as closely as possible the needs of the users. The proposed Recommendation includes numerous sets of amendments that take into account the need to modernise or adapt the nomenclature to its environment.
- (5) Since that Recommendation for an amendment to the HS Nomenclature is 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 binding on the Union and capable of decisively influencing the content of Union law, namely Annex I to Council Regulation (EEC) No 2658/87<sup>2</sup>.

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<sup>1</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>2</sup> 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)

- (6) A partial EU position to be taken in the WCO was established already before the 63<sup>rd</sup> meeting of the Harmonised System Committee<sup>3</sup>.
- 7) It is appropriate to support the draft amendment to the HS Nomenclature, and any minor editorial changes that may be deemed necessary,

HAS ADOPTED THIS DECISION:

*Article 1*

The position to be taken on the Union's behalf in the June 2019 sessions of the WCO Council shall be to support the draft Article 16 Recommendation concerning the amendment to the Harmonized System as set out in Annex R to Document NC2626B1b (Report HSC/63/March 2019).

The representatives of the Union may agree to minor editorial changes to the draft Article 16 Recommendation in the light of developments at the upcoming WCO Council sessions, in consultation with Member States, or during on-the-spot coordination meetings, without a further decision of the Council.

*Article 2*

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council  
The President*

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<sup>3</sup> ST 7138 2019 INIT, Council Decision on the position to be taken on behalf of the European Union in the World Customs Organization in relation to the Harmonized System; ST 7208 2019 ADD 1, 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 – Adoption – Statement by the Commission.