



EFTA Surveillance Authority (ESA)  
Avenue des Arts 19H  
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Casenumber FJR24060003

## **Case No. 92218 - The Icelandic Government's observation on the Authority's letter dated 9 April 2025**

On 9 April 2025, the Ministry of Finance and Economic Affairs („the Ministry”) received a letter from the EFTA Surveillance Authority (“the Authority”). The letter concerns a formal notice to Iceland regarding the customs tariff classification of cheese with added plant oil.

In the letter, the Authority claims that it must conclude that, by classifying cheese with added plant oil under the Customs Tariff subheading 0406.2000, grated or powdered cheese, of all kinds, and not Customs Tariff subheading 2106.90, other food preparations not elsewhere specified or included, and by subjecting those products, on that basis to specific customs duties, Iceland has failed to fulfil its obligations under Article 10 of the EEA Agreement, in conjunctions with Table I to Protocol 3 to the EEA Agreement, as provided for in Articles 8 (2) and 8 (3)(b) of the EEA Agreement. This is insofar as the classification is applied to products originating within the EEA that contain up to 15% by weight of butter or other milkfat classified within subheading No 2106.90. In the letter the Authority requests that the Icelandic Government submits its observations on the content of the letter. The Authority granted a two-month deadline to reply to the letter. At the request of the Ministry, the Authority extended the deadline to 31 August 2025.

The Ministry has examined the views set out in the Authority's letter, and would like to submit the following:

### **1. Rectification**

In the third paragraph on page 1 of the Authority's letter, dated 9 April 2025, it is stated that the products in question in this case were previously as a general rule classified under Chapter 19 and 21 of the Customs Tariff. However, in 2020 the Icelandic customs authorities decided to review that practice and, by Binding Opinion No. 17/2020 of 17 February 2020, the classification was set to Chapter 4 of Customs Tariff.

The Ministry wishes to point out that this is incorrect. It further notes that the first sentence on page 3 of the Ministry's letter to the Authority, dated 18 September 2024, is likewise incorrect.

The correct position is that, prior to the issuance of Binding Opinion No. 17/2020, the Icelandic customs authorities (“Customs”) had never issued a formal opinion on the tariff classification of this particular product. Pursuant to Article 20 of the Customs Act No. 88/2005 the importer of products is in all cases responsible for the tariff classification of products imported into the country. Where there is uncertainty regarding the tariff classification of a product, or if an importer wishes to obtain confirmation from the Customs on the tariff classification of a product, the importer may request a binding opinion on the tariff classification of the product, cf. Article 21 of the Customs Act. Furthermore, the Customs possess extensive powers to review tariff classification and other bases of liability and the amount of customs duties, subject to the provisions of Chapter XIV of the Customs Act.

## **2. Objection to the assertion that Iceland has not fulfilled its obligation according to the EEA Agreement**

The Ministry objects to the Authority's conclusion that Iceland has failed to fulfil its obligations under Article 10 of the EEA Agreement by classifying cheese with added plant oil under the Customs Tariff subheading 0406.2000, grated or powdered cheese, of all kinds, and not Customs Tariff subheading 2106.90.

### **i) The opinions of the HS Committee are not binding under national law.**

Iceland is a member of the World Customs Organization („WCO“) and a Contracting Party of the International Convention on the Harmonized Commodity Description and Coding System („HS Convention“ on „HS System“). As a Contracting party to the HS Convention, Iceland has undertaken to respect the fundamental rules of the HS system, i.e. to use the six-digit HS codes, to ensure that Icelandic tariff headings are consistent with that basis.

The WCO's HS Committee issues interpretations and opinions (classification opinions and decisions) regarding questions of tariff classification under the HS system. These interpretations are *not binding* under national law. They form part of the Explanatory Notes, which are used as guidance for interpretation. Every Contracting Party of the HS Convention has the right not to follow the interpretations of the HS Committee. The Contracting Parties then notify the WCO of their positions, which the WCO subsequently publishes on its website. The current list includes Iceland, in relation to the present case, as well as the European Union in relation to other cases.

Iceland's right not to follow the interpretations of the HS Committee is reiterated in Article 189 of the Customs Act No. 88/2005, cf. Article 74(2) of Regulation No. 1100/2006 on the customs treatment of products. It states that if the WCO approves amendments to the HS System or explanatory notes to the HS System, issues a ruling or issues an interpretation of the tariff classification or a new harmonized tariff nomenclature that results in a changed classification of products in the tariff, the Minister is *authorized* to make the necessary amendments to the Customs Tariff.

### **ii) No opinion from the HS Committee was available when Customs issued Binding Opinion No. 17/2020**

In February 2020, when the Customs issued Binding Opinion No. 17/2020, which stated that the product Festino IQF Mozzarella Pizza Mix should be classified in Chapter 4 of the Customs Tariff, no opinion from the HS Committee on the classification of the product under HS system was available. Both the District Court of Reykjavík, on 8 July 2021, and the Court of Appeal, on 11 February 2022, confirmed the Customs Binding Opinion No. 17/2020. In February 2022, the Supreme Court rejected the party's application for leave to appeal to the court.

The WCO's HS Committee decided in March 2023 that the product in question, should be classified under Chapter 21 of the Harmonized System, more specifically under subheading 2106.90.

On December 20, 2023 the Court of Retrial rightly rejected the party's request for a retrial, and referred to Article 189 of the Customs Act No. 88/2005, stating that the Article contained special provisions on the legal effects of various decisions of the WCO concerning tariff classification and the Customs Tariff on that occasion. In other words, the opinions of the HS Committee are not binding, they cannot override national law.

### **iii) EEA Agreement does not address the scope of the opinions of the HS Committee in relation to the Agreement**

The EEA Agreement does indeed contain references to the HS System, in Article 8(3) and in Protocol 3 to the EEA Agreement. However, the EEA Agreement, its Protocols or Annexes do not contain any provision setting out what is to be done if the tariff classification of products by a Contracting Party conflicts with a subsequent opinion of the WCO on tariff classification.

If it had been the intention that, by signing the EEA Agreement, the Contracting Parties were at the same time renouncing their important right not to follow the opinions of the WCO in the implementation of the Agreement, then a provision to that effect would have been included in the Agreement. No such provision exists. Instead, Article 2(2) of Protocol 3 stipulates that the customs duties set out in the Annexes to Table I shall be subject to annual calendar reviews.

This is reflected in the Authority's letter, which nowhere specifies the point in time from which Iceland is considered to have failed to fulfil its obligations under Article 10 of the EEA Agreement.

The Ministry wishes to point out that if Iceland were bound to follow the opinions of the WCO, then the other Contracting Parties to the EEA Agreement would likewise be so bound, including the European Union. As mentioned before, the WCO's current list of Contracting Parties, that have notified their inability to follow WCO opinions on the tariff classification of products, includes Iceland as well as the European Union.

**iv) Iceland intends to amend the Customs Tariff in accordance with the opinion of the HS Committee**

It is the general policy of the Icelandic authorities to follow the opinions of the WCO on the tariff classification of products. However, as the Icelandic courts have now delivered a final ruling on how the product in question is to be classified, it lies solely within the competence of the legislature, the Alþingi, to amend that classification.

Having regard to all the foregoing, the Minister of Finance and Economic Affairs has decided to prepare a bill to submit to the Alþingi to amend the Customs Tariff so that it will be consistent with the aforementioned opinion of the WCO. Should the bill be adopted by the Alþingi, the amended tariff classification may be expected to enter into force soon thereafter. The amendment shall not have retroactive effect.

The Ministry further emphasises that the bill will expressly provide that the quantity of fat other than milk fat must be of such scope as to have a real impact on the nature of the product. This reservation is intended to prevent the addition of a negligible proportion of for an example vegetable fat to a product merely for appearance's sake, solely for the purpose of avoiding duties.

On behalf of the minister

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