



HARMONIZED SYSTEM
COMMITTEE

-
30th Session
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NC0620E1

O. Eng.

Brussels, 7 October 2002.

CLASSIFICATION OF BAKERS' WARES (WAFFLES)

(RESERVATION BY THE US ADMINISTRATION)

(Item VII.10 on Agenda)

Reference documents :

NC0069E1 (HSC/23)	NC0384E1 (HSC/27)
NC0127E1 (HSC/24)	NC0422E1 (HSC/27)
NC0146E1 (HSC/24)	NC0430E2, Annex H/1 (HSC/27 – Report)
NC0160E2, Annex G/8 (HSC/24 – Report)	NC0466E1 (HSC/28)
NC0283E1 (HSC/26)	NC0510E2, Annex G/5 (HSC/28 – Report)
NC0340E2, Annex G/1 (HSC/26 – 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.

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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.
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), in view of the fact that "Kellogg's Breadia" waffles 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. 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. 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.
8. At the 28th Session of the HS Committee (November 2001), the US Delegate emphasised that the Committee had been discussing the classification of these products since its 23rd Session (May 1999). Referring to his administration's comments in Doc. NC0466E1, he underlined that "Kellogg's Eggo Frozen Waffles" were fully baked, and that this fact was clearly shown in the illustrations in the Annex to the working document. It was certainly not a batter, as one delegate had suggested during a previous discussion in the Committee with regard to classification of a similar product. Furthermore, he emphasised the fact that there were no standards, international or national, on the water and moisture content for waffles. Since the product at issue was commercially and commonly known as a waffle, presented and traded internationally as a waffle, known by and purchased by consumers in retail stores as a waffle and satisfied the common definition of a waffle (i.e., a bakers' ware baked between patterned metal plates), it should be classified in the Harmonized System as a waffle in subheading 1905.32, regardless of the water content limit relating to waffles in the Explanatory Note to heading 19.05.
9. Many delegates supported his view. In this regard it was pointed out that an Explanatory Note could not function to narrow or broaden the scope of a heading or a subheading. It would seem very strange not to classify this product as a waffle, since it was presented, was traded and tasted like a waffle. It was also mentioned that dietary concerns and eating habits had changed since the preparation of this Explanatory Note, meaning that an elevated water content (and a resulting reduced fat content) was more common in such products than before.
10. On the other hand, many other delegates were of the view that a product containing 45 % water after deepfreezing could not be classified as a waffle. Products containing 10 – 13.7 % water, as referred to in paragraph 25 of the working document, should be classified as waffles (and the Explanatory Notes should be amended accordingly), but 45 % water was too much. In their mind, a product containing so much water had lost the nature of being a waffle. It was also stressed that classifying products by their name or their shape was not a

normal practice in the Harmonized System. Classification had to proceed on the basis of the nature of the product.

11. One delegate indicated the contention that there was no limit on the water content of waffles would endanger the distinction made in the HS Nomenclature between the various bakers' wares, such as pastries, cakes, biscuits and waffles. After all, water content was an important criterion which determined how crisp or soft a product was. This was significant, as the new nomenclature differentiated between, inter alia, biscuits and waffles.
12. One delegate pointed out that the Explanatory Note to heading 19.05 also contained water content limits with regard to other products, such as crispbread and sweet biscuits. He could agree to insert a legal Note as to the water content limit for such products, but as the texts now stood the product at issue had to be classified in subheading 1905.90.
13. After further discussion, the Committee finally decided to classify "Kellogg's Eggo Frozen Waffles" in subheading 1905.90, by 17 votes to 15. After an additional exchange of views, it was agreed that the basis for this decision was GIR 1 and the composition of the product (including the 45 % water content).
14. In order to reflect this decision, the Committee instructed the Secretariat to prepare the following for examination by the next preessional Working Party :
 - (a) a draft Classification Opinion;
 - (b) a draft amendment to the Explanatory Note to heading 19.05, on the basis of the EC proposal in paragraph 34 to Doc. NC0283E1, that would ensure that the products mentioned in paragraph 25 to Doc. NC0466E1 would be classified as waffles. Contracting Parties were invited to submit their proposals in this connection.
15. The Committee also instructed the Secretariat to prepare a document for the next session of the Review Sub-Committee with regard to legal text amendments. These amendments should be based on proposals from Contracting Parties to be submitted as early as possible.
16. By its letter of 22 January 2002, the US Customs Service 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.
17. The Council, at its 99th/100th Sessions in June 2002, considered the US reservation and it decided to refer the question of the classification of bakers' wares (waffles) back to the Committee for re-examination.
18. On 16 September 2002, the Secretariat received the following Note from the US Administration putting forward arguments in support of the reservation it had entered in respect of the decision of the Harmonized System Committee (28th Session) concerning the classification at issue. This note is reproduced below.

II. NOTE FROM THE US ADMINISTRATION

"Introduction

19. At its 30th Session (November 2002), the Harmonized System Committee will examine the classification of Kellogg's Eggo waffles. For the reasons set forth below, the United States believes that the Eggo waffles are properly classified in subheading 1905.32 as waffles.

Background

20. At its 24th Session (October 1999), the Committee decided by 18 votes to 10 to classify Kellogg's Bredia waffles in subheading 1905.30 as waffles¹. At its 26th Session (November 2000), the Committee reconsidered the classification of Kellogg's Bredia waffles following a reservation entered by the EC against the previous classification decision for this product. It was decided to delay a final decision to the next session, however, because some delegates believed that more information on the product was needed.
21. At its 27th Session (May 2001), the Committee decided not to reconsider the classification of the Bredia waffles because they were no longer being exported to Japan (it was the Japanese administration who originally sent an enquiry to the Secretariat relating to the classification of this product). Instead, the Committee decided to consider the classification of a similar product (Kellogg's Eggo waffles) at a future session.
22. At its 28th Session (November 2001), the Committee decided by 17 votes to 15 to classify the Eggo waffles in subheading 1905.90 as other than waffles. The United States believes that there may have been a misunderstanding over the true nature of this product on the part of the Committee. Additionally, the United States believes that the legal text of the Harmonized System plainly requires that the product be classified as a waffle in subheading 1905.32. Therefore, the United States entered a reservation against the classification decision taken by the Committee at its 28th Session for the Eggo waffles.

Description of the merchandise

Ingredients in the Eggo Waffles

23. 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

24. 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

¹ In the second edition of the Harmonized System (1996), subheading 1905.30 provided for "sweet biscuits; waffles and wafers." In the third edition of the Harmonized System (2002), subheading 1905.30 has been subdivided into two six-digit subheadings: 1905.31 which provides for "sweet biscuits" and 1905.32 which provides for "waffles and wafers."

the waffle. The irons used by the Kellogg Company produce a waffle that is approximately 6/10 inch (1.5 cm) thick.

25. 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.
26. 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).
27. For the benefit of the Committee, attached to this note are pictures of Kellogg's Eggo waffles as put up for retail sale. (See attachments 1 & 2.) As the pictures reveal, these are fully cooked and prepared waffles as presented.

Classification of the merchandise

28. 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 1905.32 provides for waffles and wafers.
29. The term "waffle" is not defined in the legal text of the Harmonized System. 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 are clear 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 1905.32.
30. Item (A)(9) (page 163) to the Explanatory Notes to heading 19.05 (Third edition, 2002) states as follows :
- 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 cornets, 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.)
31. 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 1905.32 to waffles that contain 10 percent or less by weight of water.

32. The **US** 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-----	13.6 %
Parisco Belgian Waffle-----	13.3 %
Corona Waffle with Milk Chocolate-----	10.2 %
Oak Hills Maple Syrup Honey Waffle-----	12.6 %

33. 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.
34. 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."
35. 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 1905.32 as waffles.

Conclusion

36. In view of the above, the **United States** firmly believes that the waffles under consideration are properly classified in subheading 1905.32 as waffles."

ATTACHMENT NO. 1

Kellogg's Eggo Frozen Waffles



ATTACHMENT NO. 2

Kellogg's Eggo Frozen Waffles



III. SECRETARIAT COMMENTS

37. The Secretariat has already expressed its view with regard to this issue in Doc. NC0466E1 and leaves it to the Committee to decide on the classification of the bakers' ware under consideration ("Kellogg's Eggo Frozen Waffles").

IV. CONCLUSION

38. The Committee is invited to re-examine the classification of "Kellogg's Eggo Frozen Waffles" (bakers' ware) as described in Doc. NC0466E1, taking into account the comments by the US Administration above.
39. 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 28th Session, instructed the Secretariat to prepare a document for the Review Sub-Committee with regard to possible legal amendments.
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