

**World Customs Organization**

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Brussels, 21 October 2021.

21NL0131E - HP

Dear Sir,

I write with reference to your e-mail, received on 13 August 2021, requesting the Secretariat's opinion about the interpretation of the words "replacing one or more of its natural constituents by another substance" in Note 4 (b) to Chapter 4; you also asked whether any addition of vegetable oil to cheese is a replacement of butyric fats and thus excludes such products from Chapter 4.

Regarding your concern about cheese, and particularly whether any addition of vegetable oil to cheese constitutes a replacement of butyric fats and thus excludes the products from Chapter 4, the Secretariat would like to begin by drawing your attention to the fact that there is no definition of the term "cheese" in the legal texts or the Explanatory Notes.

However, according to Note 4 (b) to Chapter 4, "This Chapter does not cover : (b) products obtained from milk by replacing one or more of its natural constituents (for example, butyric fats) by another substance (for example, oleic fats) (heading 19.01 or 21.06);".

The Explanatory Notes to Chapter 4 elaborate that "For the purposes of Note 4 (b) to this Chapter the expression "butyric fats" means milk fats and the expression "oleic fats" means fats other than milk fats, in particular vegetable fats (e.g., olive oil).".

The Harmonized System Committee (HSC) looked at this issue in relation to the goods in Classification Opinion 1901.90/3 concerning a **preparation intended to be consumed as cheese substitute**, consisting of – among other things - skimmed milk (81.8 %) and vegetable oils (15.65 %).

At its 51<sup>st</sup> Session, in March 2013, the HSC decided to classify this product in heading 19.01 (subheading 1901.90) as a food preparation of goods of headings 04.01 to 04.04, not containing cocoa or containing less than 5 % by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included.

Note 4 (b) to Chapter 4 reads "This Chapter does not cover : (b) Products obtained from milk by replacing one or more of its natural constituents (for example, butyric fats) by another substance (for example, oleic fats) (heading 19.01 or 21.06);".



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The Secretariat would note that in this product the milk had been "skimmed" to remove its fats and then the missing fats had been replaced (whether in part or in full) by another form of fats, in this case, vegetable oils.

Therefore in this product there had been a replacement of milk fats with plant oils and it was excluded from Chapter 4 by Note 4 (b).

You ask whether the replacement can be "wholly or partially" under this Note.

The Secretariat is of the view that partial replacement is still a replacement. Therefore, it is of the view that "wholly or partially" is correct. While Note 4 (b) to Chapter 4 does not explicitly use the terms "partially" and "wholly", the Secretariat's opinion is that it would cover the whole of, or part of one constituent being replaced, or indeed the whole of, or part of several constituents being replaced.

Consequently, the Secretariat considers that substituting vegetable oil for some or all milk fats in order to produce cheese involves replacing butyric fats by non-milk fats (in this case vegetable oils), and cheese prepared on this basis cannot be classified in Chapter 4 (Chapter 19 or 21).

You also refer to the comment made by the Secretariat in paragraph 24 of Doc. NC1852E1a and seek clarification of its impact. This statement was: "As far as the applicability of exclusion (b) of the General Explanatory Note to Chapter 4 is concerned, the Secretariat wishes to note that the addition of vegetable oil to a product containing milk fat will inevitably result in a product containing vegetable oil and a lower proportion of other fats in a given quantity of the final product compared to the balance of these ingredients before vegetable oil was added. In other words, oleic fats will simply crowd out the butyric fats and therefore, arguably, replace them. From this perspective, it can be assumed that the addition of vegetable oil to a product containing milk fat in all circumstances leads to a replacement of milk fat with vegetable oil, and thus a replacement of butyric fats by oleic fats, at least to a certain extent."

This interpretation of exclusion (b) in the General Explanatory Note to Chapter 4, which later became Note 4 (b) to Chapter 4, was not specifically covered by the HSC in its deliberations. It was not required for such a deliberation to be given as the product in question was made from milk from which a natural constituent had been removed and replaced by another substance.

The Secretariat notes that this statement was made in 2013. Looking at this statement now, the Secretariat would note that the situation of permitted additives is more complex than that statement would suggest. While there would always be a change in relative proportions of types of fats with the addition of vegetable oil to a milk based product, the addition of a number of additives that are permitted within certain headings of Chapter 4 would also change the relative proportions of milk and non-milk components within certain classes of substances, such as within the mix of types of fats, proteins or sugars in the product overall.

There are potential issues in relation to the identity of various products of Chapter 4 if vegetable oils are added, regardless of the operation of Note 4 (b), so this may have factored into the considerations behind the statement, but at this distance in time, whether this was the situation being considered or not is not determinable.





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The statement in the Working Document mentioned above does not necessarily represent the current view of the Secretariat and has not been commented on by the HSC.

So the question of whether or not Note 4 (b) permits or prohibits the addition of non-milk fats to a cheese made of milk *that has not had any removal of the milk fats* is an interpretation question that needs to be submitted to the HSC. Under the Convention, ruling on such issues of interpretation is a function that rests firmly with the HSC.

Noting that a milk/vegetable oil mixture would not be milk for the purposes of Chapter 4 (Note 1 to Chapter 4), then a further question would arise for any product where the base input into the cheese making process was such a mixed preparation of milk and oil. This may be a different situation than the vegetable oil being an additive to a cheese, as for example would be the case with the addition of small quantities of sun-dried tomatoes in oil. That question is whether a product claiming to be cheese would in fact be cheese, for the purpose of heading 04.06, if the raw material was not milk, but a preparation being a milk and vegetable oil mixture.

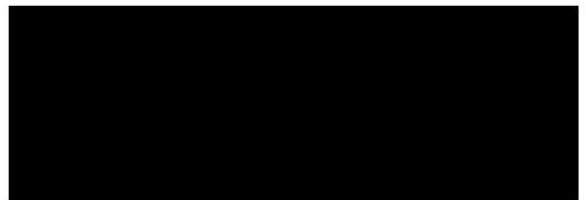
Any such questions would need to be considered on the basis of an actual product.

It should also be noted that in the event that the addition of vegetable oil to whole milk products not being ruled out for heading 04.06 by Note 4 (b), then further consideration would still need to be undertaken as to whether the actual product met the requirements of Note 3 to Chapter 4 and whether or not the actual product retained the character of cheese or instead the addition of the oil sufficiently altered the character of the product to become a food preparation made from cheese. This requires a case by case consideration of products.

If you wish to put questions to the HSC in relation to the above, please let us know and provide details of the product, or products, in question.

I hope you will find this information helpful.

Yours faithfully,



Director, Tariff and Trade Affairs