



HARMONIZED SYSTEM
COMMITTEE

-
23rd Session

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O. Eng.

H1-1

Brussels, .

POLICY ISSUES RELATING TO THE HARMONIZED SYSTEM :

BINDING STATUS OF HSC DECISIONS

(Item III.4(b) on Agenda)

Reference documents :

42.007 (HSC/21)

42.107 (HSC/21)

42.110 (HSC/21)

42.100, Annex C/1 (HSC/21- Report)

42.377 (PC/39)

42.550 (PC/39 - Report)

42.750, Annex C/4(HSC/22 - Report)

42.720 (PC/40)

42.832 (PC/40 - Report)

I. BACKGROUND

1. At its 22nd Session (November 1998), the Harmonized System Committee examined the question of amending the HS Convention or preparing a Protocol for making the HSC decisions legally binding on Contracting Parties. It was concluded that the Committee strongly supported the idea of providing a legal basis for making the Committee's decisions binding and that there was a general preference in favour of a protocol. The Secretariat was instructed to study the matter further and to submit a draft protocol, taking account of the suggestion that a time-limit should be introduced for implementation of HSC decisions in the proposed legal provisions.
2. At its 40th Session of the Policy Commission held in December 1998, there was support for the principle of making the Committee's decisions binding on HS Contracting Parties. However, some concerns were expressed about a variety of legal issues, as well as how to handle the problem of implementation in cases where internal tariff, etc., measures would need to be taken.

File No. 2669

II. CONTRACTING PARTIES' RESPONSES TO THE QUESTIONNAIRE

3. In accordance with the above instructions, the Secretary General sent out a questionnaire (see Annex I to this document) on 28 January 1999 to the Contracting Parties to the HS Convention to gather necessary information for the study.

4. So far the Secretariat has received responses to the questionnaire from the following 27 Contracting Parties :

Australia	Indonesia	Malta	Romania	Tunisia
China	Iran (Islamic Rep.of)	Mauritius	Saudi Arabia	Turkey
Cyprus	Ireland	Mexico	Slovakia	US
Czech Republic	Japan	New Zealand	Spain	
EC	Korea (Rep.of)	Norway	Sweden	
Hungary	Lithuania	Poland	Switzerland	

The Secretariat wishes to thank these Members for their co-operation.

5. The Secretariat has noted that the EC replied on behalf of the fifteen Member States, although Ireland, Spain and Sweden replied separately. Therefore, given the fact that both the EC and its Member States are Contracting Parties to the HS Convention, the suffix of "(+15)" has been added wherever appropriate in the information provided below and the responses by Ireland, Spain and Sweden were not double reported, except for information on their national procedures to implement the decisions (Question 4).

6. A summary of the responses to the Questions is set out below. The details of the responses to all questions have been synthesized in Annex II to this document.

Question 1. Name of the Administration (Customs or Economic Union)

7. With the EC Member States taken as a whole, the total number of responses was 24 (+15).

Question 2. Does your Administration (Customs or Economic Union) implement HSC classification decisions ?

8. Nineteen (+15) Members responded "Yes", while Mexico, New Zealand and Norway responded "No".

9. Switzerland commented that the HSC decisions were implemented in principle but with a few exceptions, given that some decisions could not be implemented at national level because they conflicted with national procedures which had governed classification in national subheadings of the Swiss Customs Tariff for many years (this mainly involved decisions and classification opinions concerning products in the "foodstuffs" Chapters).

10. Similarly, the US indicated that HSC classification decisions were implemented to the extent permitted within the limits of their national legislation.

Question 3. Procedures for implementation

11. Fifteen (+15) respondents indicated that administrative procedures were applied. Six respondents (Iran (Islamic Rep. of), Poland, Romania, Switzerland, Turkey and the US) indicated that both administrative and legislative procedures might be invoked or one or the other procedure might be necessary depending on the nature of the decision. Hungary and Lithuania indicated legislative procedures were applied.

Question 4. Explain the procedure in brief (step by step)Administrative procedure

12. For most Members, this generally involves a process of examination of HSC decisions by competent national authorities (Customs administrations in most cases), translation when necessary, communication of the decisions to Customs officers and parties concerned through administrative circulars and, if necessary, amendment of national tariffs. For the US Administration, a notice and comment period must be provided before a determination may be made as to whether an HSC decision which is contrary to current US practice can be implemented.

Legislative procedure

13. As indicated above, for a number of administrations, HSC decisions may have to go through a legislative process, although the steps taken are different from country to country. For the US Administration, an investigation and comment period must be provided before a determination may be made on the basis of certain criteria as to whether an HSC decision will be implemented.

Question 5. Average time taken for implementation after the HSC decisions have become final (expiry of reservation period under Article 8.2 of the HS Convention)

14. Nine (+15) respondents indicated two to three months. Five respondents indicated one month. Four respondents indicated three to six months. Switzerland indicated three to six months or above six months, depending on the nature of the decisions. The US pointed out that under either the administrative or legislative procedures, more than three months, and sometimes more than six months were necessary. Iran (Islamic Rep. of) indicated above six months.

Question 6. If your answer to question 5 is "above 6 months", indicate the reasons

15. For Switzerland and the US, these relate to the extended time necessary to go through the legal procedures, namely, time necessary to inform the Parliament or for comment and analysis. Iran (Islamic Rep. of) indicated that administrative and translation problems contributed to the prolonged process.

Question 7. If the HSC classification decisions are made legally binding, does the situation change with regard to the national procedure for implementation ?

16. Fifteen (+15) Members responded "No", while five Members responded "Yes". The US commented that there would be no change in the above procedure unless the change

were required by an amendment to the Convention or similar vehicle, and were accepted and ratified by the US Government in accordance with its laws and procedures.

Question 8. If you have answered "Yes" to Question 7, explain the change in procedure.

17. Japan and Slovakia indicated that since they have been implementing the HSC classification decisions by means of administrative procedures, their national procedures would have to be changed from administrative to legislative by incorporating the decisions in national legislation, if the decisions were to be made legally binding.
18. Switzerland pointed out that to make the HSC decisions binding could have repercussions on national procedures with regard to appeals arising from disputes about the classification of goods, and a transfer of powers from the Swiss courts to the HSC.
19. Turkey indicated that a systematic application has already been initiated to make HSC decisions binding.

III. SECRETARIAT COMMENTS

20. While the Committee and the Policy Commission have supported the idea of making HSC decisions legally binding on Contracting Parties and have expressed a preference for doing this by Protocol, the Secretariat would note that the discussions of this complex matter in both the Committee and the Policy Commission have been surprisingly brief. There has been almost no discussion of the implications of the decision. There has been general acceptance of the idea without studying the repercussions.
21. The Secretariat has no intention of re-opening the basic discussion of the issue, but does believe that the issue, and in particular the implications and repercussions, need to be discussed in greater detail by the Committee before a Protocol to the HS Convention can be drafted by the Secretariat.
22. In this connection, the Secretariat would first of all stress that it should be understood that a Protocol would be binding only on the signatories to the Protocol and not on the other Contracting Parties to the HS Convention.
23. Furthermore, in become a signatory to such a Protocol it should also be understood that signatories will give up a degree of national sovereignty that they have retained so far. As pointed out by the Swiss Administration, agreeing that the decisions of the HS Committee will be legally binding on your administration means that the decisions of the Committee will take precedence over decisions of your administration, your legislature and your courts.
24. While this initiative was undertaken to improve the functioning of the HS decision making process, it should also be understood that it will clearly result in a greater number of reservations being entered with regard to Committee decisions, with a consequent increase in the time taken to resolve disputes.
25. In drafting this document, in studying the possibility of a draft Protocol, and in reflecting upon the responses to the questionnaire, the Secretariat has come across a number of questions which it would like to pose to the Committee.
 - Which HSC decisions should be covered by the Protocol?

[The Secretariat would define the expression to mean decisions taken by the Committee regarding individual classification questions (including “Classification Opinions or other advice” as referenced in paragraph 1(b) of Article 7 of the HS Convention and the recommendations of paragraphs 2 and 3 of Article 10 of the Convention.)]

- What is meant by making the decisions binding ?
- Would the binding nature of the decisions apply only to the specific article before the Committee or to the same class or kind of articles ?
- Do we wish to make decisions binding when decisions are taken by a small majority only ?
[Perhaps a two-thirds majority should be required as in the case of legal amendments to the Harmonized System.]
- What are the repercussions on an administration if a binding decision is not implemented by that administration or is not implemented in a timely basis?
- What would constitute a reasonable time period for implementation of HSC decisions?
[3 months, 6 months, longer ?]
- How many signatories will be needed for the Protocol to enter into force ?
[For the HS Convention the minimum number was 17.]

26. Due to the lateness of this document, the Secretariat would suggest that the Committee hold only a preliminary discussion of these issues and any others that may arise in connection with this question at this session of the Committee. Based on the discussion of the Committee, the Secretariat would then be in a better position to draft a Protocol which would give binding status to the decisions of the Committee, for the consideration of the Committee at its 24th Session.

IV. CONCLUSION

27. The Committee is invited to examine the question of how to give binding status to the decisions of the Committee, taking into account the results of the Secretariat’s survey and the Secretariat’s comments, and in particular the questions raised by the Secretariat in paragraph 25 above.

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QUESTIONNAIRE

Subject : Implementation of HSC decisions

1. Name of the Administration (Customs or Economic Union)
2. Does your Administration (Customs or Economic Union) implement HSC classification decisions (*circle appropriate answer*)?

* Yes * No
3. Procedure for implementation :

* legislative procedure * administrative procedure * both
4. Explain below the procedure in brief (*step by step*)
5. Indicate (*circle as appropriate*) the average time taken for implementation after the HSC decisions have become final (*expiry of reservation period under Article 8.2 of the HS Convention*)

* 1 month * 2-3 months * 3-6 months

▪ above 6 months
6. If your answer to question 5 above is "above 6 months", indicate the reasons below.
7. If the HSC classification decisions are made legally binding, does the situation change with regard to the national procedure for implementation ?

* Yes * No
8. If you have answered "Yes" to question 7 above, explain the change in procedure.

Please return the completed questionnaire before 20 February 1999 to :
The Director
Tariff and Trade Affairs (Nomenclature and Classification Sub-Directorate)
30 rue du Marché, B-1210 Brussels
Fax : (32 2) 209 94 92

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ANNEX II

RESPONSES TO THE QUESTIONNAIRE ON NATIONAL PROCEDURES**REGARDING IMPLEMENTATION OF HSC DECISIONS****I. Questions 1, 2, 3, 5, 7**

Q1	Q2	Q3	Q5	Q7
Australia	Yes	Administrative	2-3 months	No
China	Yes	Administrative	2-3 months	No
Cyprus	Yes	Administrative	2-3 months	No
Czech Republic	Yes	Administrative	3-6 months	No
EC	Yes	Administrative	2-3 months	No
Hungary	Yes	Legislative	3-6 months	No
Indonesia	Yes	Administrative	2-3 month	No
Iran (Islamic Rep. of)	Yes	Both	Above 6 months	Yes
Japan	Yes	Administrative	2-3 months	Yes
Korea	Yes	Administrative	3-6 months	No
Lithuania	Yes	Legislative	1 month	No
Malta	Yes	Administrative	1 month	No
Mauritius	Yes	Administrative	1 month	No
Mexico	No			
New Zealand	No	Administrative	1 month	Yes
Norway	No			
Poland	Yes	Both	2-3 months	No
Romania	Yes	Both	2-3 months	No
Saudi Arabia	Yes	Administrative	1 month	No
Slovakia	Yes	Administrative	2-3 months	Yes
Switzerland	Yes/no	Both	3-6 months or above 6 months	Yes
Tunisia	Yes	Administrative	1 month	No
Turkey	Yes	Both	3-6 months	Yes
US	Yes/no	Both	3-6 months or above 6 months	Yes /No
Total : 24 (+ 15)	Yes : 19(+15) No : 3 Yes/No : 2	Administrative : 14 (+15) Legislative : 2 Both : 6	1 month : 6 2-3 months: 9 (+15) 3-6 months : 4 3-6 months/above: 2 6 months or above : 1	No :15(+15) Yes : 6 Yes/No : 1

II. Question 4 (Explanation of procedures)

Australia

The description of the goods, the classification decision and the reasons for the decision are recorded as a tariff classification precedent in the electronic Tariff And Precedent Information Network (TAPIN).

Persons wishing to import like goods must take heed of this precedent.

China

- Confirm that the HSC decisions have become final.
- Translate the decisions into Chinese.
- Distribute the decisions to all Customs districts for implementation.

Cyprus

For the decisions which are in agreement with our decisions, action is being taken.

The other decisions are notified to the Customs officers, clearing agents and any other legal persons, organisations or services deemed necessary. Any contrary previous decision is annulled at the same time.

Czech Republic

- Translation of HSC classification decisions into the Czech language.
- Creation of list of HSC classification decisions.
- Use of list of HSC classification decisions as supporting viewpoints in the process of the classification of goods.

EC

- Adoption by the Customs Code Committee.
- Publication in the Official Journal of Explanatory Notes and Classification Opinions.
- Possible adoption of a Regulation or of Explanatory Notes to the Combined Nomenclature.

Hungary

- Official Hungarian translation is made by Tariff Department of the Hungarian Customs Administration.
- The competent divisions of the Ministry of Finance prepare the change of regulations.
- The Minister of Finance issues the new regulation.

Indonesia

No details given.

Iran (Islamic Rep. of)

- In accordance with the provisions of Article 56 of the Customs Law of Iran and Article 316 of its rules of procedures use of the Explanatory Notes as well as the Classification Opinions is binding.
- Insertion of amending supplement to the Explanatory Notes in the official gazette is binding.
- In accordance with our administrative procedures, all WCO recommendations (subject to Article 7, NC) have been applied so far.

Ireland

- HSC classification decisions are published.
- Relevant Irish Binding Tariff Information decisions are examined.
- If appropriate, amended Irish Binding Tariff Information decisions are issued.

Japan

The Japanese Administration has issued directives to implement HS Explanatory Notes and the Compendium of Classification Opinions, and implemented HSC classification decisions by means of directives for amendments to the Explanatory Notes and the Compendium of Classification Opinions.

After receiving amendments to the Explanatory Notes and the Compendium of Classification Opinions, the Japanese Administration would translate them into Japanese and issue directives in order to implement HSC classification decisions.

Korea

If the decisions contain general information concerning application of the Harmonized System, such as Explanatory Notes, Classification Opinions, they are announced in the form of administrative notices.

If the decisions contain recommendations for settlement of classification disputes, they are usually implemented in the form of administrative instructions.

Lithuania

Following Resolution No. 1052 dated 11 September 1996 of the Government of the Republic of Lithuania on "the Combined customs tariff and foreign trade statistics nomenclature of the Republic of Lithuania", the Combined Nomenclature of Goods is applied following the Customs Code of the Republic of Lithuania, other acts of the Republic of Lithuania regulating its application, general interpretative rules of the HS, the explanations of the HS and the advice of commodity classification published in the official publications of the WCO, the explanations of the EEC Combined Nomenclature approved by the Commission of the EC, the Recommendations of the WCO HSC and Scientific Sub-Committee and the regulations on classification of goods by the Commission of the EC. The classification decisions haven't been legalised separately.

Malta

The decisions are communicated to the staff and the business sector.

Mauritius

As soon as the HSC decisions are made final by the WCO and received by Mauritius Customs, they are disseminated through Departmental Orders or Instructions to officers and the trading community.

New Zealand

Where New Zealand does choose to implement an HSC classification decision (opinion), it may be incorporated in a New Zealand supplement to the HS Explanatory Notes or to be a factor in the issuing of a classification ruling given by the Customs Service to an importer (and which "binds" the New Zealand Customs Service for a period of three years).

New Zealand supplements to the HS Explanatory Notes are issued for the guidance of our clients.

Noting HSC classification decisions (opinions) are also published by the WCO and are available to our clients in the same way as the Explanatory Notes to the HS, when new decisions are received in the central office, consideration is given to issuing a New Zealand supplement to the EN's. Generally, such a supplement is only created when the HSC decision (opinion) has a significant impact on active trade.

When considering an application for classification ruling by an importer, the New Zealand Customs Service will take account of any impacting decisions (opinions) issued by the HSC. Equally, should a decision (opinion) of the HSC suggest a review of a previously issued classification ruling of the New Zealand Customs Service, that ruling will be re-examined and changed as appropriate.

Poland

HSC decisions in both procedures are prepared in the Central Board of Customs (CBC) by the Essential Department and then are consulted by its Legal Department – after that HSC decision are sent at the same title to :

1. Official publication as regulation of the President of CBC.
2. Customs offices as circulation letter of the President of CBC.

Romania

For the implementation of HSC decisions and the classification opinion of goods, the Romanian Customs Administration applies the provisions of Article 104 of the implementation regulation of the Customs Law concerning implementation of HSC decisions by Customs offices on the basis of the decision of the Director-General of Customs.

For other decisions of the HSC of a different nature, a legislative procedure is applicable.

Saudi Arabia

- Classification decisions are first examined by the national Tariff and Studies Committee.
- The decisions are then issued and notified to the Customs offices.

Slovakia

In the pre-entry classification system, binding tariff information is issued in accordance with HSC classification decisions.

Spain/Sweden

- Adoption by the Customs Code Committee.
- Eventual publication in the Official Journal.
- Eventual adoption of the Regulation or Explanatory Note.

Switzerland

Classification decisions which imply a change in practice (other than those mentioned under Question 2 above) and do not require modification of Customs Tariff legal texts, are implemented within the six months following their entry in force in accordance with Article 8, paragraph 2 of the HS Convention, generally by administrative circular. They are also communicated in writing to tariff information holders, when these are known to the Administration.

In cases where it is necessary, for economic reasons, to alter the structure of the Customs Tariff (latest example: the decision to classify potato meal products, fried in oil, in heading 19.05) the procedure can take a year or more, given the procedure necessary to inform the Parliament.

As for the Explanatory Notes, amendment decisions are implemented after the corresponding Amending Supplements are received from the WCO. They are then distributed as correction bulletins to Switzerland's Explanatory Notes. To save on printing costs, publication of Explanatory Notes is not always synchronised with publication of the HS Explanatory Note amendments. The national Explanatory Notes are usually amended twice a year. The length of the implementation period includes the time needed for drafting, printing and distributing the national correction bulletins.

Classification opinions are issued as circulars and published in the official Swiss trade sheet as soon as the WCO's Amending Supplements are received. As a general rule, the compendium of national classification decisions is updated once a year.

Tunisia

- Amendment of national tariff.
- Publication of the HSC decisions by administrative circulars.

Turkey

To date classification decisions and amendments to the Explanatory Notes have been implemented through the administrative procedure. However, classification opinions have been subjected to legislative procedure. A new system has also been accepted to implement the decisions after their publication in the Official Gazette.

United States

Administrative: under 19 USC 1625 or 19 USC 1315 (d), copies attached, a notice and comment period must be provided before a determination may be made as to whether an HSC decision can be implemented by the U.S. Customs Service, if the HSC decision requires a change of an existing position or practice.

Legislative: under 19 USC 3005, copy attached, an investigation and comment period must be provided before a determination may be made by the President of the United States as to whether an HSC decision, which requires a change in the Harmonized Tariff Schedule nomenclature, can and will be implemented. In this respect, any determination must be (i) consistent with the Convention and (ii) consistent with sound principles of tariff nomenclature.

III. Question 6 (Reason for length of national procedure)

Iran (Islamic Rep. of)

Due to administrative and translation problems implementation usually takes a long time.

Switzerland

See Question 4 above.

United States

The nature of the legal procedures, which involves notice and comment and analysis, will require a minimum of three months and may necessarily extend beyond six months.

IV. Question 8 (Explanation of need for changes in national procedures)

Iran (Islamic Rep. of)

Twenty-five years have passed since the Iran Customs Law laid down which it coincided with the implementing of CCCN. In the content of the CCCN Convention we consider that there are some differences between the duties of the Committee and providing of Explanatory Notes from those of HS Committee. However, if the HSC classification decisions are made legally binding, the matter will get more clear.

Japan

The Japanese Administration has implemented HSC classification decisions by means of administrative procedure. If the decisions are to be made legally binding, our national procedure will need to be changed from administrative to legislative.

New Zealand

Current NZ legislation caters for binding classification decisions and revolves around an established relationship between the Customs Service and the applicant. The nature of that relationship is peculiar to the client in that the Service is obliged to honour the opinion (ruling) for a period of three years (subject to certain conditions, e.g., - new information provided). The relationship for HSC opinions is different and how this would be handled would need to be thought through.

Possible areas of difficulty include :

- how will HSC opinions be published ? They would need to be widely broadcast to ensure all traders were aware of their existence then apply them accordingly.
- in NZ, the burden is on the declarant (importer or exporter) to correctly classify their goods. Should a trader not classify a product for which they have been issued a local ruling, intent to defraud could be an issue. Would the same exist in the situation of a bound HSC opinion regime ?

Slovakia

HSC classification decisions would be incorporated into the national legislation to full extent in order to declare that they are legally binding.

Switzerland

In principle, the Swiss Administration would have to establish a faster procedure. Modifications to the Customs Tariff could also be considered. The Swiss Administration points out that, for Switzerland, to make the decisions binding could have repercussions on national procedures with regard to appeals arising from disputes about the classification of goods, and a transfer of powers from the Swiss courts to the HSC.

Turkey

Classification decisions are dominated by those taken in the Harmonized System Committee. A systematic application of the HSC decisions has been initiated over the last year.

United States

There would be no change in the above procedures unless, of course, the change were required by an amendment to the Convention or similar vehicle, and were accepted and ratified by the Government of the United States in accordance with its laws and procedures.

V. Other

Switzerland

Time for implementation at national level

From a general standpoint, the Swiss Administration believes it would be useful to grant administrations a suitable period of time which would allow them to examine the full implications of decisions to be implemented on national classification practice and which

would also take account of internal procedures for preparing the necessary documentation to inform trade circles and for preparing any necessary amendments in accordance with national legislative procedures.

Protocol

It appears that there is a general consensus within the HSC in recognising that the HS Convention does not contain any arrangements, which explicitly make the Classification Decisions taken by the HS binding on Contracting Parties. Swiss jurisprudence concerning disputes on the classification of goods in the Customs Tariff also regards the Classification Opinions as having no legal weight. The Opinions can however serve as a source of interpretation. It therefore becomes clear that any arrangement intended to make Classification Opinions binding on Contracting Parties would represent a considerable shift in the legislator's aims. The Swiss Administration believes that it would be possible to insert a provision of this type in the Convention via an amendment Protocol as long as Convention Article 16 was respected.
