

THE CUSTOMS CLASSIFICATION OF TOBACCO HEATING PRODUCT CONSUMABLES AND THE CHEMICAL PREPARATIONS USED IN ENDS IN THE WCO'S HARMONIZED SYSTEM TARIFF NOMENCLATURE

FOUR PROPOSALS ARE TO BE CONSIDERED BY THE HSC IN SEPTEMBER 2018

The Harmonized System Committee's (HSC) 62nd Session will be meeting on 17th - 28th September 2018 to discuss the customs classification in the Harmonized System (HS) nomenclature for implementation in 2022 of:

- a. tobacco used with Tobacco Heating Products (THPs); and
- b. the chemical preparations used for e-cigarettes or electronic nicotine delivery systems (often called 'e-liquids').

The HSC has been invited to discuss the following four proposals on *"Possible amendments to the nomenclature to create a new heading for nicotine products and novel tobacco products"*:

1. **The Mali proposal**, which would classify THPs in Chapter 24 of the HS ('Tobacco and manufactured tobacco substitutes') separately to combustible tobacco. It would also classify e-liquids under new headings in Chapter 38 ('Miscellaneous chemical products').

	Tobacco Heating Products (THPs)	E-liquids		Nicotine Replacement Therapy (NRT) Products
		With nicotine	Without nicotine	
Status quo	2403.99 – Other [non-smoking tobacco]	3824.99 – Other [chemical preparations]		2106.90 [gums/tablets] 3824.99 [patches]
Mali	2403.92	3827.10	3827.20	N/A [no change to the status quo]
WHO / WCO Secretariat	2403.20	2404.11	2404.12	2404.21 [gums/tablets] 2404.22 [patches]
WCO Secretariat	2404.11	2404.12	2404.19	2404.91 [gums/tablets] 2404.92 [patches]
Moldova	2404.11	2404.12	2404.19	2404.91 [gums/tablets] 2404.92 [patches]

2. **The joint proposal by the WHO & WCO Secretariat** which would classify e-liquids in the same chapter as tobacco products (Chapter 24) but makes a clear

distinction between e-liquids and tobacco products. This proposal would also classify e-liquids together with Nicotine Replacement Therapy (NRT) products. And further, the WHO / WCO Secretariat joint proposal makes a clear distinction between THPs and combustible tobacco.

3. **The WCO Secretariat proposal** which would classify e-liquids together with THPs in Chapter 24.
4. **The Moldova proposal**, whilst first advocating for the status quo, alternatively makes a proposal that is virtually identical to the WCO Secretariat's proposal.

The HSC will decide which proposal(s) should be sent back to the next meeting of the Review Sub-Committee (RSC) in November 2018 for final drafting.

THE MALI PROPOSAL MEETS THE GREATEST NUMBER OF OBJECTIVES WITH FEWEST DISTORTIONS TO THE UNDERLYING PRINCIPLES OF CUSTOMS CLASSIFICATION

General customs classification principles are that two criteria should be applied when deciding upon the appropriate customs classification of a product:

- i) the essential physical characteristics of products; and
- ii) in some cases, their intended use.

That is, there must be sufficient commonality in the objective physical characteristics and properties of products for them to be classified in the same headings or subheadings of the international customs classification system. It is important that any new headings or subheadings created in the HS adhere to this fundamental principle.

Although this is the primary criterion against which new proposed headings and subheadings should be assessed, other criteria may be considered *in addition* including to:

- facilitate better data collection on international trade in nicotine products;
- enable administrations to more easily implement domestic policies;
- enable Contracting Parties to continue to create subcategories at a national level to further facilitate data collection and domestic policy implementation; and
- be simple and require fewest changes to the existing HS.

	Meets conditions required to define products for customs purposes		Facilitates better data collection on international trade in nicotine products	Enables administrations to more easily implement domestic policies	Enables contracting parties to create subcategories at a national level to further facilitate data collection and domestic policy implementation	Simple and requires fewest changes to the existing HS
	Essential physical characteristics of product similar to other products in chapter / heading / subheading	Intended use of product similar to other products in chapter / heading / subheading				
Status quo	✓	✓	✗	✗	✓	✓
Mali proposal	✓	✓	✓	✓	✓	✓
WHO / WCO Secretariat joint proposal						
- NRTs in Ch 24 w/ e-liquids	✓	✓	✓	✓	✓	✗
- NRTs outside of Chapter 24	✗	✗	✓	✓	✓	✗
WCO Secretariat proposal	✗	✗	✓	✓	✓	✗
Moldova proposal	✗	✗	✓	✓	✓	✗

The Confederation of European Community Cigarette Manufacturers (CECCM) and its members¹ believe that **the Mali proposal is the only one that satisfies all of these criteria.** Tobacco products would continue to be classified in an entirely different chapter of the HS than the chemical preparations used with e-cigarettes. It would ensure that products with fundamentally different physical characteristics continue to be classified in different chapters, in keeping with the fundamental requirements of the HS. But by defining new headings for both THPs and e-liquids in the appropriate chapters, the Mali proposal also allows the WCO and Contracting Parties to achieve all the stated

¹ British American Tobacco (BAT), Imperial Brands (IMB), and Japan Tobacco International (JTI)

objectives of the HS: to facilitate international trade; to facilitate the collection, comparison and analysis of trade statistics; and to promote the standardisation of trade documentation and the transmission of data.

The next best option on table is **the status quo** which, as with the Mali proposal, would ensure that products continue to be classified in different chapters of the HS in keeping with their different physical characteristics.

The WHO / WCO Secretariat joint proposal achieves almost all the stated criteria provided that NRTs are classified together with e-liquids. Although e-liquids would be moved into Chapter 24 in this proposal, it avoids classifying products containing no tobacco in the same way as those with tobacco by: i) fundamentally changing the title of the whole chapter from covering tobacco products to very clearly covering all nicotine based products for human consumption; and ii) classifying e-liquids (and other chemical preparations used with e-cigarettes) in a subheading separate to all forms of tobacco products but together with NRT products (which makes it very clear that e-liquids are similar in their physical composition to NRTs and that both are fundamentally different to tobacco products).

If, however, the WHO / WCO Secretariat joint proposal were to omit NRTs, it would suffer from the same, fundamental, drawbacks as the WCO Secretariat proposal which we now explain.

We consider that **the WCO Secretariat and Moldova proposals** to classify the chemical preparations used with e-cigarettes, including e-liquids, in Chapter 24 are wholly inappropriate. Tobacco products and the chemical preparations used in ENDS do not display similar physical characteristics. The chemical preparations used in ENDS (including e-cigarette cartridges and liquids) contain no tobacco.

Indeed, the Harmonized System Committee (HSC) agreed at its 48th Session (September 2011) that cartridges for electronic cigarettes, *“whether or not containing nicotine, could not be regarded as tobacco substitutes.”* For this reason, the HSC decided to classify them in Chapter 38 as a chemical product. Nothing has fundamentally changed regarding the physical characteristics of cartridges for use with electronic cigarettes (or other chemical preparations used with ENDS) since September 2011 that would validate now classifying them in a chapter of the HS other than Chapter 38.

Moreover, classifying the chemical preparations used with e-cigarettes would be inconsistent with recent guidance from the scientific community, whose definitions of such products are based wholly on the physical features of the products. In June 2018, the journal *Nicotine & Tobacco Research*, stated that it will not refer to vapour products as ‘tobacco products’, because they are neither made from nor contain tobacco². The Editor-in-Chief Marcus Munafò (Professor of Biological Psychology at Bristol University, UK) said: *“If all products containing nicotine derived from tobacco were labelled as ‘tobacco products’ internationally, then nicotine replacement therapies would be classified as tobacco products, which they are clearly not.”*

In short, **Mali’s is the only proposal that creates new headings that both adhere to the fundamental principles by which products are classified for customs purposes and maintain simplicity within the existing system. Insofar as the status quo adheres to fundamental customs classification principles, it also remains a viable approach.**

The Confederation of European Community Cigarette Manufacturers
CECCM

² <https://academic.oup.com/ntr/advance-article/doi/10.1093/ntr/nty130/5041976>