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HARMONIZED SYSTEM
COMMITTEE

-
28th Session
-

NC0466E1
(+ Annex)
O. Eng.

Brussels, 9 October 2001.

CLASSIFICATION OF BAKERS' WARES (WAFFLES)

(Item VII.5 on Agenda)

Reference documents :

NC0069E1 (HSC/23)	NC0340E2, Annex G/1 (HSC/26 – Report)
NC0127E1 (HSC/24)	NC0384E1 (HSC/27)
NC0146E1 (HSC/24)	NC0422E1 (HSC/27)
NC0160E2, Annex G/8 (HSC/24 – Report)	NC0430E2, Annex H/1 (HSC/27 – Report)
NC0283E1 (HSC/26)	

I. BACKGROUND

1. At its 23rd Session (May 1999) the Harmonized System Committee exchanged preliminary views on the classification of “Kellogg’s Breadia” bakers’ wares (a kind of “waffles”), on the basis of Doc. NC0069E1.
2. After a short exchange of views, the Committee concluded that this classification issue should be settled at its next session in October 1999. On that basis, the Committee could decide what further action should be taken with regard to the legal texts and/or the Explanatory Notes.
3. At its 24th Session in October 1999, the Harmonized System Committee re-examined the classification of the waffles in question. After discussion, the Committee decided (by 18 votes to 10) to classify the waffles presented by Japan in Doc. NC0069E1 in subheading 1905.30 (by application of GIR 1).
4. By its letter of 21 December 1999, the EC asked the Secretary General of the WCO to refer the Committee’s decision to the Council, in accordance with the provisions of Article 8.2 of the HS Convention.
5. The Council, at its 95th/96th Sessions in July 2000, considered the EC reservation and it decided to refer the question of the classification of bakers’ wares (waffles) back to the Committee for re-examination.

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6. At its 26th Session in November 2000, questions were raised as to the composition of the waffles at issue. The Committee therefore, after discussion, agreed to postpone final discussion of this Agenda item until its next session. In the meantime, the Japanese Administration would carry out the necessary laboratory analysis as to the water content if it could obtain samples of the waffles in question. The Secretariat was asked to contact the manufacturer to obtain information on the exact composition (including the water content) of the product after it had been baked, but before being frozen.
7. At its 27th Session (May 2001), the US Delegate emphasized that the waffles referred to in his administration's comments in Doc. NC0422E1 ("Kellogg's Eggo Frozen Waffles") had exactly the same composition as the "Kellogg's Bredia" waffles which, according to information submitted by the Japanese Administration, were no longer manufactured. The only difference was that these two types of waffles contained different leavening agents. He was therefore of the opinion that the Committee should be in a position to classify "Kellogg's Bredia" waffles on the basis of the new information submitted by his administration. Since similar products were traded all over the world, it was very important that the Committee take a final decision with regard to the classification of such products at that session.
8. On the other hand, the EC Delegate pointed out that, since "Kellogg's Bredia" waffles were no longer manufactured, it would, in his view, be against this Committee's principles to classify a product which no longer existed. He could agree to classify the new product submitted - "Kellogg's Eggo Frozen Waffles", and he could be in agreement to eventually change the Explanatory Note to heading 19.05, and even to change the legal texts with regard to waffles, but not at that session. He noted that Doc. NC0422E1, paragraph 9, merely stated that Kellogg's Eggo "was similar in every respect to Bredia waffles" but, obviously, the Committee would have to classify this new product on the basis of its exact composition and not on the basis of its resemblance or similarity to a product that was no longer marketed. This information would have to be communicated to the Committee so that it could be studied in detail. He therefore proposed to postpone the classification of this product to the Committee's next session in November.
9. After further discussion, and in view of the fact that "Kellogg's Bredia" waffles, the classification of which had been the subject of a reservation by the EC, were no longer manufactured, the Committee decided not to pursue the classification of this product. This decision was in line with the views of the enquiring administration (Japan) and the administration (the EC) which had entered the reservation.
10. As a replacement for this classification issue, the Committee agreed to classify a comparable waffle product ("Kellogg's Eggo Frozen Waffles") at its next session. During the intersession the US Administration would provide necessary information as to the exact composition of this product. Furthermore, the Committee agreed that a decision should also be taken at the next session with regard to possible Explanatory Notes and/or legal text amendments.
11. On 27th September 2001, the Secretariat received the following Note from the US Administration concerning the classification of Kellogg's Eggo waffles.

II. NOTE FROM THE US ADMINISTRATION

“BACKGROUND

12. At its 24th Session, the Harmonized System Committee decided to classify Bredia frozen waffles by an overwhelming vote in subheading 1905.30 as waffles. At its 26th Session, the Committee reconsidered the classification of Kellogg's Bredia frozen waffles following a reservation entered by the EC against the previous classification decision for this product.
13. During the discussion at the 26th Session, a question arose as to the composition of the Bredia frozen waffles with respect to their water content. Specifically, the EC Delegate stated that according to the description given in the original working document, the Bredia frozen waffles contained 40-50 percent by weight of water. In his view, this description indicated that the classification question under consideration dealt with the classification of a batter and not waffles. The U.S. Delegate explained that the Bredia frozen waffles were fully cooked and prepared waffles as presented. Moreover, the U.S. Delegate pointed out that the 40-50 percent moisture content stated to be found in the frozen waffles was not relevant to their classification because there exist no water or moisture content limitations for waffles.
14. In the interest of proceeding with the classification of the Kellogg's Bredia waffles on the basis of complete information, the U.S. Administration contacted the Kellogg Company, the manufacturer and exporter of the Bredia waffles. The Kellogg Company provided detailed information on the Bredia waffles which was forwarded to the Secretariat for consideration by the Committee. At its 27th Session, the Committee decided not to reconsider the classification of the Bredia waffles because they were no longer being exported to Japan. Instead, the Committee decided to consider the classification of Kellogg's Eggo frozen waffles. The U.S. Administration was requested to provide information to the Secretariat on the Eggo waffles for consideration by the Committee.
15. Set forth below is detailed information on Eggo waffles obtained from the Kellogg Company, which is the manufacturer of the waffles.

DESCRIPTION OF THE MERCHANDISE

Ingredients in the Eggo Waffles

16. The Eggo waffles are made of a mixture of water, wheat flour, eggs, leavening, sugar, whey powder and a fat source (typically soybean oil).

Preparation of the Eggo Waffles

17. The ingredients are blended into a batter. The batter is then poured into waffle irons that are very similar to the “clam-shell” type of waffle irons commonly used in a home to make waffles. As with waffle irons used in a home, the waffle irons at the Kellogg Company's facility use a patterned grill that creates a pattern of square-shaped “pockets” in the waffle. The irons used by the Kellogg Company produce a waffle that is approximately 6/10 inch thick.

18. Once the waffles have finished baking and the waffle irons are opened, moisture begins to evaporate from the waffles. This evaporation continues while the waffles are on a conveyor that transports them to a freezer and continues during the freezing of the waffles. In the freezer, strong fans blow sub-zero Fahrenheit air over the waffles, which removes moisture from them. Between the time the waffles are finished baking in the waffle irons and the time that they exit the freezer, they have lost about 2-3 percent moisture (1 to 2 grams per waffle). A plain Eggo waffle just out of a waffle iron has an average moisture content of approximately 48 percent and the same waffle after being frozen has an average moisture content of approximately 45 percent.
19. The Eggo waffles are fully baked in the waffle irons prior to freezing. They are ready to eat at the point they are frozen; warming or toasting of the waffles by the consumer does not bake the waffles (but merely warms them before eating).
20. For the benefit of the Committee, attached to this note are pictures of Kellogg's Eggo waffles as put up for retail sale (see Annex to this document). As the pictures reveal, these are fully cooked and prepared waffles as presented.

CLASSIFICATION OF THE MERCHANDISE

21. Waffles are bakers' wares that are classified in heading 19.05. That heading provides for, in pertinent part, "bread, pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa." Within heading 19.05, subheading 1905.30 provides for sweet biscuits, wafers and waffles.
22. The term "waffle" is not defined in the Nomenclature. A waffle is generally defined as "a kind of batter-cake, baked in a waffle-iron, and eaten hot with butter or molasses," Volume II, *The Compact Edition of the Oxford English Dictionary* (1987), page 3664. Two points emerge from this definition. First, there is no reference in this definition to a limitation on the moisture content of waffles. Second, the product before the Committee clearly meets this definition. This product which is commercially known as a waffle should fall to be classified in subheading 1905.30.
23. Item (A)(9) (page 152) to the Explanatory Notes to heading 19.05 states as follows :
 - (9) Waffles and wafers, which are light fine bakers' wares baked between patterned metal plates. This category also includes thin waffle products, which may be rolled, waffles consisting of a tasty filling sandwiched between two or more layers of thin waffle pastry, and products made by extruding waffle dough through a special machine (ice cream comets, for example). **The water content must be 10 % or less by weight of the finished product.** Waffles may also be chocolate-covered. Wafers are products similar to waffles. (Emphasis added.)
24. The Explanatory Notes purport to place a limit of 10 percent of water content for waffles. As noted above, the legal text contains no such restriction. For this reason, this administration sought to identify any industry or international standards that set limits or restrictions on the water or moisture content for waffles such as the 10 percent water-content restriction set forth above. Despite our efforts, no such standards could be found. Moreover, a review of the historical documents to the Explanatory Note to heading 19.05 did not reveal a technical reason or justification for the 10 percent water-content limitation. Therefore, there is no legal or technical basis for restricting or limiting subheading 1905.30 to waffles that contain 10 percent or less by weight of water.

25. The U.S. Administration tested six different types of shelf-stable waffles for their water content. The results are as follows :

Average Percentage of Moisture Content by Weight

<u>Sample</u>	<u>Average Moisture Content</u>
Corona Soft Waffle	10.0 %
Corona Liege Waffle	13.7 %
Corona Liege Waffle with Chocolate	13.7 %
Parisco Belgian Waffle	13.3 %
Corona Waffle with Milk Chocolate	10.2 %
Oak Hills Maple Syrup Honey Waffle	12.6 %

26. Except for one sample (which was found to have an average water content of 10 percent by weight), each of the samples tested was found to have an average water content greater than 10 percent by weight.
27. All six of the waffles tested are bought and sold as waffles. Nevertheless, under the above-mentioned Explanatory Note, five of the six would not be classified as waffles in the Harmonized System but rather would fall in residual subheading 1905.90. Moreover, as noted by the Secretariat in paragraph 12 of Doc. NC0069E1, this water-content limitation in the Explanatory Notes "creates the curious situation that "Belgian waffles", for example, cannot be classified as "waffles" in the Harmonized System Nomenclature".
28. The Harmonized System Nomenclature should not and need not result in such an anomalous situation of classifying waffles as other than waffles. All waffles, regardless of moisture content, remain waffles and are legally classifiable in subheading 1905.30 as waffles.

CONCLUSION

29. In view of the above, the United States believes that the waffles under consideration are properly classified in subheading 1905.30 as waffles."

III. SECRETARIAT COMMENTS

30. In Doc. NC0069E1 (HSC/23), in conjunction with the classification of "Kellogg's Breadia" bakers' wares (a kind of "waffles"), the Secretariat made some general comments with regard to the classification of waffles. Since it appears that "Kellogg's Eggo Frozen Waffles" are quite similar to "Kellogg's Breadia" bakers' wares, the Secretariat is of the opinion that these comments also apply to the product at issue. For ease of reference relevant parts of these comments are therefore reproduced below.

A study undertaken by the Secretariat concerning the history of the Explanatory Note to heading 19.05 with regard to Item (A) (9) revealed that this text was based on a proposal from the Swiss Administration (Doc. 26.898). The initial Swiss proposal did not contain a provision for the water content limit, but during the discussion in the former Harmonized System Committee this criterion was added to the Swiss proposal (Appendix E.3. of Annex IV to Doc. 27.000). The Nomenclature Committee, at its 47th Session (see Annex D/3 to Doc. 28.100 - Nov. 1981), adopted, with minor modifications, a Supplementary

Explanatory Note to subheading 1905.30, which became an Explanatory Note during the final revision of the Explanatory Notes (see Annexes E/19 and M/12 to Doc. 28.500 - May 82).

In this connection, it should be noted that the legal texts do not impose a water content limit, and based solely on the legal texts, classification of all waffles could therefore be considered in subheading 1905.30. However, as mentioned above, the Explanatory Notes make clear that a water content limit applies and in fact uses the word "must", a word normally reserved for legal texts. The Explanatory Notes thus create the curious situation that "Belgian waffles", for example, cannot be classified as "waffles" in the HS Nomenclature.

Since we have a situation where, according to the legal texts only, the products in question could be classified in subheading 1905.30, but when reading the legal texts in combination with the Explanatory Notes they could not, the Secretariat believes that the question must be resolved by the HS Committee.

The Secretariat is also of the view that the situation should be improved for the future and would suggest that if the Committee agrees that a 10 % water content criterion is applicable to waffles, such a criterion should be inserted in the legal texts.

The Secretariat is aware that one Contracting Party (EC) has introduced an additional note in its Combined Nomenclature, making it quite clear that waffles and wafers, with a water content of more than 10 % by weight, are excluded from subheading 1905.30. The Committee might consider introducing a similar provision in the HS Nomenclature as a solution to this "problem". The Committee is invited to express its views in this regard.

On the other hand, if the Committee takes the view that amending the Explanatory Note, (Item (A) (9)) by defining "waffles and wafers" is enough to clarify the position, this could be done by moving the actual provision to the end of the item, and adding the words "of waffles and wafers" after "content" ("The water content of waffles and wafers must be 10 % or less by weight of the finished product"). This amendment would in the Secretariat's view, make it clearer that the water content limit applies to all waffles and wafers of item (A) (9).

In this regard, it should be recalled that the Committee has already decided to split present subheading 1905.30 into new subheadings 1905.31 ("sweet biscuits") and 1905.32 ("waffles and wafers") (see Doc. 41.600, Annex IJ/2). A similar approach might, therefore, also be envisaged for item (A) (8) (b) defining "sweet biscuits", taking into account that this item, in addition to the water content limit (12 %), also contains provisions for the "base" (50 %) and the "fat content" (35 %).

IV. CONCLUSION

31. The Committee is invited to :

- (a) rule on the classification of "Kellogg's Eggo Frozen Waffles", as described in paragraphs 16 to 20 above, taking into account the Explanatory Note (Item (A) (9)), to heading 19.05, the US Administration's comments in paragraphs 12 to 29 and the Secretariat's observations in paragraph 30 above;
- (b) express its views as to what further action should be taken with regard to clarifying the classification of "waffles" with a water content higher than 10 %.

Bakers' wares (a kind of "waffles"), made from water, wheat flour, eggs, leavening agents, sugar, whey powder and fat (typically soya-bean oil). After the ingredients are blended into a batter, the batter is poured into a patterned waffle iron. After the product is fully baked, it is frozen. The average moisture content is 48 % after baking and 45 % after being frozen.

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Kellogg's Eggo Frozen Waffles



Kellogg's Eggo Frozen Waffles

