



HARMONIZED SYSTEM
COMMITTEE

-
26th Session
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NC0287E1

O. Eng.

Brussels, 16 October 2000.

CLASSIFICATION OF "HIGH FAT CREAM CHEESE"
(RESERVATION BY AUSTRALIA)
(Item VII.5 on Agenda)

Reference documents :

41.475 (HSC/20)	42.850, Annex A/13 (SSC/14 - Report)
41.600, Annex G/23 (HSC/20 – Report)	NC0027E1 (HSC/23)
42.040 (HSC/21)	NC0086E1 (HSC/23)
42.056 (HSC/21)	NC0090E2, Annex E/1 (HSC/23 – Report)
42.113 (HSC/21)	NC0129E1 (HSC/24)
42.100, Annex H/1 (HSC/21 – Report)	NC0154E1 (HSC/24)
42.438 (HSC/22)	NC0160E2, Annex G/10 (HSC/24 – Report)
42.727 (HSC/22)	NS0002E1 (SSC/15)
42.750, Annex G/12 (HSC/22 – Report)	NS0014E2, Annex A/1 (SSC/15 – Report)
42.805 (SSC/14)	NC0181E/1, paragraphs 2 to 7 (HSC/25)
42.827 (SSC/14)	NC0248E1 (HSC/25)
42.828 (SSC/14)	NC0250E2, Annex H/10 (HSC/25 – Report)

I. BACKGROUND

1. At its 25th Session (March 2000) the Harmonized System Committee re-examined the classification of “high fat cream cheese” (sample B and sample C).
2. After discussion, the Committee decided, by 24 votes to 2 and 23 votes to 2, respectively, that the products in question should be classified in heading 04.05 (subheading 0405.20) (dairy spreads).
3. By its letter of 30 May 2000, the Australian Customs Administration 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.
4. The Council, at its 95th/96th Sessions in July 2000, considered the Australian reservation and decided to refer the question of the classification of “high fat cream cheese” back to the Committee for re-examination.

File No. 2701

5. On 13 September 2000, the Secretariat received the following Note from the Australian Administration putting forward arguments in support of the reservation it had entered in respect of the decision of the Harmonized System Committee (25th Session) concerning the classification at issue. This note is reproduced below.

II. NOTE FROM AUSTRALIA

6. "Australia's reservation is based on concerns that the classification of two varieties of high fat cream cheese (Sample B and Sample C) as dairy spreads is inconsistent with :

- the Notes to Chapter 4 of the Harmonized System (HS) Nomenclature; and
- existing international definitions of cheese.

Notes to Chapter 4

7. The decision is inconsistent with the current legal texts for two reasons. First, the product has a Solids-Non-Fat (SNF) ratio in excess of 2 % by weight, and second, it is not a water-in-oil type emulsion.

Level of Solids-Not-Fat

8. Samples B and C have too much SNF to be dairy spreads. The decision to classify these two products as dairy spreads within heading 04.05 is therefore, clearly in conflict with the present legal text.

9. Dairy spreads are internationally understood to be a mixture of butter and water. This is implicit in the terms of Note 2 (b) to Chapter 4, which directs that dairy spreads are :

“... a spreadable emulsion of the water-in-oil type, containing milkfat as the only fat in the product ...”.

The only milkfat that exists is butter.

10. As milkfat is the only permitted fat in dairy spread, it is the only permitted oil in the product, and therefore “water-in-oil” must mean “water-in-butter”. Dairy spreads are therefore defined by Note 2 (b) as an emulsion of water and butter.

11. Note 2 (a) to Chapter 4 defines butter. The note directs that butter cannot have a SNF content of greater than 2 % by weight. (SNF is the total amount of protein plus lactose plus ash).

12. The addition of water to butter increases the weight of the final product (i.e., the dairy spread) and so dilutes the SNF. Therefore, the SNF content of dairy spread must be less than 2 % by weight.

13. According to the analysis provided by Australia in April 1999, and accepted by the Harmonized System Committee (HSC), as reported in paragraph 5 of the decision, (Annex H/10 to Doc. NC0250E2), Sample B has a protein and lactose content of 2.36 % and Sample C 2.396 %. In addition, these products contain 0.18 % ash and 0.19 % ash respectively (as reported in Annex II to Doc. NS0002E1).

14. The SNF of Samples B and C are therefore 2.54 % and 2.586 % by weight respectively, and thus are not dairy spreads.

Emulsion Type

15. An additional difficulty is that dairy spreads are defined in Note 2 (b) to Chapter 4 as being an “emulsion of the water-in-oil type”. In this respect, there are three types of emulsion - the water-in-oil type, the oil-in-water type and the phase variable type. The products under consideration are not clearly water-in-oil type emulsion products.
16. Only two of the eleven countries that tested Samples B and C concluded the products were clearly a water-in-oil type emulsion. Seven others did not make any attempt to describe the emulsion type. One described them as being of the phase variable type. Another observed that they “appear” to be water-in-oil type. Two of eleven is not a “majority” as reported in the decision. On this inconclusive basis it is not reasonable to classify them as dairy spreads which by definition must be water-in-oil type emulsions.
17. In the case of fresh cheese (e.g., high fat cream cheese), the state of the emulsion will vary depending on the freshness of the product. It would appear that some Customs laboratories tested product which had deteriorated (as pH levels and other tests showed) and as such the physical properties had broken down.
18. Further, there is no evidence that a standard method of determining emulsion type is in use or was used by the various laboratories concerned. Indeed there is no internationally agreed method for testing emulsion type (as noted previously by the HSC in paragraph 12 of Doc. NS0002E1). This highlights the problem with attempting to classify a product according to emulsion type.

International Definitions of Cheese

19. Australia has argued, and continues to maintain, that high fat cream cheese meets the present CODEX Alimentarius (CODEX) definition for cheese.
20. Australia’s second area of concern relates to the basis for the HSC deciding that Sample B and Sample C could not be classified as cheese.
21. The properties of all cheeses vary. Blue mould cheese differs in taste, looks, texture and smell from cheddar styles. Similarly cream cheeses show variations in organoleptic characteristics, which by their nature are highly subjective. For example, Triple Mascarpone and Philadelphia Cream cheese are different in their organoleptic characteristics, and completely different from other varieties of cream cheese in style, taste, smell and texture.
22. Australia is concerned that a classification decision that affects only two of the many variations of cream cheese that exist, will only lead to further confusion as to which products are sufficiently similar to the two sample products as to be not classified as cheese.
23. Paragraph 7 of the decision states that the two products under consideration could not be classified as cheese because of :
- " the very low protein content, which in their view was too low for coagulation (as prescribed in the present CODEX definition for cheese);

the elevated fat content, and

the description in the test reports from the majority of Customs laboratories (indicating that these samples were of the water-in-oil emulsion type)."

24. Australia emphasises that the present HS legal texts and Explanatory Notes for Chapter 4 do not attempt to define cheese based on minimum protein level, maximum fat level or emulsion type. Nor are these three criteria used to define cheese in any other existing internationally recognised standard. The decision that two of the products are not cheese was not, therefore, made on the basis of the present legal texts and as such is a flawed decision.
25. While CODEX has clearly agreed that coagulation around protein is a key factor in determining whether a product is cheese, the dairy experts at CODEX are yet to agree on the minimum level of protein that must remain in the final cheese for coagulation to have taken place. In rejecting the classification of the two samples as cheese on the basis of protein level, the HSC has implied that a level of protein of 1.5 % in the dry matter is insufficient. It does not, however, indicate what level is sufficient. It does not, therefore, provide Customs authorities with a measurable and defined cut off point at which the HSC determines whether or not the product can be classified as cheese.
26. Similarly, the decision implies that a fat level of 70.4 % is too high for cheese, but it does not provide a measurable and clearly defined cut off point above which the product may not be classified as cheese.
27. The third issue, emulsion type, as noted above is not helpful in defining cheese because cheese may have varying emulsion types and there is no recognised test for this.
28. High fat cream cheese is a term used to describe a broad category of products. Therefore, this decision relating to just two products, without any clear guidance as to the basis for the decision (in terms of criteria which can be measured at the border), leaves the classification of high fat cream cheese unclear.

Conclusion

29. Australia notes that in paragraph 13 of the decision it was stated that the Secretariat should carefully follow the developments of this issue in the International Dairy Federation (IDF). This administration supports this stance and will work towards the incorporation, into the Explanatory Notes or the legal text, of a suitable definition for cheese. This should include dialogue with the IDF and CODEX in order to ensure consistency and uniformity of regulation."

III. ARGUMENTS PUT FORWARD AT THE 25TH SESSION

30. When this question was discussed by the Committee (25th Session), the Chairman emphasized that the classification of these products had to be determined on the basis of the present legal texts. He stressed that the Explanatory Notes contained many examples of cheese and that information with regard to the chemical composition of cheese could be found in literature and on the Internet. He therefore wondered whether it was necessary to wait for the Codex Committee on Milk and Milk Products (CCMMP) to take a final decision on the definition of cheese.

31. The Delegate of Japan reminded the Committee that this item had already been discussed five times in the HS Committee and two times in the Scientific Sub-Committee. He was of the opinion that the scientific and technical information available should make it possible to classify at least samples A, B and C. Since the CCMMP was in the final stages of the Codex procedure of adopting a new definition for cheese, he was of the opinion that a classification decision could be taken on the basis of the draft definition, which included a minimum 6 % limit as to protein content on a dry matter basis.
32. The Australian Delegate, on the other hand, was of the opinion that it was inappropriate to establish any minimum levels of protein at this stage. He reminded the Committee that the Scientific Sub-Committee, at its last session, had proposed that certain questions should be submitted to the International Dairy Federation (IDF) to accelerate the process of taking a final decision. The Committee should therefore defer the classification decision until the CCMMP had reached a final agreement on the definition of cheese - hopefully before the next meeting of the Committee.
33. Another delegate was of the same view as the Chairman, that is to say, that classification had to be determined on the basis of the present legal texts. Furthermore, as a matter of principle, he was strongly opposed to the idea that the Committee should wait for another international organization to take a decision before taking its own independent decision.
34. After a long discussion the Committee decided, by 19 votes to 10, to classify samples A, B and C at the present session. However, in view of uncertainties, as to, e.g., the test results and the protein content in the dry matter, the Committee, after further discussion, decided not to classify sample A. The Committee also decided to classify products B and C on the basis of the test results provided by Australia in April 1999 :

	Sample B	Sample C
Fat content	70.4 %	72.5 %
Fat content – dry matter	97.8 %	98.8 %
Protein content	1.06 %	0.996 %
Protein content – dry matter	1.5 %	1.4 %
Moisture	28.0 %	26.6 %
Lactose content	1.3 %	1.4 %

35. Japan was of the opinion that samples B and C had to be classified as dairy spreads because of their physical, chemical and organoleptic characteristics.
36. Other delegates took the view that these products could not be classified as cheese for the following reasons :
- the very low protein content, which in their view was too low for coagulation (as prescribed in the present CODEX definition for cheese),
 - the elevated fat content, and
 - the description in the test reports from the majority of Customs laboratories (indicating that these samples were of the water-in-oil emulsion type).

37. The Australian Delegate, on the other hand, opposed classification in heading 04.05. In his mind, dairy spreads of heading 04.05 had to contain less than 2 % by weight of milk solids-non-fat content as prescribed for butter. Due to the extra water in dairy spreads, they had to contain even fewer solids-non-fat than butter. Furthermore, since these products were “phase variable”, they could not be regarded as water-in-oil emulsion types.
38. After further discussion, the Committee decided, by 27 votes to 6, not to classify sample B as cheese. With regard to the final classification, the Committee decided by 24 votes to 2, to classify sample B in heading 04.05 (subheading 0405.20), on the basis of GIRs 1 and 6 and Note 2 (b) to Chapter 4.
39. The Committee further decided to classify sample C in heading 04.05 (subheading 0405.20) by 23 votes to 2, on the basis of GIRs 1 and 6 and Note 2 (b) to Chapter 4, after having decided that this sample as well, by 26 votes to 5, could not be regarded as cheese.

IV. SECRETARIAT COMMENTS

40. In paragraphs 8 to 14 above, Australia referred to Solids-Non-Fat (SNF) in connection with dairy spreads as described in Note 2 (b) to Chapter 4. The Secretariat would like to point out that this Note is silent as to SNF ratio. Furthermore, attention should be drawn to Classification Opinion 0405.20 (dairy spreads), according to which SNF ratio of the product described in the Opinion is far higher than 2%.
41. As regards the expression “phase variable” as mentioned in paragraph 15 above, the Observer for the International Dairy Federation (IDF) informed the Scientific Sub-Committee that this expression was unknown to him in the production of cheese, but that it would probably be a mixture of both emulsion types (paragraph 11 of Annex A/1 to Doc. NS0014E2 - Report of SSC/15/Jan. 2000).
42. Concerning the results of the analysis carried out by 10 laboratories with regard to emulsion types as mentioned in paragraph 16 above, the Secretariat has reproduced the relevant parts of Annexes I to X to Doc. NS0002E1 as follows :
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| Australia | : “phase variable” |
| Austria | : No mention |
| Canada | : “would appear to be a water-in-oil emulsion” |
| France | : “water-in-oil emulsion” |
| Ireland | : “developed into a water in oil emulsion” |
| Japan | : “considered as water-in-oil emulsions” |
| Mexico | : “the discussion on whether cheese could be a water-in-oil type emulsion and if so, how to make a distinction between water-in-oil emulsion type dairy spreads and water-in-oil emulsion cheese is irrelevant. ...there is no question regarding this product to be oil/water emulsion” |
| Netherlands | : “can be considered to be a water in oil emulsion” (Doc. NC0086E1) |
| UK | : No mention |
| US | : No mention |
43. As pointed out by Australia in paragraph 29 above, the Secretariat, at the Committee’s last Session, was instructed to carefully follow developments in the IDF as to the definition of cheese. An extract from the preliminary official report of the 4th Session of the Codex

Committee for Milk and Milk Products (CCMMP) which took place in Wellington (28 February - 3 March 2000) was reproduced in Doc. NC0248E1.

44. According to the final report of this Committee (ALINORM 01/11 – paragraph 139), the next session (Fifth) “was tentatively scheduled to be held in approximately two years time in Wellington”, subject to consultation between the CODEX and Host Government Secretariats – which in the Secretariat’s view indicate of that a final decision with regard to the definition of cheese can not be expected from the Codex Alimentarius Commission before 2002.

IV. CONCLUSION

45. The Committee is invited to re-examine the classification of “high fat cream cheese” as described in Doc. NS0002E1, taking into account the comments by the Australian Administration in paragraphs 6 to 29 above and the arguments put forward at the 25th Session in paragraphs 30 to 39 as well as the comments by the Secretariat in paragraphs 40 and 44.
46. The Committee is also invited to indicate what further action should be taken with regard to this matter. In this context the Committee is reminded that the Harmonized System Committee, at its 25th Session, decided that possible legal amendments would be studied by the Review Sub-Committee only on the basis of proposals from administrations.
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