Some common questions about the HS, and how to change it to meet needs

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Good trade-related policy requires good trade data.

While it may occasionally be necessary to implement policies and trade measures without a data-driven understanding of the underlying trade, there is always the risk that doing so could deliver unpredictable results or miss the desired objectives. Good trade data is also essential for monitoring and assessing the implementation of trade policies.

Commonly for trade-related issues, a major part of examining the data involves looking at the data generated by Customs classification. For trade beyond the imports/exports of one Customs union or one country, the comparison of data relies on classification at the six-digit level, i.e., at the level provided by the Harmonized System (HS). Over the last few years, a wide range of events and issues have generated increased interest in how the HS can be utilised to increase data specificity, to expand the range of goods for which focused trade monitoring is possible, and, in many cases, to also act as a basis for trade measures – for example, for environmentally preferable goods.

The pandemic, the climate crisis, other environmental issues such as the accumulation of plastics in the environment, the fragility of food security, the circular economy model – these are all examples of critical, urgent or emerging topics that have been occupying many minds in governments, international organizations and academia, and have also been behind enquiries to the WCO about current classifications and how to increase the available data and specificity of classification in the HS for critical goods.

As part of this development the Secretariat is often asked some quite difficult questions, and, in this article, I will discuss the answers to some of the most common questions posed.

There is a lot of trade in this commodity – why doesn’t it have its own HS Code?

Every good is classified, but not all goods are specified by name in their own HS code. The question of the varying levels of specificity around goods in the HS can be puzzling to people when they realise just how variable this is.

Let us look at an example. "Salicylic acid and its salts" were highlighted as ‘products of interest’ in relation to the pandemic and they have their own subheading, which is “2918.21”. Salicylic acid is used in its own right to treat a range of skin conditions, but its main point of interest in terms of the pandemic is that it is the principal ingredient used to manufacture
acetylsalicylic acid, commonly known as aspirin, used to treat pain, fever and inflammation.

But what about aspirin tablets or capsules themselves? They are a compounded medicament consisting of acetylsalicylic acid and various other, non-active ingredients put up in a measured dose, i.e., as tablets or capsules, and are covered under subheading “3004.90 - Other”. This is a very broad category, covering thousands of different products.

So while we can track, with a good level of precision, trade in pure salicylic acid or in pure acetylsalicylic acid (subheading “2918.22 -- O-Acetylsalicylic acid, its salts and esters”), we can’t use the HS to track international trade specifically in ready-to-use aspirin.

Nevertheless, knowing these non-specific classifications is still vitally important at the national level. If you want to insert domestic subheadings for aspirin tablets or capsules, or you want to introduce concessions or measures for them, then you do need to know that these should be applied under subheading “3004.90”. However, the classification will not tell you what proportion of international trade under “3004.90” consists of ready-to-use aspirin, as it lacks that specificity.

**Why is the specificity level so variable?**
The HS was created from what was included in its predecessor, the Brussels Nomenclature, and was then modified over the years on the basis of proposals submitted to the Harmonized System Committee (HSC) by representatives of the Contracting Parties to the International Convention on the Harmonized Commodity Description and Coding System Convention (HS Convention) or an intergovernmental organization (IGO) representing such Contracting Parties. Hence, those classifications which are highly specific reflect the types of trade items which were preoccupying these parties at the time when the relevant proposals were considered.
So, an area like textiles – which has a long history of quotas, sensitive trade negotiations and economic importance – includes many provisions which are highly specific. For example, “5206.33” covers “cotton yarn (other than sewing thread), containing less than 85 % by weight of cotton, not put up for retail sale, in the form of multiple (folded) or cabled yarn, of uncombed fibres, measuring per single yarn less than 714.29 decitex but not less than 232.56 decitex (exceeding 14 metric number but not exceeding 43 metric number per single yarn)”.

In fact, heading “52.06” has 20 subheadings detailing the various possibilities for “cotton yarn (other than sewing thread), containing less than 85% by weight of cotton, not put up for retail sale.” And “52.06” is just one of two headings covering “cotton yarn (other than sewing thread), not put up for retail sale”. Taking headings “52.05” and “52.06” together, there are 44 subheadings for this subset of goods.

If we compare this to something like heading “90.18”, an important heading during the pandemic that covers “Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electromedical apparatus and sight-testing instruments” (in other words, a large proportion of the crucial medical equipment), we can see that “90.18” has not been heavily specified. Compared to the 44 subheadings for “cotton yarn (other than sewing thread), not put for retail sale”, the entire category of “Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electromedical apparatus and sight-testing instruments” has only 13 subheadings, of which only eight name product types with relatively high specificity. The other five are “Other” subheadings.

The difference in specificity between these examples relates to what the Contracting Parties to the HS have proposed for inclusion. The choice as to where efforts should be made to increase specificity lies in their hands of the Contracting Parties. The HS is Contracting Party-driven and proposals come from Contracting Parties, or from intergovernmental organizations representing them.

Why is country x classifying this item differently from country y?

One question that arose frequently during the early days of the pandemic was why differences in classification at HS level sometimes emerged when countries compared classifications. For example, why might some countries classify paper masks under “4818.50”, which covers “Articles of apparel and clothing accessories”, while other countries classify them under “4818.90” (“Other”)?

Of course, the obvious answer is that there are different understandings of what “articles of apparel and clothing accessories” means. But this is a fundamental issue where legal provisions are concerned – the understanding of words and phrases can differ.

The HS is language-based. The inherent lexical ambiguity level of most languages is very high. There are estimates that in the English language, over 80% of words have more than one meaning. For perfect clarity between HS Contracting Parties, there would have to be a perfect shared understanding of the intended meaning of the corresponding English and French words or phrases used in the provisions, and words or phrases that correspond perfectly to that understanding of the meaning would have to exist in every language into which the HS is translated.

Given that this is impossible, ambiguity will always be an issue.

This issue is sometimes addressed by the existence of a legally binding definition within a Note to the Section, Chapter or Subheading concerned. Definitional Notes serve a vital purpose in providing greater legal certainty in the HS, but they are not without problems.

These Notes can be very helpful, but they do add to the difficulties facing HS users as their existence is not obvious to someone reading a provision unless it is actually specified in the terms of that provision (and it usually isn’t). There is also the risk that a definition may make sense when it is created but then become outdated over time, as the goods evolve.

More problematic still is the fact that it can be difficult, or even impossible, to draft and negotiate a definitional Note successfully in the case of a very broad term such as “apparel” or “accessory” that is causing consistency problems.
The other tool used for increasing consistency in practice is the Harmonized System Explanatory Notes. Although the Explanatory Notes are not legally binding (unless a Member has made them so at the national level), the value of proposals to update the Explanatory Notes should not be underestimated as they are very influential in classification.

The other source of ambiguity is inherent in the requirements set out in the legally binding rules governing classification in the HS, known as the General Rules for the Interpretation of the Harmonized System, for making certain judgements when there is more than one possible heading or subheading for a commodity. Here, I am referring mainly to the requirements for judging specificity or essential character, although these are not the only aspects of the Rules which require a judgement call. In particular, judgements on what constitutes the “essential character” of a particular item are a relatively common source of disagreement between HS Contracting Parties or other users of the HS.

Classification resolution
So, if Contracting Parties disagree, how can they seek international classification resolution? Firstly, they will normally talk to each other. Often, once they have exchanged information about the goods and their views, they can reach agreement. If not, then the normal process is for one of the Contracting Parties to the HS to refer the matter to the HSC for a decision on classification.

One point that can puzzle users unfamiliar with the system is that the process can take quite a long time. A classification may be decided within a single meeting, but for some matters the Committee may first ask for more information and consider it during a subsequent meeting, or the matter might be postponed if the HSC has insufficient time to get through all of its Agenda.

Getting a proposal on the table in good time is often more important than having it perfectly formulated at the time of introduction. The RSC and HSC usually improve proposals during the negotiations, often turning an unlikely proposal into a successful proposal in the process.

What is the procedure for changing the HS?
Having looked at issues related to variations in specificity, the inherent ambiguity of the language used in the provisions, and the potentially long timeframes for resolving classification differences, where does that leave us in terms of how we can change the HS to clarify the classification of critically important goods?

The Harmonized System is actually the Annex to the HS Convention. So, when we change the HS we are changing an international Convention, and this is not done lightly.

As previously mentioned, we first need proposals. If a Contracting Party identifies changes that it believes are needed, or has accepted a proposal from its national industry, seeking changes, then the government concerned sends a proposal to the WCO Secretariat for presentation to the Harmonized System Committee (HSC) and its Review Sub-Committee (RSC). As noted, this can also happen via an IGO.
The RSC is the drafting body. If there is sufficient interest in proceeding with the change, the RSC will work on the drafting of the new or altered texts. This Sub-Committee works on a consensus basis, and when it has either reached consensus on the wording, or has gone as far as possible towards achieving consensus, the draft is sent to the HSC.

The HSC is the voting body which decides on the provisional adoption of the proposed changes. Unlike classification decisions, which require only a simple majority, the provisional adoption of a change to the HS requires a two-thirds majority vote in favour.

At the end of the five-year negotiation period, all of the changes provisionally adopted during that period are gathered into a draft Recommendation and sent to the WCO Council, which meets each June. The Council consists of WCO Members’ Heads of Customs or their appointed representatives, and they determine whether to recommend to the HS Contracting Parties that they accept the draft Recommendation. If, at the end of a six-month period starting from the Council meeting, there is no outstanding reservation by a Contracting Party against any part of the draft Recommendation, then the Recommendation is deemed accepted in its entirety and a Notification is sent out. HS Contracting Parties, the Secretariat and users then have approximately two years to prepare for the new edition of the HS.

OK, I have all that – now, how do we make a successful proposal?

Not all proposals are accepted by the RSC and the HSC. So, making a proposal with a strong chance of success requires careful attention. I will outline some of the points to consider if you want to give your proposal the best chance.

However, if HS Contracting Parties or IGOs are having difficulties with any of the aspects explained below, they are welcome to discuss the matter with the Secretariat and we may be able to assist. Getting a proposal on the table in good time is often more important than having it perfectly formulated at the time of introduction. The RSC and HSC usually improve proposals during the negotiations, often turning an unlikely proposal into a successful proposal in the process.

Here are the points worth considering.

A clear rationale – the “Why”

Why would this proposal represent a good use of an HS code? There are millions of products, but there is limited capacity in a usable Customs nomenclature with a six-digit limit. As a result, goods are not added lightly. The HSC looks primarily at trade value and global relevance, so do you have any indicators of the trade value of the goods you would like to specify, and how widely they are traded? The HSC also considers goods which don’t have a high trade value, but are a high priority for reasons of ‘global good’, for example because they are globally regulated or have a high impact internationally in such areas as security, health and the environment.

But even if you can claim a global good, there is still a need for consideration. Let’s look at an example. There has been interest, in the past, in creating provisions for biodegradable plastic bags. But even this apparently simple aim can raise questions about whether the rationale justifies the proposal. The HSC might question, for example, whether it would be preferable to highlight alternatives to plastic or reusable

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1 We currently have 5,612 six-digit subheadings, and only a proportion of these specify goods narrowly.
plastic bags instead, if the aim is to substantially reduce pollution from plastic bags. It might ask whether the end products of the biodegradation will be safe, or if there are different levels of environmentally preferable products falling under the broad scope of the term.

When writing your proposal, it is useful to think what questions might be asked about the rationale behind it. Many of the questions that can be raised around rationale can also cross over into the second requirement for a good proposal, i.e., a well-defined scope.

**A robust definition – the “What”**

This is perhaps the most important aspect of a proposal. Can the goods be defined clearly? Is the scope of the terms clear internationally? Can the definition or understanding of the scope be protected against legal challenges? Do you understand how the goods will be presented at the border?

Staying with the example of biodegradable plastic bags, because there is no globally accepted international standard defining the term “biodegradable plastics”, it is unclear what this term would cover. What does “biodegradable plastics” actually mean? What about plastics that only partially biodegrade and form micro-plastics – are they meant to be covered? If a plastic can biodegrade but contains toxic additives, is it covered? If a plastic will biodegrade under industrial composting conditions, but survives for years under most normal environmental conditions or in home composting, is it included?

Understanding how the goods are presented at the border is also critical. For example, if you want a heading to cover a specific chemical, is it imported in pure form or as a mixture? Is a machine imported fully assembled, or do its components normally arrive in separate shipments? Misunderstandings on these matters can mean the provision does not cover the goods intended.

As the HS is a global instrument and is intended to be applied, without any change of scope, by all Contracting Parties, the answers to questions of this kind about what is covered are of vital importance in terms of ensuring uniform classification.

So, in cases where no agreed global definition or understanding exists, it would be advisable to think about whether a proposal would need to include a legally binding Note to define the scope, what the provision would cover, or the meaning of the terms used. Such definitions would need to be acceptable to Contracting Parties.

This leads us to the third requirement of a good proposal.

**Use of verifiable provisions – the “How”**

The ability to verify whether goods claiming a classification actually comply with the conditions is essential for an HS provision. The HS forms part of Customs law in the Contracting Party States, through its incorporation in their tariff legislation. For the HS to be part of the law, it needs to be enforceable. If there is a suspicion that a claim is factually false, it needs to be possible and practical for the claim to be verified – in other words the degree of difficulty involved, or the level of expense, time or resources required, should be reasonably within the capacity of Customs in both developed and developing countries.

It is important to remember that Customs classifies goods at the border in the condition in which they are presented. This means that the goods need to be objectively assessable for classification as imported, and that classification should not be dependent on what happens with the goods after their importation.

So, is the applicability of the proposed new provision verifiable by inspection of the physical characteristics of the goods at the border? If not, are there analysis or testing authorities that would be available to provide acceptable evidence of applicability? If laboratory testing by Customs is required for verification, is there an accepted testing method and how difficult is it to perform the test? Are there other characteristics, in terms of how the goods are presented or put up, that would answer the question of applicability?

Returning to the biodegradable plastics example, if the only available tests for the biodegradability of plastics involve exposing samples to controlled conditions and generally take between 28 days and 6 months, then the practical difficulties of using this as a border verification method are clear.
Where you have a definition of goods that is very difficult or impossible to verify at the border, it is advisable to look at whether you could achieve the same objectives by changing the definition to be verified. Do the goods that you want to specify share a common physical characteristic, such as material composition, size, or the presence of a specific component? Can you narrow or broaden your scope to change verifiability and still achieve the policy aim of the proposal?

If the only way to verify the applicability of a proposed provision is a post-import audit of the actual usage of the goods, then it is highly unlikely to be accepted. For provisions that require this type of verification, the best option is generally to consider the introduction of measures through tax administrations or other agencies that work within national borders and are already set up to perform a retrospective assessment of taxes or rebates.

In addition to the above, we need to look at the issues of “Where”, “Who” and “When”.

An indication of where the goods are currently classified – the “Where”

When goods move to a new provision, their duty rates are expected to move with them. In addition, the statisticians will want to be able to make the necessary adjustments to preserve time series information. This means it is important to be able to identify where the goods are currently classified.

It can happen that goods from an undefined range of positions are moved to a new heading. This usually occurs if a type of item is classified as a “part” and is used for a wide range of goods, but – for reasons of economic importance or because of the difficulty of identifying what a part is for in order to classify it – it is decided to give this item its own classification. Flat panel display modules are an example from HS 2022. However, this is a difficult situation for the transposition of duty rates and the collection of statistics, so it is only done in exceptionally rare cases where there is strong justification.

If you have goods that are not currently classified in a specific or narrow range of headings, it can be very problematic to create a new provision for them and the justification for such an action would need to be very strong.

Finally we turn to “Who” and “When”.

“Who” and “When”

Creating provisions requires proposals. As noted, these come from either Contracting Parties to the HS Convention or an intergovernmental organization representing such Contracting Parties. As to the “When”, in terms of the HS review cycle it is always later than you think!

Proposals normally progress through the Review Sub-Committee (RSC), a consensus body that works on drafting and meets twice a year, then passes its drafts to the Harmonized System Committee (HSC), a voting body that is responsible for deciding on whether to provisionally adopt a proposal. So if a proposal goes through, say, three sessions of the RSC for drafting, and then is considered at two sessions of the HSC, then starting from its first presentation at the RSC it will take two years to be provisionally adopted. The period can be shorter than this, or longer, and it is not unusual for a complicated proposal to take multiple years.

At the end of each negotiation cycle, the provisionally adopted provisions are sent to the WCO Council for approval as a Recommendation to WCO Members. For HS 2027, the final HSC meeting of the negotiation period will take place in March 2024, and the draft Recommendation will be submitted to the Council in June 2024. The Council’s approval, which must be unanimous, is followed by a six-month period for possible objections. For HS 2027, the six-month period will expire in December 2024.

Then, under the terms of the HS Convention, Contracting Parties have two years to prepare for entry into force, meaning that the new Edition will come into force on 1 January 2027.

So, how long is left before the HS 2027 negotiations come to an end? The last RSC drafting session is in November 2023, and, as indicated above, the last HSC voting session for HS 2027 will be in March 2024. Given the time it takes to get most proposals through, it is recommended that you get proposals in as soon as possible.

More information

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