



To:

Mr Antti SUORTTI
Head of Unit, Customs Tariff (TAXUD.A.4)
Rue Joseph II 79
B - 1000 Bruxelles

Cc:

Mr Jouangrand, Ms Cibulkova, Mr Klare-Turvey

Brussels, 25 November 2020

Subject: Harmonized System (HS) Explanatory Notes on tobacco products and substitutes

Dear Mr Suortti,

We appreciate the work that you and your team are doing with respect to the HS Explanatory Notes which are currently drafted in the framework of the Harmonized System Committee (HSC).

We, from Tobacco Europe AISBL (formerly The Confederation of European Cigarette Manufacturers – CECCM), a non-commercial association which represents the common views of three major European-based cigarette manufacturers (British American Tobacco, Imperial Brands and Japan Tobacco International), would like to contribute to this work by proposing clarifications on certain issues which may cause concern for our industry, if they are not appropriately addressed.

Background

Chapter 24 of the HS is currently covering tobacco and manufactured tobacco substitutes. Under the HS 2022, the scope of Chapter 24 is extended to cover tobacco products intended for inhalation without combustion and other nicotine containing products intended for the intake of nicotine into the human body.

The structure of the new Chapter 24 makes a clear distinction between traditional tobacco products (which will be classified under headings 2401, 2402 and 2403) and new products such as heated tobacco products, vapor, etc. (which will be classified under the newly created heading 2404). Annex 1 provides the complete list of the sub-headings created under HS heading 2404.

Additionally, Chapter 24 will have two new Notes:

“2.- Any products classifiable in heading 24.04 and any other heading of the Chapter are to be classified in heading 24.04.

3.- For the purposes of heading 24.04, the expression “inhalation without combustion” means inhalation through heated delivery or other means, without combustion.”.

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Our comments

We have observed that the wording of HS 2022 for Chapter 24 and HS Chapter Notes can create confusion in relation to the customs classification of the potentially reduced risk products under the newly created HS heading 2404. Furthermore, there are certain “traditional tobacco products” which risk being classified in this heading though this was not intended. Therefore, to avoid any type of uncertainty or confusion, we believe that the WCO Explanatory Notes should provide clear examples regarding the products which will be classified under the newly created HS heading 2404.

This will be in line with the objective stated in the Preamble of the HS Convention which emphasizes the importance of ensuring that the HS is kept up to date in light of changes in technology and patterns of international trade. Adaptation to current trade through the recognition of new product streams and addressing environmental and social issues of global concern are the major features of the HS 2022 amendments.

We view that it will be beneficial to clarify the below points through the content of the HS Explanatory Notes which are currently drafted at the WCO level:

1) Tobacco products for oral consumption

Traditional tobacco oral products (e.g. chewing tobacco, snus, etc.) are currently classified under HS subheading 2403.99. We believe that these products should continue under the HS 2022 to be classified under heading 2403.

Nevertheless, the HS heading 2404 includes the subheading 2404.91, covering other products “for oral application”. Even when technically it is clear that the traditional tobacco oral products remain in HS heading 24.03, and given that the new subheading 2404.91 is created from products currently classified in subheading 2106.90 and 3824.99, the name of the new subheading could create some confusions. This so especially if it is read together with note 2 of Chapter 24, which outlines that “any products classifiable in heading 2404 and any other heading of the Chapter are to be classified in heading 2404”. This note could be interpreted as to indicate that tobacco products for oral consumption, such as chewing tobacco and snus, may be classified under the newly created HS heading 2404.

We understand that the purpose of this note was not to cause any transfer of tobacco products for oral consumption from HS heading 2403 to HS heading 2404 (WCO Note NR1412Ea of 1 April 2020 refers). Therefore, with the exception of heated tobacco products, the WCO Explanatory Notes should clearly exclude the classification of products containing tobacco or reconstituted tobacco under HS heading 2404.

2) Non-tobacco nicotine pouches

There is a new market which is currently developing worldwide, including the EU, for non-tobacco nicotine pouches.

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Non-tobacco oral nicotine products are single-use pouches containing a chemical mixture including nicotine and flavourings, which does not contain tobacco. The intended use of the single-use nicotine containing pouch is to be placed under the consumer's lip allowing the nicotine to be absorbed through the oral mucous membrane lining the inside of the mouth.

The HS customs tariff codes for heated tobacco products (HTPs) and nicotine containing e-liquids have been indicated in WCO classification opinions. However, the customs tariff code applicable for non-tobacco oral nicotine pouches may currently vary between countries.

Considering the objective characteristics of non-tobacco oral nicotine pouches, these are products containing nicotine for oral application. In our view, given that the Explanatory Notes is a practical guidance for the identification of products covered by the classification codes, and that these are novel nicotine products, the HS 2022 Explanatory Notes should clearly include these products as examples of nicotine goods classified under HS subheading 2404.91.

3) Cartridges and refills filled for electronic cigarettes, which contain a chemical solution without nicotine

The wording of the HS heading 2404 indicates that products intended for inhalation without combustion that contain "*nicotine substitutes*" should be classified under HS subheading 2404.19. Considering that there is no definition for nicotine substitutes under the HS 2022, the HS Explanatory Notes should include clear examples for the products which will be classified under the HS subheading 2404.19.

In the recent years, we noticed that there are new products placed on the market such as cartridges and refills for electronic cigarettes which contain a chemical solution with active ingredients such as cannabidiol (CBD), caffeine, taurine, etc. These ingredients are not very clearly defined as "nicotine substitutes". However, we understand that the intention is to classify the e-cigarettes cartridges without nicotine under the newly created HS subheading 2404.19.

Therefore, we view that the HS Explanatory Notes should include clear examples of products to be classified under HS subheading 2404.19.

4) Cartomizers and refills filled for electronic cigarettes

Several types of cartomizers are currently sold across a range of countries including the EU.

A cartomizer with e-liquid is a single item consisting essentially of a plastic cartridge containing a number of components including a tank filled with nicotine formulation and an electric and electronic component such as a heater (atomiser). It is an integral part of an electronic cigarette and is specially designed to connect to the power control component by its shape and method of operation.

The cartomizers is not intended to be refilled with nicotine formulation as it is currently designed for single use only.

The electric and electronic element such as a heater (atomiser) is a key component which differentiate the cartomizers from simple e-cigarettes cartridges.

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In addition to the nicotine formulation, cartomizers contain a heater and other critical components essential to the atomisation of the nicotine formulation. The nicotine does not confer the essential character of the whole product since the atomisation of the nicotine is an equally important part in the operation of an electronic cigarette. Therefore, the cartomizers cannot be classified in HS subheading 2404.12.

The cartomizer is specifically shaped and designed to connect with the power control component and also contains not only the heater, but other components essential for the operation of the electronic cigarette e.g., the connecting electrode to enable the activation of the heater.

A cartomizer may include the following parts:

- an electric heater;
- a plastic tank which holds the nicotine formulation;
- a ceramic plate;
- an electrode (connector to electrically connect the cartomizer to the battery within the power control component);
- a magnetic base to enable the cartomizer component to be connected to the power control unit.

The heater within the cartomizer can be made of materials such as nichrome which is commonly used as a heating element given its high resistance when heated. The heater is affixed to a metal plate which is enclosed within the cartomizer. The outer layer of the heater compartment may consist of a high temperature resistant stainless-steel ring. The energy for the heater and the control of same is received from a power control unit (i.e. electronic cigarette device) through the connecting electrodes.

Considering the materials used for the heater, the value of the atomizer in the final price of the cartomizer is significantly higher than the value of the nicotine formulation contained therein.

The EU Customs Code Committee already acknowledges the classification of an empty cartridge for electronic cigarettes, described in Regulation 2017/635 as follows:

“An article in the form of an empty cylindrical cartridge made of clear plastic approximately 44 mm long and sealed with a removable plastic stopper at the lower end as a protective cap. The upper part of the cartridge is shaped like a mouthpiece and has a small hole through which vapour can be inhaled.

The user fills the empty cartridge with a special liquid called ‘e-liquid’ and the cartridge is then inserted into the e-cigarette. The same cartridge can be refilled and reused for smoking between 10 and 20 times before being disposed of as waste. The mouthpiece plays the role of the filter on conventional tobacco cigarettes. When the cartridge is inserted in the e-cigarette, the user places the mouthpiece end in the mouth and inhales. This causes the atomiser in the e-cigarette to convert the liquid into a gentle stream of mist which is then released through the mouthpiece into the user’s mouth”

The EU Customs Code Committee concluded in the above regulation that a “user would not put an e-cigarette into the mouth without the presence of the mouthpiece and the stream of mist would not be

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released without activating the atomiser via the mouthpiece. Therefore, the cartridge with the specially shaped upper part is an essential part to the operation of the e-cigarette and not a simple container made of plastics. Classification under heading 3926 as an article of plastics is therefore excluded.”

The cartridge was therefore classified at item 8543 90 00 as a part of an electronic cigarette.

While the above regulation on cartridges do not specifically describe the cartomizer with e-liquid, it does provide guidance on what is to be regarded as a part of an electronic cigarette.

Given that the cartomizer contains in addition to the nicotine formulation, a heater and other critical components essential to the atomisation of the nicotine formulation, it cannot in our view be classified in heading 3824 as the nicotine does not determine the essential character of the whole product given that the atomisation of the nicotine is an equally important role in the operation of an electronic cigarette.

The cartomizer is specifically shaped and designed to connect with the power control component and also contains not only the heater, but other components essential for the operation of the electronic cigarette e.g., the connecting electrode to enable the activation of the heater.

We view that the cartomizers containing e-liquid for electronic cigarettes are excluded from the classification under the newly created HS 2404.12. Therefore, to avoid any confusion, the Explanatory Notes should clearly indicate that these products are to be classified as parts of the device under HS subheading 8543.90.

5) Products for oral consumption which contain ingredients such as CBD, caffeine, taurine, etc.

There is a new market which is currently developing worldwide, including the EU, for CBD and products containing ingredient such as taurine, caffeine. The EU Novel Foods Catalogue confirmed in January 2019 that CBD extracts should be treated as food products.

According to Euromonitor International, *“the global market for vitamins and dietary supplements is predicted to be the largest cannabis-driven OTC market by 2025, with 2% of total value sales to be CBD or THC-based, followed by topical analgesics, sleeping aids and sports nutrition.”*¹

These products can be in the form of pouches, tablets, pastilles, etc. which have as ingredients CBD, caffeine, taurine, etc. However, these products do not contain any nicotine, and are not intended to substitute nicotine.

HS Subheadings 2404.91, 2404.92 and 2404.99 cover only nicotine containing products intended for the intake of nicotine into the human body. HS 2022 indicates that products for oral application such as nicotine pouches, nicotine lozenges or nicotine chewing gum should be classified under HS subheading

¹ <https://blog.euromonitor.com/legal-cannabis-the-billion-dollar-market-set-to-disrupt-consumer-goods/#:~:text=According%20to%20Euromonitor%20International%2C%20the,sleeping%20aids%20and%20sports%20nutrition.>



2404.91. However, since HS subheading 2404.91 is identified only as “for oral application”, it is possible that some customs authorities may consider that products for oral application without nicotine are also to be classified under this HS heading as “nicotine substitutes”.

Language of HS heading 2404 is clear in relation that only nicotine containing products intended for the intake of nicotine into the human body are classified here. Therefore, to avoid any confusion, it is important to clearly mention in the HS 2022 Explanatory Notes that products for oral consumption without nicotine which contain food ingredients such as CBD, caffeine or taurine are excluded from classification under the HS subheading 2404.91. Additionally, for further clarification, it will be important to include some examples of products effectively classified in HS subheading 2404.91.

6) Others

With the aim to constructively support efforts to capture the patterns of international trade and accurately classify currently existing novel products into HS 2022, we attach our proposal regarding product examples for the HS 2022 Explanatory Notes for Chapters 21, 24, and 85.

Furthermore, there are classification opinions which need to be amended in order to reflect the HS 2022 changes. We include for ease of reference a list of WCO decisions that should be amended in the WCO Compendium of Classification Opinions.

Should you need any additional information or clarification, please do not hesitate to contact us.

Sincerely,

A handwritten signature in blue ink, appearing to read "Darge", with a long horizontal line extending to the right.

Nathalie Darge
Director Tobacco Europe



ANNEX 1- Overview of the HS heading 2404 under WCO HS 2022

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.”

- Products intended for inhalation without combustion:

- 2404.11 -- Containing tobacco or reconstituted tobacco
- 2404.12 -- Other, containing nicotine
- 2404.19 – Other

- Other:

- 2404.91 -- For oral application
- 2404.92 -- For transdermal application
- 2404.99 -- Other”

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