



HARMONIZED SYSTEM
COMMITTEE

NC0283E1

-
26th Session

O. Eng.

Brussels, 2 October 2000.

CLASSIFICATION OF BAKERS' WARES (WAFFLES)

(RESERVATION BY THE EC)

(Item VII.1 on Agenda)

Reference documents :

NC0069E1 (HSC/23)
NC0127E1 (HSC/24)
NC0146E1 (HSC/24)
NC0160E2, Annex G/8 (HSC/24 – Report)

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.

File No. 2773

6. On 22 June 2000, the Secretariat received the following Note from the EC putting forward arguments in support of the reservation it had entered in respect of the decision of the Harmonized System Committee (24th Session) concerning the classification at issue. This note is reproduced below.

II. MEMORANDUM FROM THE EC

“Subject : Classification of waffle-type biscuits. EC reservation.

Ref. WCO NC0160E2 Annex G/8 (HSC/24); NC0090E2 Annex IJ/35 (HSC/23); NC0069E1; NC0127E1; NC0146E1.

BACKGROUND

7. At its 24th meeting held in Brussels from 11 to 22 October 1999 the Harmonized System Committee examined the classification of waffle-type biscuits in the HS Nomenclature.
8. The HS Committee decided by 18 votes to 10 to classify the waffle presented in Doc. NC0069E1 by the Japanese Administration, containing 40-50% water, in subheading 1905.30 pursuant to General Rule 1. Its view was apparently that "waffles", whatever their water content, come under this heading.
9. This decision goes against the current HS Explanatory Note to heading 19.05, Item (A) (9) (page 152) according to which the water content of waffles must not exceed 10% by weight. It is also contrary to the practice of certain Contracting Parties, such as the EC, which have incorporated the contents of this Explanatory Note in their Customs tariffs.
10. By letter dated 21 December 1999 the EC asked the Secretary-General of the WCO to put this HS Committee decision to the Council in accordance with Article 8.2 of the HS Convention.
11. On the basis of Article 20 of the HS Committee's Rules of Procedure, the EC is required to present a memo setting out the reasons for its request, as well as proposals to resolve the issue.

CLASSIFICATION PROBLEM

12. The HS Committee's decision (paragraph 4 of Annex G/8 to Doc. NC0160E2) concerns only the classification of the "waffle" called "Kellogg's Breadia" presented by Japan and described at the end of Doc. NC0069E1. However, this decision could be misconstrued and taken to mean that the Committee had accepted the principle that all these types of product, whatever their water content, should be regarded as waffles. In any case, this latter question is not part of the Committee's decision.
13. There are two main aspects to the matter :
- a) whether or not the water content (moisture) of the product is significant;
 - b) the name used : there are linguistic differences in the normal use of the terms "wafer" and "waffle" and their equivalents "gaufre" and "gaufrette".

14. The Association of the Chocolate, Biscuit and Confectionery Industries of the EU (CAOBISCO) was consulted. It considers that products with a relatively low moisture content and biscuits have certain major characteristics in common : their texture in the mouth is rather dry and they keep for a long time. However, products with a water/moisture content that exceeds (about) 10% are much more akin to bakery or pastry products because they have a softer texture and keep for a relatively short time.
15. When the Customs authorities decided on the contents of this Explanatory Note, they agreed that products called "waffles" with a higher moisture content than that specified in the HS Note should appear separately in subheading 1905.90, i.e. in a tariff heading unrelated to biscuits.
16. Needless to say, products cannot be classified simply on the basis of their trade name but rather on their nature and characteristics. From a language point of view, there does not seem to be a clear and universal definition covering the use of the terms wafer/waffle, gaufre/gaufrette.
17. In English-speaking countries, the term "wafer" tends to describe dry and quite thin products, especially ones that are served with ice cream or which are used to make filled double wafers with a medium or long shelf life (similar to biscuits). The term "waffle" generally describes a softer, moister product that is eaten, for example, at breakfast, often served hot and with honey or syrup or another sweet spread.
18. In both French- and English-speaking countries, it is also possible to differentiate between the two types of the product by the dough and/or the manufacturing method used (patterned plates). This is not the case in other languages. For example, the German term "waffel" covers both types of product.
19. Most of the delegates who spoke at the Committee meeting considered that the current limit of a water content of 10% by weight for waffles and wafers given in Item (A) (9) of the Explanatory Note to heading 19.05 could unduly restrict the scope of the legal text of subheading 1905.30. The EC could accept this standpoint and it would be willing to accept an amendment to the Explanatory Note so as to have a less restrictive text.
20. However, the EC seems to recall that when classifying "Kellogg's Breadia" the discussion mainly centred on whether or not to accept the limit set in the said Explanatory Note, which is rather rigid, and that the characteristics and composition of the product may have been put aside when classifying the product.
21. The EC would point out that while the Explanatory Note to heading 19.05 states that the water content must be 10% or less by weight of the finished product, the product classified by the Committee has a water content of between 40-50 % by weight, which is an enormous difference. The EC would ask the Committee to consider whether the products of subheading 1905.30 (sweet biscuits; waffles and wafers) should still be classified under this subheading whatever their water content, or whether the water content remains one of the particular characteristics of their nature or definition by which they can be distinguished from other bakery or pastry products.
22. In fact the two products mentioned in the wording of subheading 1905.30 "sweet biscuits; waffles and wafers" are described in Items (A) (8) (b) and (A) (9) of the Explanatory Notes. In both cases, the scope of these terms is defined by the water content : 12% or less for sweet biscuits and 10% or less for waffles and wafers.

23. It seems clear that the scope of this subheading was intended for the "dry" products mentioned in the wording with a relatively small proportion of water. They are mainly products that "are baked for a long time to improve the keeping qualities and are generally put up in closed packages".
24. This description taken from the opening part of Item (A) (8) (Biscuits) of the above Explanatory Note seems to be a very different method from that described in the manufacture of the product classified by the Committee : cooking and quick open freezing.
25. In this regard, though admittedly titles have no legal force, it might nevertheless be indicative that the study made by the Committee and all the documents concerning it including even Annex G/8 to Doc. NC0160F1 (Report on the Session) have the title : "Classement de biscuits du type gaufre". That is to say, they refer not to waffles in general but to a type of waffle that is close to biscuits, which would fall in subheading 1905.30.
26. Another legitimate question concerns the exact water content of this product. The water content given in the product description is 40/50 % but since it has undergone fast freezing, part of the water declared may come from the defreezing process. The water content of the finished product would then be much lower and therefore closer to the usual limits for these types of product. The Committee should perhaps clarify this question before classifying the products. The EC considers that the water content given in Items (A) (8) and (A) (9) of the Explanatory Notes to HS heading 19.05 refers to the water contents of the finished product itself and not the coating resulting from the product's frozen or semifrozen state.

PROPOSALS TO RESOLVE THE QUESTION

27. The EC accepts that the limit of 10% by weight can be restrictive and that there could be a higher limit of about 15%. The EC also accepts that any limit can, in principle, be considered restrictive but what the EC questions is whether a product with a water content of 50% or more by weight ("whatever the water content") reflects the actual nature of waffles/wafers.
28. Those delegations of the Committee that said that the water content criterion cannot be taken into consideration when classifying the products of subheading 1905.30 insisted that this criterion does not exist at legal level, neither in the heading text nor in a legal Note. This is clear, but it is also clear that not all the characteristics of every product can be included or mentioned in each heading for each product. This would make the Nomenclature too complex, detailed and long. It is the Committee's own custom in certain cases to have the product description or definition put in an Explanatory Note provided, of course, that the Note is not contrary to the legal text.
29. According to the study carried out by the Secretariat in paragraph 10 of Doc. NC0069E1, the Explanatory Note in question and the indication of the maximum water content for the products of subheading 1905.30 were drafted by the former HS Committee. Other delegates in the HS Committee are now contesting this work done by the former Committee. The EC is sure that the "legislators" of this first Committee were well aware that an Explanatory Note could neither restrict nor broaden the scope of a legal text and that it should simply clarify it. The Secretariat could give the Committee examples of Explanatory Notes where quantity criteria are given to clarify a legal text. The Committee should also consider whether it thinks all these Explanatory Notes should be disregarded, since the volume, size or percentage indicated do not exist in the heading text or a legal Note (e.g., the

Explanatory Notes to headings 11.09; 12.10; 12.13; 12.14; Chapter 15 (General); 15.09; 15.10; 17.02; Item (A) (6); 19.05, Items (A) (4), (A) (8) (b) and (A) (9); 22.09; 23.09).

30. The HS Committee has to decide whether the water content criterion (not the percentages indicated which may be modified or even cancelled) breaches or infringes the wording of subheading 1905.30 or whether it can be regarded as one of the criteria for identifying and distinguishing these products from other bakery or pastry products to be classified under the same heading.
31. The EC would point out that although sweet biscuits and waffles/wafers are currently put together under subheading 1905.30, as from 2002 they will be divided into two new subheadings : 1905.31 and 1905.32 respectively. Greater precision will therefore be required to identify these products.
32. The EC is accordingly of the view that there will be a direct effect on the Explanatory Note to heading 19.05, Items (A) (4), (A) (8) (b) and (A) (9), if the Committee decides that the water content is not a significant criterion for the classification and identification of these products.
33. The EC calls on the Committee to :
- a) decide on the classification of the product "Kellogg's Breadia" with 40-50 % of water, giving due consideration to whether the water content indicated in this product comes directly from the finished product or, to a large extent, also from its state of presentation;
 - b) decide whether to amend the Explanatory Note to heading 19.05 and, if so, outline the extent of this amendment.
34. In this context, the EC could agree to consider replacing the phrase : "the water content must be 10% or less by weight of the finished product" with "in a finished state these products have a relatively small proportion of water, generally 10% (15%) or less by weight". This percentage is given as an example and may be amended following the results of a study to be carried out by the Committee in close collaboration with the industry."

III. SECRETARIAT COMMENTS

35. When this question was discussed by the Committee (24th Session), many delegates were of the view that even though the Explanatory Note to heading 19.05 contained a 10 percent water-content limitation for waffles, the waffles in question had to be classified in subheading 1905.30 because the legal text placed no restrictions on the water-content of waffles. They believed that the Explanatory Notes could never restrict the scope of the legal texts. When the legal texts were clear, as in this case, they saw no need to consult the Explanatory Notes. In addition, the US Delegate stated that there was no technical basis for the 10 percent water-content limitation for waffles. It was also pointed out that a number of waffles on the market, known as Liège waffles, Belgian waffles, etc., had a moisture content of more than 10%. These products were commonly and commercially known as "waffles". Not classifying these products as waffles would be both contrary to the legal texts and commercial reality. All waffles, regardless of the water content, remained waffles and should therefore be legally classified in subheading 1905.30.
36. Other delegates indicated that they were also of the view that the Explanatory Notes were not legally binding, but when the Explanatory Notes contained a clear definition like that

for waffles, they had to be read in conjunction with the legal texts. It was also pointed out that classifying goods according to a name given by a producer could lead to inopportune classifications. Furthermore, industrial circles in Europe were of the view that the distinction between "dry" waffles of subheading 1905.30 and "wet" waffles of subheading 1905.90, should be kept. One delegate emphasized, that e.g., both the Explanatory Notes to heading 17.02, Item (A) (6), and heading 19.05, Item (8) (b), contained restrictive provisions similar to waffles, and that these provisions were very helpful in clarifying the classification of certain products to which specific names were given. These delegates were, therefore, of the view that waffles containing more than 10 percent water should be classified in subheading 1905.90.

37. In response to the comment regarding dry and wet waffles, it was noted that nothing in the legal text made a distinction between waffles on a dry or wet basis.
38. The Secretariat agrees, that on the basis of the Explanatory Note to heading 19.05, Item (A) (9), it seems difficult to classify waffles with a water content above 10% in subheading 1905.30. On the other hand, the legal texts do not impose a water content limit on waffles; neither does the technical literature consulted by the Secretariat (The New Encyclopædia Britannica, Grand Larousse Universel, Larousse Gastronomique, and The Concise Oxford Dictionary). However, the Secretariat leaves it to the Committee to decide whether these "waffles" should be classified in subheading 1905.30 or in subheading 1905.90.
39. Finally, with regard to paragraph 25 above, the Secretariat would like to point out that the English title corresponding to the French title "Classement de biscuits du type gaufre" is "Classification of baker's wares (waffles)".

IV. CONCLUSION

40. The Committee is invited to re-examine the classification of "Kellogg's® Breadia" bakers' wares (a kind of "waffles"), as described in Doc. NC0069E1, taking into account the arguments put forward by the EC in paragraphs 7 to 34 above and the comments by the Secretariat in paragraphs 35 to 39. The Committee is also invited to indicate what further action should be taken with regard to this matter.
