EUROPEAN
COMMISSION

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COMMISSION DECISION

of 20.1.2016

finding that post-clearance entry in the accounts of import duties is justified and that remission of those duties is justified with regard to a debtor and is in part justified in the particular case of another debtor but in another part not justified with regard to that particular debtor and modifying Commission Decision C(2010)2858 of 6 May 2010
(REC 07/07(REV))

(only the French and Dutch texts are authentic)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code[1], and in particular Articles 220 and 239 thereof,

Whereas:

(1) By letter of 14 December 2007, received by the Commission on 18 December 2007, Belgium asked the Commission to decide whether waiving post-clearance entry of import duties was justified under Article 220(2)(b) of Regulation (EEC) No 2913/92 and, in the alternative, whether the remission of those duties was justified under Article 239 of the same Regulation, in a particular case.

(2) Between 22 June 1998 and 8 November 1999 the applicant ("the Belgian company"), through its customs agent, lodged with the Antwerp Customs Office (Belgium) 116 import declarations for bananas from Ecuador for the release for free circulation.

(3) The import declarations were supported by 221 import licences, apparently issued by the Kingdom of Spain, which allowed bananas originating in non-ACP third countries to be imported into the European Community as part of a tariff quota with payment of a reduced customs duty of EUR 75 per tonne, under Council Regulation (EEC) No 404/93[2], as amended by Council Regulation (EC) No 3290/94[3], and Commission Regulation (EC) No 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Regulation No 404/93 regarding imports of bananas into the Community (OJ 1998 L 293, p. 32), for the period beginning 1 January 1999[4].

(4) At the time of release for free circulation of fresh bananas originating in Ecuador, the applicant presented import licences which had apparently been issued by the Spanish authorities. The licences allowed bananas to be imported into the European Community, under part of a tariff quota with payment of a reduced customs duty of EUR 75 per tonne.

1 OJ L 302, 19.10.1992, p. 1
2 OJ L 47, 25.02.1993, p. 1.
3 OJ L 349, 31.12.1994, p. 105.
4 OJ L 293, 31.10.1998, p.32.

(5) The Belgian customs authorities accepted the declarations and granted favourable tariff treatment.

(6) On the basis of Article 13 of Commission Regulation (EEC) 1442/93 of 10 June 1993[5], laying down procedures for applying the system for importing bananas into the Community, for imports carried out before 1 January 1999 and on the basis of Article 21 of Commission Regulation (EEC) n° 2362/98 of 28 October 1998 laying down rules for the application of Council Regulation (EEC) n° 404/93 for importing bananas into the Community for the imports carried out as from 1 January 1999, the rights arising from the import licences could be transferred for only one assignee. In accordance with Article 21(2) second subparagraph of Regulation 2362/98, the transfer of rights from newcomers to traditional operators was not permitted. Prior to 1 January 1999, the tariff quota was distributed amongst three categories of operators (A, B and C); an operator A or B obtained certificates on the basis of the average quantities of bananas that it had marketed during the last three years. The applicant was a category A operator. Under Commission Regulation (EC) No 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Council Regulation (EEC) No 404/93 regarding imports of bananas into the Community, from 1 January 1999 the quota was shared between "traditional operators" and "newcomers". A traditional operator obtained licences on the basis of the quantities actually imported during the reference period, which was 1994-96 for imports to be carried out in 1999. The applicant was a “traditional operator”.

(7) The applicant obtained these certificates from two Spanish companies established in Spain, via a Portuguese tradesman established in Lisbon. For the imports carried out between 22 June 1998 and 31 December 1998, the applicant appeared as an assignee on the submitted certificates, the transferors being various Spanish companies belonging to category B.

(8) As regards the period from 1 January 1999 to 8 November 1999, 108 licences were involved, all presented by the applicant to the Antwerp Customs Office. The majority of the licences (95 licences) belonged to "newcomers" within the meaning of Article 7 of Regulation 2362/98 and a minority (13 licences) belonged to “traditional operators”.

(9) Since the imports carried out in 1998 in this case were comparable in fact and law to those which have been dealt with in decision REC 06/07, the Belgian authorities were authorised to decide themselves what to do about these imports. The Belgian authorities were informed of this interpretation in a letter from the Commission dated 13 April 2010, in which the part of this case that involved the 1998 imports was referred back to these authorities.

(10) Accordingly, the present decision concerns only the request for non-recovery and, in the alternative, the remission of the import duties relating to the imports carried out in 1999.

(11) For the imports under dispute carried out in from 1 January 1999 to 8 November 1999, the applicant did not appear on the certificates, because it only paid for their use but was not an assignee. The customs declarations were made by the applicant's customs agent and there was no evidence that the customs clearance was done on behalf of the

[5] OJ L 142, 12.6.1993, p.6.

holder of the certificates. The holder was only listed as consignee but not as a declarant.

(12) Investigations conducted by the Member States and coordinated by the Commission found that forged import licences had been presented for release for free circulation in several Member States, including Belgium. This also was the case for the certificates submitted by the applicant's customs agent at the time of the imports in question (1 January 1999 to 8 November 1999).

(13) By letter of 1 February 2000, OLAF informed the Belgian customs authorities that forged Spanish import licences, bearing forged stamps from the Spanish authority responsible for the issue of those documents, had been used to import bananas into the Community. In the course of an investigation the customs authorities discovered that the import licences, including the 108 licences corresponding to the period between 1 January 1999 and 8 November 1999, presented to Antwerp customs were forged Spanish licences.

(14) In the case under consideration, granting favourable tariff treatment was subject to the presentation of import licences. However, the Spanish authorities stated that they had not issued the licences. The licences were therefore forged.

(15) Insofar as the products imported into Belgium could not consequently benefit from the preferential tariff treatment, the relevant customs office initiated proceedings for the recovery of the import duties from the applicant and the customs agent, including of the EUR xxxxxxx corresponding to the period between 1 January 1999 and 8 November 1999, an amount for which the interested parties were asking not to be entered subsequently in the accounts and, alternatively, to be remitted.

(16) The interested parties (the customs agent and the applicant) challenged the recovery of post-clearance customs duties. Belgian customs were of the opinion that the request for waiver of post-clearance recovery and for remission of customs duties should be granted.

(17) By letter of 14 December 2007 received by the Commission on 18 December 2007, the Belgian customs and excise authority transmitted the file for decision to the Commission.

(18) By its Decision C(2010)2858 of 6 May 2010 ("Decision C(2010)2858"), the Commission authorised post-clearance entry in the accounts of import duties (Article 1(1) of the Decision) and remission of duties in the case of one person liable, the customs agent, for the amount of EUR xxxxxxx (Article 1(2) of the Decision), but not in the particular case of another person liable, namely the applicant, (Article 1(3) of the Decision) for the amount of EUR xxxxxxx.

(19) In its Decision C(2010)2858 (see paragraphs 4-6), the Commission considered that for imports carried out in 1998, the circumstances of fact and law were the same as those of a previous Commission Decision – Decision C(2010)2108 – concerning the use of forged licences in the imports of bananas from Ecuador and authorized the Belgian authorities to decide themselves whether to proceed with the remission of the duties or not for the imports of that period, since it took the view in its above mentioned previous Decision that post-clearance entry in the accounts of import duties and remission of those duties were justified.

(20) The Commission made its assessment on the basis of Article 220(2)(b) of the Community Customs Code and found that it could not be said that the Spanish authorities had committed an error since they have had no part in drawing up those

licences (paragraphs 20-26 of Decision C(2010)2858). The Commission referred to the suspected involvement of a Spanish official in the fraud, suspicion which was subsequently dismissed following correspondence between OLAF and the Spanish judicial authorities. (paragraph 28 of Decision C(2010)2858)

(21) Finally, the Commission dismissed the applicant's arguments because, according to the Commission, the following were not capable of constituting an error on the part of the customs authorities: the circumstances that it was impossible for economic operators to check whether the holders of import licences were actually registered operators and whether the licences and the stamps they bore were authentic, that it would have been impossible for the national authorities to perform checks/to verify the facts, and that the Community authorities had failed to perform checks. (paragraphs 29-32 of Decision C(2010)2858).

(22) As the three conditions set out by Article 220(2)(b) of the Community Customs Code ("CCC") are cumulative, the Commission in its Decision C(2010)2858 was of the view that, in the absence of an error on the part of the competent authorities, there was no need to check whether the other two conditions of that provision were met[6] (paragraph 33 of Decision C(2010)2858)

(23) Thereafter, the Commission examined whether the conditions of Article 239 were fulfilled and concluded that the applicant's customs agent had not engaged in any deception or negligence and could on that basis benefit from the waiver of entry in the accounts or remission of import duties. In its Decision C(2010)2858, the Commission held also that the applicant had not acted diligently and concluded that in consequence it could not benefit from the waiver of recovery and also that it could not be granted the remission of import duties (paragraphs 52-67 of Decision C(2010)2858)

(24) The applicant, supported by the Kingdom of Belgium, brought an action lodged at the Registry of the General Court of the European Union ("the General Court") on 11 August 2010 claiming that the General Court should annul Article 1, paragraphs (1) and (3) of Decision C(2010)2858.

(25) By Judgment in case T-324/10 of 19 March 2013 the General Court annulled Article 1(3) of Commission Decision C(2010)2858 and dismissed the action as to the remainder.

(26) Following this partial annulment of its Decision C(2010)2858, the Commission must adopt a new decision in the light of the judgment of the Court in Case T-324/10.

(27) Following the adoption of the General Court's judgment in case T-324/10, the Commission asked on 16 September 2013 for additional information from the Belgian customs authorities on the amounts corresponding to newcomers' and to traditional operators' licences, respectively, used by the applicant in 1999.

(28) Given that the answer from the Belgian authorities dated 14 January 2014 did not contain the requested information, the Commission sent on 24 January 2014 a subsequent demand for the additional information previously requested to be provided.

(29) The applicant reacted by appealing to the General Court – Cases T-603/13 and T-171/14 – asking for the annulment of the Commission's letters of 16 September 13 and

[6] In paragraph 63 of its Judgment in Case T-324/10, the General Court confirmed that "the Commission was not obliged to consider the other conditions governing its application [application of Article 220 (2) (b) of the Community Customs Code], since the first of those conditions was not fulfilled in any event".

24 January 2014 informing the applicant of the continued suspension of the time-limit provided for by Article 907 of Commission Regulation(EEC) No 2454/93 (OJ 1993 L 253, p. 1) for the taking of a decision on the remission of import duties on bananas from Ecuador, in the context of the review of the file pursuant to the judgment of the General Court of 19 March 2013 in Case T-324/10 Van Parys v Commission (Ref REC 07/07). The Commission has pleaded for the inadmissibility of both applications. The General Court in its decisions of 24 June 2014 and of 26 November 2014 in the two above-mentioned cases dismissed both actions (T-603/13 and T-171/14) .

(30) The Commission has received the reply from the Belgian customs authorities on those amounts (corresponding to newcomers' and to traditional operators' licences, respectively, used by the applicant in 1999) on 18 February 2015.

(31) Pursuant to Article 266 of the Treaty on the Functioning of the EU, the Commission must adopt a new decision under Article 239 of the Customs Code. As stated in Article 266 TFEU and reiterated in paragraphs 32 and 35 of the Court's decision in case T-171/14, a new decision of the Commission on the remission of duties should be adopted by the Commission within a "reasonable time".

(32) According to the Court's decision in case T-171/14 (paragraph 34), the recognition of the partial illegality of Decision C(2010)2858 requires the Commission, as the author of the annulled decision, to eliminate that illegality in a new Decision within a reasonable time period, the only time-limit applicable in this case.

(33) A group of experts composed of representatives of all the Member States met to examine the case on 21 September 2015 within the framework of the Customs Code Committee, Debt and Guarantees Section.

(34) In accordance with Article 239 of the aforementioned Regulation (EEC) n° 2913/92, the repayment or the remission of the import duties is possible in situations other than those referred to in Articles 236, 237 and 238 of the said Regulation when two conditions are met:

* in the case of an exceptional situation;

* resulting from circumstances involving neither deception nor obvious negligence by the interested party.

(35) According to the case law of the Court of Justice of the European Union, this provision constitutes a general equity clause and the existence of an exceptional situation is established when the circumstances surrounding the case at stake show that the debtor is in an exceptional situation in relation to the other operators carrying out the same activity and that in the absence of these circumstances, the debtor would not have suffered an injury as a result of entering the customs duties subsequently in the accounts.

(36) In its Decision C(2010)2858 (paragraph 51), the Commission considered that the circumstances of the case exceeded the normal commercial risk which an operator had to bear and it stated that the condition of the existence of a special situation was satisfied. The General Court in its Judgment of 19 March 2013 did not examine the

existence of a special situation as this condition was fulfilled according to the Commission's Decision C(2010)2858[7].

(37) For that reason, in the present new Decision adopted following the Judgment of the General Court in Case T-324/10, the Commission only focuses on whether the second condition set out by Article 239 of the CCC with regard to the absence of deception or negligence was satisfied.

(38) According to the established case law of the Court of Justice of the European Union[8], there is a need to examine the condition governing the absence of deception or obvious negligence in taking account in particular of the complexity of the legislation, of the experience of the applicant and the care taken by the trader.

(39) The General Court considered in its judgment in Case T-324/10 that "it must be noted that, in its defence, the Commission considered that the arrangements used by the applicant to obtain use of the import licences were 'unlawful', as they are contrary to the second indent of Article 21(2) of Regulation No 2362/98, which does not allow any transfers of rights arising from an import licence from a newcomer operator to a traditional operator. On that point, it is clear that the contested decision, in that it refuses the remission of import duties, is not based on the unlawfulness of the arrangements for the purchase of the import licences, but on the obvious negligence on the part of the applicant. Therefore, the Commission's argument cannot, in the present case, have any bearing on the proper foundation for the refusal to remit the import duties"[9]. Thus, the Commission has also to examine in this new Decision whether the arrangements used by the applicant to obtain use of the import licences were lawful, taking into account that the second indent of Article 21(2) of Regulation No 2362/98 does not allow any transfers of rights arising from an import licence from a newcomer operator to a traditional operator. The Commission has also to reassess in this new Decision the grounds for establishing whether there was absence of deception or negligence.

(40) The applicant cannot take refuge behind the argument of complexity since the only legal basis to be considered at the time of the facts (from 1 January 1999 to 8 November 1999), as the applicant himself rightly recognised in Court proceedings, was Regulation 2362/1998.

(41) The following elements prove that Regulation 2362/98 was not complex:

1. The detailed and clear explanation on the purpose of the new rules at that time in Regulation 2362/98 of 28 October 1998 laying down rules for the application of Council Regulation (EEC) n° 404/93 for importing bananas into the Community for the imports carried out as from 1 January 1999 (replacing Regulation (EEC) 1442/93 of 10 June 1993) could be found in Recitals 13[10] and 14[11] of Regulation 2362/98. In

[7] Paragraph 77 of the Judgment in Case T-324/10.

[8] Case C-250/91 Hewlett Packard

[9] Paragraphs 90 and 91 of the Judgment. Emphasis added.

[10] "Whereas, except where derogations are explicitly provided for, Commission Regulation (EEC) No 3719/88 of 16 November 1988 laying down common detailed rules for the application of the system of import and export licences and advance-fixing certificates for agricultural products (3), as last amended by Regulation (EC) No 1044/98 **,** should apply; whereas, pursuant to Article 9 of that Regulation, rights resulting from licences may be transferred by the holder only once per licence or per extract from a licence during the term of validity thereof**.**

[11] "Whereas the conditions for and the effects of transferring licences should be specified in the light of the definition of operator categories established by this Regulation; whereas a transfer restricted to a single

Regulation 2362/98 there was a clear definition of "traditional operators" (Article 3) and "newcomers" (Article 7).

2. Article 5(3) of Regulation 2362/98 stated:

"Actual imports shall be attested by both of the following:

(a) by presenting copies of the import licences used either by the holder or, in the case of a transfer under Article 9 of Regulation (EEC) No 3719/88 duly endorsed by the competent authorities, by the transferee, in order to release the relevant quantities for free circulation; and

(b) by presenting proof of payment of the customs duties due on the day on which customs import formalities were completed. The payment shall be made either direct to the competent authorities or via a customs agent or representative.

Operators furnishing proof of payment of customs duties, either direct to the competent authorities or via a customs agent or representative, for the release into free circulation of a given quantity of bananas without being the holder or transferee holder of the relevant import licence used for this purpose - or, where appropriate, of the proper customs documents and import permits in accordance with paragraph 4 - shall be deemed to have actually imported the said quantity provided that they have registered in a Member State under Regulation (EEC) No 1442/93 and/or that they fulfil the requirements of this Regulation for registration as a traditional operator. Customs agents or representatives may not call for the application of this subparagraph".

In accordance with Article 5(3) of Regulation 2362/98, an operator who proves that he paid the duties without being the holder or transferee of the import certificate used for that transaction shall be deemed to have actually imported the said quantity.

3. Article 21(2), second paragraph of the said Regulation was, as it can be seen, clear in stating that: "The transfer of rights from newcomers to traditional operators shall not be permitted".. This provision also fixed clear rules for the calculation of the quantities transferred in the event of transfer of rights. Despite the clarity of this provision, the applicant a "traditional operator" deliberately used certificates whose holder was a "newcomer".

(42) Those rules were simple to understand and to implement. A simple reading of the rules and of the certificates would have been enough to inform the applicant of what he had to do in order to apply correctly the above mentioned provisions of Regulation 2362/98.

(43) It follows that the argument of the applicant concerning the alleged complexity of the above mentioned provisions is unfounded.

(44) Regarding the condition relating to the professional experience of the applicant, the Court of Justice has ruled that, according to the case law, there is a need to check if it involves a professional business operator, whose activity primarily consists of import and export operations, and if the operator has already some commercial experience

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transferee per licence or certificate or extract therefrom will allow trade relations to develop between the various registered operators; whereas, however, artificial trade, speculation or disturbance of normal trade should not be encouraged by permitting transfers from 'newcomers' in favour of 'traditional operators'.

with the goods in question, i.e. if the operator had carried out such operations in the past for which duties to be collected had been duly calculated[12].

(45) According to the Belgian authorities (letter to the Commission of 14 December 2007), the applicant company is a major traditional operator established in Belgium, experienced in trading and importing bananas, which had been importing bananas into the European Community from Ecuador for more than 25 years.

(46) The applicant is very experienced in the operations in question. It follows that the applicant's experience level has to be taken into account for the purposes of assessing its negligence.

(47) The repayment or remission of import duties constitutes an exception to the normal import and export procedure, and, consequently, the provisions which provide for such repayment or such remission are to be interpreted strictly. In particular, since a lack of obvious negligence is an essential condition of being able to claim repayment or remission of import duties, it follows that that term must be interpreted in such a way that the number of cases of repayment or remission remains limited[13].

(48) As regards the operator's diligence, the person liable for payment may plead good faith if he can demonstrate that, during the period in which the transactions concerned took place, it took due care to ensure that all the conditions for favourable treatment were fulfilled.

(49) There is nothing in the file to sufficiently prove a lack of diligence with regard to the "traditional operator" licences acquired by the applicant.

(50) Nevertheless, as the newcomers' licences are concerned, a simple examination of the licences should have allowed the applicant to conclude that he could not use the rights based on those licences because that use would be contrary to Article 21(2) second subparagraph of Regulation 2362/98, as this provision does not permit the transfer of rights from newcomers to traditional operators. Additionally, this situation is similar to the one covered by case REC 08/07, in which the Commission adopted a negative decision for the applicant (Commission Decision C(2010)2109), decision which has not been contested.

(51) Even if it could be argued that it was practically impossible to see that the documents were forged, a simple examination of the licences should have allowed the applicant to avoid an infringement of Article 21(2) second subparagraph of Regulation 2362/98.

(52) The applicant could have immediately seen just by reading the entries on the certificates that the certificates were issued to a "newcomer".

(53) It was simple for the applicant to see that he was in danger of committing an irregularity, as the certificates contained, in box 20, the information "newly arrived": "nuevo operador/ solicitud certificado - recién llegado - reglamento (CE) N° 2362/98". If the applicant had checked the entry in box 20 of the certificate he would have realised easily that the transfer of such a certificate to him who is a traditional operator would be clearly unlawful.

[12] Case C-250/91, Hewlett Packard, para 26; Case C-48/98 Sohl & Söhlke, paragraph 57, and Case C-443/05P Common Market Fertilizers v Commission, paragraph 188.

[13] Case C-48/98 Söhl & Söhlke and Case C-156/00 Netherlands v Commission, paragraph 92.

(54) In this regard, the EU Court of Justice has stated that it is not unreasonable to expect an experienced economic operator to keep abreast of the Community law applicable to its transactions by reading the relevant Official Journals[14].

(55) If the applicant had been a diligent operator, he would have immediately noticed the incompatibility between the entry in box 20 on each licence and the above-mentioned incompatibility with Article 21(2) second subparagraph of Regulation 2362/98. Given the importance of the amounts on each licence, it is reasonable to expect experienced operators to check at least the information entered on the licences and check whether his behaviour is in conformity with the legislation. That was not the case of the applicant.

(56) Moreover, in keeping with the settled case-law of the Court, if the trader concerned has doubts as to the correctness of the rules applicable, he must make inquiries and seek the greatest clarification possible in order to ascertain whether or not his doubts are well founded[15].

(57) In the present case, the applicant could have no doubt that the rights arising from an import licence could not be transferred from a "newcomer" to a "traditional operator". In any event, if that were the case, it was for the applicant to seek the greatest clarification possible. It is clear that, by not making at least such inquiries, the applicant did not demonstrate the required diligence.

(58) For the above reasons, it follows, on the one hand, that, by using rights from newcomers, the applicant who is a traditional operator has not respected the prohibition stipulated in Article 21(2) second subparagraph of Regulation 2362/98, because this provision does not permit the transfer of rights from newcomers to traditional operators; and, on the other hand, that the applicant did not demonstrate the diligence that might normally be expected from an experienced operator, as it can be established that the applicant did not act in the framework of standard trading practices and did not demonstrate all the diligence that can be expected from an experienced operator.

(59) In view of the above, in the absence of proof of lack of negligence, the conditions for remission of the import duties in the sum of EUR xxxxxx, corresponding to traditional licences covering the period between 1 January 1999 and 8 November 1999, requested by Belgium on 14 December 2007, for traditional operators' licences used by the applicant on the basis of Article 239 of Regulation (EEC) n° 2913/92 are met.

(60) The applicant, who is a "traditional operator", by using rights from "newcomers" has not respected the prohibition stipulated in Article 21(2) second subparagraph of Regulation 2362/98 and, on the basis of Article 239 of Regulation (EEC) n° 2913/92, there is no justification for the remission of the duties in the sum of EUR xxxxxxx related to newcomers' licences used by the applicant and covering the period between 1 January 1999 and 8 November 1999, requested by Belgium on 14 December 2007.

(61) There is no justification for the remission of the duties in value of EUR xxxxxxx corresponding to newcomers' licences (95 licences), calculated taking into account the

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[14] Case C-161/88 Binder.

[15] Case C-64/89 Deutsche Fernsprecher, paragraph 22; and Case C-250/91 Hewlett Packard France paragraph 24.

additional information provided by the Belgian authorities by their letter dated 18 February 2015.

(62) Article 1, paragraphs (1) and (2) of Decision C(2010)2858 of 6 May 2010 have to remain unaltered as they were neither challenged nor annulled by the General Court's judgment in case T-324/10.

HAS ADOPTED THIS DECISION:

Article 1

Article 1 of Decision C(2010)2858 of 6 May 2010 is hereby replaced by the following:

1. The import duties in the sum of EUR xxxxxxx which were the subject of Belgium's request of 14 December 2007 shall be entered in the accounts.

2. Remission of the import duties in the sum of EUR xxxxxxx, requested by Belgium on 14 December 2007, is justified with regard to the customs agent.

3. Remission of the import duties in the sum of EUR xxxxxx, corresponding to traditional licences, requested by Belgium on 14 December 2007, is justified with regard to the Belgian company.

4. Remission of the import duties in the sum of EUR xxxxxxx, corresponding to newcomers' licences, requested by Belgium on 14 December 2007, is not justified with regard to the Belgian company.

Article 2

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 20.1.2016

For the Commission
Pierre MOSCOVICI
Member of the Commission