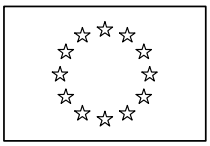

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 12-2-2009
COM(2009)747 final

COMMISSION DECISION

Of 12-2-2009

finding that the post-clearance entry in the accounts of a certain amount of import duty is not justified and finding that the post-clearance entry in the accounts of another amount of import duty is justified and that the remission of those duties is not justified in a particular case

(only the Dutch text is authentic)

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(only the Dutch text is authentic)

(Request submitted by the Netherlands)

(REC 01/08)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code[1],

Having regard to Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code[2],

Whereas:

(1) By letter dated 2 April 2008, received by the Commission on 15 April 2008, the Dutch authorities asked the Commission to decide whether, under Article 220(2)(b) of Regulation (EEC) No 2913/92, waiving post-clearance entry in the accounts of import duties or, in the alternative, remission of those duties, was justified in the following circumstances.

(2) Between 23 July 2002 and 2 November 2004, acting on behalf of the importer, a Dutch customs agent, hereinafter referred to as "the firm", carried out the formalities for release for free circulation of integrated electronic compact fluorescent lamps (CFL-i) of tariff heading 8539 31 90 91 from Pakistan.

(3) At the time in question, imports into the Community of this type of product originating in Pakistan qualified for preferential treatment under the system of generalised

[1] OJ L 302, 19.10.1992, p. 1.
[2] OJ L 253, 11.10.1993, p. 1.

preferences. In accordance with Article 80 of the version of Regulation (EEC) No 2454/93 in force at the time, products covered by a Form A origin certificate issued by the competent authorities in Pakistan were eligible for preferential tariff treatment on their release for free circulation.

(4) In the case in point, the customs agent presented a Form A origin certificate in support of each customs declaration for release for free circulation. The Dutch customs authorities accepted the declarations and granted preferential tariff treatment.

(5) Following a complaint lodged on 4 April 2000 by the European Lighting Companies Federation on behalf of Community producers representing a major proportion of Community production of CFL-i, the Commission announced, by a notice published in the Official Journal of the European Communities[3], the initiation of an anti-dumping proceeding with regard to imports into the Community of CFL-i originating in China.

(6) Commission Regulation (EC) No 255/2001 of 7 February 2001 imposed a provisional anti-dumping duty on imports into the Community of CFL-i originating in China[4]. The anti-dumping duty was made definitive by Council Regulation (EC) No 1470/2001 of 16 July 2001 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of CFL-i originating in China[5].

(7) On 16 August 2004 the Commission received a request to open an investigation into the possible circumvention of anti-dumping measures imposed on imports of CFL-i originating in China. The request contained sufficient prima facie evidence that the anti-dumping measures on the product concerned originating in China were being circumvented by means of transhipment via Vietnam, Pakistan or the Philippines and/or by assembly in Vietnam, Pakistan or the Philippines of the product under investigation.

(8) Therefore Commission Regulation (EC) No 1582/2004 of 8 September 2004 initiated an investigation concerning the possible circumvention of anti-dumping measures imposed by Council Regulation (EC) No 1470/2001 on imports of CFL-i originating in China by imports of CFL-i consigned from Vietnam, Pakistan or the Philippines, whether declared as originating in Vietnam, Pakistan or the Philippines or not[6], and made such imports subject to registration.

(9) Council Regulation (EC) No 866/2005 of 6 June 2005 extended the definitive anti-dumping measures imposed by Regulation (EC) No 1470/2001 on imports of CFL-i originating in China to imports of the same product dispatched from Vietnam, Pakistan and the Philippines[7]. The duties extended under Regulation (EC) No 886/2005 were also charged retroactively from 11 September 2004 on imports registered in accordance with Regulation EC No 1582/2004.

(10) At the same time, an administrative cooperation mission comprising representatives of the European Anti-Fraud Office (OLAF) and some Member States travelled to

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3 OJ C 138, 17.5.2000, p. 8.
4 OJ L 38, 8.2.2001, p. 8.
5 OJ L 195, 19.7.2001, p. 8.
6 OJ L 289, 10.9.2004, p. 54.
7 OJ L 145, 9.6.2005, p. 1.

Pakistan from 18 to 27 April 2005 to investigate exports to the Community of CFL-i declared as originating in Pakistan. The conclusion of this investigation was that the CFL-i declared as originating in Pakistan were actually of Chinese origin, meaning that they were not eligible for preferential treatment under the generalised system of preferences (GSP) when imported into the Community and were subject to anti-dumping duties under Regulation (EC) No 1470/2001.

(11) Accordingly, the Dutch customs authorities initiated proceedings against the firm to recover a total of EUR XXXX (EUR XXXX in customs duties and EUR XXXX in anti-dumping duties), concerning which the firm has requested waiver of post-clearance entry in the accounts or, in the alternative, remission.

(12) In support of the request made by the Dutch authorities, the firm stated, in accordance with Articles 871(3) and 905(3) of Regulation (EEC) No 2454/93, that it had seen the dossier that the Dutch authorities proposed to submit to the Commission and had made comments which were attached to the request.

(13) By letter dated 23 October 2008, received by the firm on 24 October 2008, the Commission notified the firm of its intention to withhold approval and explained the reasons for this.

(14) By letter dated 20 November 2008, received at the Commission on the same date, the firm made known its views on the Commission's objections.

(15) In accordance with Articles 873 and 907 of Regulation (EEC) No 2454/93, the time limit of nine months for the Commission to take a decision was therefore extended for one month.

(16) In accordance with Articles 873 and 907 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met on 5 December 2008 within the framework of the Customs Code Committee (Repayment Section) to consider the case.

(17) The request sent to the Commission by the Dutch authorities and the letter from the firm dated 2 April 2008 suggested that waiving entry in the accounts and remission were justified for the following reasons:

(18) Waiving entry of the customs duties in the accounts would be justified because the Pakistani authorities had committed an error that was not detectable by an operator acting in good faith by issuing Form A origin certificates for goods that did not fulfil the conditions laid down for the GSP.

(19) Remission of the anti-dumping duties would be justified because the preferential rules would be harder to comply with than the non-preferential rules of origin applicable in the case of anti-dumping duties. The firm therefore had a legitimate expectation that the goods were indeed of Pakistani origin for the purposes of both preferential and non-preferential origin. The assurances received by the firm (in the form of a written undertaking by the exporter) that the goods originated in Pakistan bore out this legitimate expectation.

(20) Furthermore, the Commission committed an error by not informing the importers that there were doubts about the validity of the Form A origin certificates issued by the Pakistani authorities.

(21) Lastly, the firm acted in good faith throughout and no obvious negligence could be attributed to it.

(22) Firstly, the argument raised by the firm in its letter of 26 September 2007 to the effect that some of the duty was not legally owed and should be repaid under Article 236 of Regulation (EEC) No 2913/92 calls into question the existence of the customs debt. Disputing the debt in this way falls outside the scope of the procedure for waiving post-clearance recovery of duties under Article 220(2)(b) and the procedure for remission or repayment under Article 239 of Regulation (EEC) No 2913/92. It is for the Member States, not the Commission, to determine whether a debt has been incurred and, if so, the amount of the debt. Furthermore, the Court of Justice has consistently ruled that the purpose of Commission decisions under the procedures for waiving post-clearance entry in the accounts or remission/repayment on an equitable basis is not to determine whether a customs debt has been incurred or the size of the debt[8]. An operator who does not recognise the existence of a customs debt must challenge the decision establishing that debt before the national courts in accordance with Article 243 of Regulation (EEC) No 2913/92.

I. Examination of the request under Article 220(2)(b) of Regulation (EEC) No 2913/92

(23) Under Article 220(2)(b) of Regulation (EEC) No 2913/92, there can be no post-clearance entry in the accounts where the amount of duty legally owed failed to be entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.

A - Condition concerning an error on the part of the customs authorities

(24) The firm's arguments concerning an error on the part of the Pakistani authorities and those concerning an error on the part of the Commission should be examined consecutively.

1. Error on the part of the Pakistani authorities

(25) The request concerning the customs debt resulting from the goods' ineligibility for preferential tariff treatment (normal customs duties) and that concerning the debt resulting from it being found that the goods were of non-preferential Chinese origin (anti-dumping duties) should be examined separately.

(a) Normal customs duties

[8] See judgments in Sportgoods (C-413/96; 24.9.1998), Kia Motors (T-195/97; 16.7.1998) and Hyper Srl (T-205/99; 11.7.2002).

(26) In the case under consideration, the granting of preferential tariff treatment was subject to the presentation of Form A origin certificates. The provisions applicable to products not wholly obtained in a country entitled to preferences are Articles 67(1) and 69 of Regulation (EEC) No 2454/93 and Annex 15 thereto.

(27) To be eligible for preferential origin, products of heading 8539, which covers CFL-i, must satisfy one of the following two conditions (Annex 15 to Regulation (EEC) No 2454/93):

> "Manufacture:
>
> - from materials of any heading, except that of the product, and
>
> - in which the value of all the materials used does not exceed 40% of the ex-works price of the product."
>
> or
>
> "Manufacture in which the value of all the materials used does not exceed 30% of the ex-works price of the product.".

(28) The goods exported by the supplier of the firm's client met neither of these conditions; furthermore, the report of the joint mission shows that the information presented by the exporter to the authorities responsible for issuing Form A origin certificates in Pakistan was inaccurate. However, even on the basis of this inaccurate information, the competent Pakistani authorities should have realised that the goods did not meet the conditions of eligibility for the GSP preferential arrangements. They therefore committed an active error when issuing the Form A origin certificates.

(29) According to Article 220(2)(b), the issuing of a certificate by the authorities of a third country, should it prove to be incorrect, constitutes an error which could not reasonably have been detected by the person liable acting in good faith. The first condition of Article 220(2)(b) is therefore fulfilled in respect of normal customs duties.

(b) Anti-dumping duties

(30) The firm argues that the Pakistani authorities also committed an error regarding the non-preferential origin of the goods; firstly, it claims, it was more difficult to comply with the preferential origin rules than with the non-preferential origin rules and, secondly, the Pakistani authorities, in issuing the Form A origin certificates, had accepted that the non-preferential origin rules had also been complied with.

(31) The Commission does not consider that the line of reasoning followed for the normal customs duties is relevant in respect of the anti-dumping duties for the following reasons:

(32) For anti-dumping duties the rules for non-preferential origin are applicable and, although the Pakistani authorities are competent to issue documents certifying compliance of goods with the preferential rules of origin under the GSP, they cannot play any part in determining the non-preferential origin of the goods for the purposes of the Community anti-dumping rules. The Pakistani authorities are therefore not "the

competent authorities" for purposes of the Community anti-dumping rules within the meaning given to this term by the European Court of Justice[9].

(33) Moreover, the preferential rules of the GSP and the rules of origin applicable under the commercial policy, including anti-dumping measures, are independent of each other and pursue completely different objectives. The former are aimed at fostering the economic development of certain countries, whereas the latter are aimed at countering certain unfair trading practices.

(34) The procedures and mechanisms applied to determine preferential origin and those used to determine non-preferential origin are independent of each other. When a declaration is submitted for the release for free circulation of goods subject to anti-dumping duties, no certificate of origin is required, and there is no administrative cooperation procedure for non-preferential origin such as that applicable under the GSP.

(35) Since the Pakistani authorities did not and could not play any part in determining non-preferential origin, they cannot be held to have committed an error in this respect.

(36) The Commission therefore considers that the Pakistani customs authorities did not commit an error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92 in respect of that part of the customs debt relating to the anti-dumping duties.

2. Error on the part of the Commission

(37) The firm considers that waiver of post-clearance entry in the accounts is also justified because the Commission committed an error in not informing Community importers of its doubts concerning the validity of certain Form A origin certificates issued by the Pakistani authorities for the products concerned.

(38) In this respect it should first be noted that Community law contains no provision expressly requiring the Commission to notify importers when it has doubts about the validity of customs transactions carried out by those importers under preferential arrangements[10].

(39) Furthermore, the courts have ruled that the Commission may be obliged, by virtue of its duty of diligence, to issue a general warning to Community importers only when it has serious doubts as to the legality of a large number of exports effected under preferential arrangements[11]. At the time of the disputed imports, it had not been established that the CFL-i imported from Pakistan in fact originated in China. As stated in the OLAF report on the mission to Pakistan in April 2005, information submitted by the Belgian customs authorities indicated that it was "not very likely" that the lamps exported by the customs agent's supplier met the conditions for being accepted as originating in Pakistan. However, these suspicions had to be addressed through more thorough investigations which were carried out following the

9 See the Mecanarte judgment in Case C-348/89 of 27.6.1991, paragraph 22.
10 See Hyper Srl judgment of 11.7.2002 (Case T-205/99).
11 See, in particular, judgment of 6.2.2007 in Case T-23/03.

publication of Regulation (EC) No 1582/2004 and during the joint mission of April 2005.

(40) Consequently no error can be imputed to the Commission for having failed to inform importers.

(41) It may be concluded from the above that the Pakistani authorities committed an error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92 in respect of preferential origin (normal customs duties) and no other error has been committed in the case under consideration.

B - Conditions regarding the good faith of the person concerned and compliance with the rules in force as regards the customs declaration

(42) According to the Dutch authorities, the firm acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.

(43) When assessing whether the firm had acted in good faith, the Commission took account of the nature of the error, the professional experience of the firm and the diligence it had shown.

(44) As to the nature of the error, the Court of Justice has ruled that it should be assessed among other things in the light of the complexity of the legislation concerned and the length of time over which the authorities persisted in their error.

(45) In the case in point, the Pakistani authorities issued Form A origin certificates for goods that did not qualify for such certificates throughout the period covered by the joint mission, namely 2001-2004.

(46) It is also true that no notice informing Community importers of the risks they ran by importing CFL-i from Pakistan had been published at the time.

(47) The firm in question is a customs agent and thus a professional economic operator whose business is essentially made up of import and export transactions. Furthermore, it had already submitted customs declarations for comparable products before the disputed operations, including declarations for the importer concerned in this case. The firm must therefore be considered to be experienced.

(48) As regards the firm's diligence, the person liable may plead good faith when he can demonstrate that, during the period covered by the trading operations concerned, he took due care to ensure that all the conditions for preferential treatment were fulfilled.

(49) To show its good faith, the firm produced a letter dated 4 October 2001 sent by its supplier to its client. This supposedly showed that the importer had taken steps to ensure compliance with all the rules of origin. But this letter merely showed that henceforth the supplier was going to produce the lamps in question at a new company set up in Pakistan, that it was aware of recent changes in Community legislation and that it would supply Form A certificates.

(50) Moreover, it is noteworthy that the firm's supplier (the parent company in China) was cited by name in the list of Chinese exporting producers in Regulation (EC) No 255/2001 and was subject to the provisional anti-dumping duty provided for in that

Regulation, and that the letter in question dated from 4 October 2001, that is, shortly after the publication of Regulation (EC) No 1470/2001 imposing a definitive anti-dumping duty.

(51) Commission Regulation (EC) No 1582/2004 cited above initiated an investigation concerning the possible circumvention of anti-dumping measures imposed by Council Regulation (EC) No 1470/2001 on imports of CFL-i originating in China by means of imports of CFL-i dispatched from Vietnam, Pakistan or the Philippines, whether or not declared as originating in Vietnam, Pakistan or the Philippines, and made such imports subject to registration. From 10 September 2004 the firm was therefore aware of the doubts which existed about the origin of the CFL-i declared as originating in China.

(52) Furthermore, the code "W" entered in box 8 of the Form A origin certificates gave a clear indication that the imported CFL-i had been manufactured from components which did not originate in Pakistan.

(53) In view of the above, the Commission considers that the firm cannot be deemed to have been diligent in respect of the declarations made after 10 September 2004 (declarations of 27 September 2004 and 2 November 2004).

(54) The following points should be made regarding compliance with the rules in force on the customs declaration.

(55) It transpires from the request that the goods were declared under the correct tariff heading (8539 31 90 91) in only three of the ten contentious declarations. In the other seven declarations the goods were declared either under heading 8539 31 90 99 (twice) or under heading 8513 10 00 (five times). Here it should be pointed out that, although the Form A origin certificates had code 8539 in box 8, the firm declared the goods under HS heading 8513 on five occasions despite there being no grounds to justify such a classification. Even if the incorrect classification of the goods resulted from a simple error on the part of the firm (see its letter of 20 November 2008), the errors it committed in classifying the goods make it impossible to conclude that it complied with all the provisions of the legislation in force in the case of the seven incorrect declarations.

(56) In these circumstances, the firm cannot be deemed to have acted in good faith and observed all the provisions laid down by the rules in force for customs declarations in the case of the declarations with an incorrect tariff classification nor in the case of declarations lodged after 10 September 2004; one declaration falls into both categories.

(57) In the light of these considerations, entry in the accounts of the customs debt in respect of EUR XXXX in normal customs duties arising from the declarations of 26 August 2002 and 10 August 2004 is not justified because it has been established that the firm acted in good faith and complied with all the provisions of the legislation in force as regards the customs declaration. Entry in the accounts is justified, however, for an amount of EUR XXXX arising from the eight other declarations. Since it has not been possible to establish any error in relation to the customs debt in respect of the anti-dumping duties, post-clearance entry in the accounts of EUR XXXX is justified. The question as to whether the firm was placed in a special situation within the

meaning of Article 239 of Regulation (EEC) No 2913/92 as regards the part of the customs debt in respect of anti-dumping duties should therefore be examined.

II - Examination of the request under Article 239 of Regulation (EEC) No 2913/92

(58) Under Article 239 of Regulation (EEC) No 2913/92, import duties may be repaid in situations other than those referred to in Articles 236, 237 and 238 resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

A. Existence of a special situation

(59) The Court of Justice has ruled that this provision represents a general principle of equity designed to cover an exceptional situation in which an operator, which would not otherwise have incurred the costs associated with post-clearance entry in the accounts of customs duties, might find itself compared with other operators carrying out the same activity[12].

(60) It is necessary to check whether the firm's situation should be considered exceptional in comparison with the other operators engaged in the same business. Given the conclusions in point I, this check concerns only the part of the customs debt made up of the anti-dumping duties.

(61) In their letter of 8 April 2008 to the Commission, the Dutch authorities stated that the rules on non-preferential origin were generally no stricter than the rules on preferential origin, from which they concluded that an economic operator could deduce from the fact that the authorities responsible for the issue of certificates of preferential origin had issued such certificates that the goods also complied with the rules of non-preferential origin. They also suggested that the Commission itself endorsed this reasoning in its decision C(2003)4891 final of 19 December 2003 (case REC 04/03) concerning the importation of car radios declared to be of Indonesian origin. In that case, according to them, the Commission accepted that the incorrect issue of a Form A origin certificate by the Indonesian authorities constituted a special situation within the meaning of Article 239 of the Code and that the firm could therefore legitimately consider that the goods concerned complied not only with the preferential rules of origin, but also with the rules of non-preferential origin.

(62) The error committed by the Pakistani authorities when issuing the Form A origin certificates meant, at the time of import, not only that preferential tariff treatment was mistakenly applied but also, no less mistakenly, that anti-dumping duties were not applied.

(63) However, the circumstances of this case should not be seen as constituting a special situation.

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[12] Kaufring judgment of 10 May 2001 (Cases T-186/97, T-190/97 to T-192/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99), ECR, II – 01337.

(64) First, the arguments cited in points 30 to 36 above could equally be invoked as grounds for considering that the circumstances of this case do not constitute a special situation.

(65) Second, the following should be noted concerning a comparison of the preferential and non-preferential rules of origin.

(66) In order to foster regional economic integration, the rules determining origin under the GSP have gradually been relaxed. In particular, this is the purpose of the rules on regional cumulation in Articles 72 to 72b of Regulation (EEC) No 2454/93. Article 72(3) stipulates that regional cumulation applies to three regional groups: Pakistan belongs in group III, along with Bangladesh, Bhutan, India, the Maldives and Sri Lanka.

(67) Thanks to the regional cumulation rules, materials originating in one country of the regional group are considered as originating in the beneficiary country when determining the originating status of the final product. These rules therefore make it possible for imported materials originating in other partner countries (countries belonging to the same group) to be used in one country without their being subject to the obligation of sufficient processing. These rules mean that the provisions determining preferential origin cannot be considered more demanding than those determining non-preferential origin.

(68) Contrary to what the firm writes in its letter of 20 November 2008, when the Commission set out the rules on cumulation of origin in its letter of 23 October 2008 it certainly did not intend to claim that there was any question of cumulation of origin between Pakistan and China; it did want to show that, in view of the regional cumulation applicable to group III countries, the GSP preferential rules of origin could not be considered stricter than the non-preferential rules of origin.

(69) Third, the following points can be made regarding the reference to case REC 04/03.

(70) The circumstances of the case under examination and those of case REC 04/03 are not in fact comparable. In case REC 04/03 the Indonesian authorities had manipulated the facts about the materials used in the manufacture of the car radios exported to the Community so that the preferential origin rules could be deemed to have been complied with. This action by the Indonesian authorities is described in recital 22 to the Commission Decision in case REC 04/03: "*It should be noted that the Indonesian authorities issued certificates despite the fact that the dossiers did not contain the necessary documents to prove Indonesian origin, that the certificates were sent back to the exporters for them to alter the percentage of imported goods that had been incorporated into the car radios so as to increase the percentage of Indonesian goods incorporated, and that the authorities did not ask for cost estimates until September 1992*."

(71) The Pakistani authorities cannot be accused of any comparable manipulation. The Commission therefore considers that neither the fact that the Pakistani authorities wrongly issued Form A origin certificates for the application of the GSP nor the fact that the Commission did not inform importers of its doubts about the Pakistani origin of the imported goods could have placed the firm in an exceptional situation compared with other operators engaged in the same business.

(72) The following observations should also be made about the declarations submitted by the firm on 27 September and 2 November 2004.

(73) Regulation (EC) No 1582/2004 was published in the Official Journal on 10 September 2004. Article 1 of that Regulation provided that an investigation was to be initiated to determine whether imports into the Community of the lamps concerned, "consigned from Vietnam, Pakistan or the Philippines, whether declared as originating in Vietnam, Pakistan or the Philippines or not, were circumventing the measures imposed by Regulation (EC) No 1470/2001." Lastly, Regulation (EC) No 866/2005 extended the definitive anti-dumping measures imposed by Regulation (EC) No 1470/2001 on imports of CFL-i originating in China to imports of the same product consigned from Vietnam, Pakistan and the Philippines. As a result, imports of CFL-i declared as originating in Pakistan became liable from 10 September 2004 to anti-dumping duties. The firm was even less likely to be considered as being in a special situation in the case of declarations made after this date.

(74) The first condition referred to in Article 239 of Regulation (EEC) No 2913/92 is therefore not fulfilled.

B. Absence of deception or obvious negligence

(75) There being no special situation, there is no need to examine whether the second condition laid down in Article 239 of Regulation (EEC) No 2913/92 is met.

(76) The remission of import duties requested is therefore not justified,

HAS ADOPTED THIS DECISION:

Article 1

1. The import duties in the sum of EUR XXXX (EUR XXXX in normal customs duties and EUR XXXX in anti-dumping duties), which are the subject of the Netherlands' request of 2 April 2008 shall be entered in the accounts.

2. The import duties of EUR XXXX, which are the subject of the request by the Netherlands of 2 April 2008, shall not be entered in the accounts.

3. Remission of the import duties in the sum of EUR XXXX, requested by the Netherlands on 2 April 2008, is not justified.

Article [2]

This Decision is addressed to the Netherlands.

Done at Brussels, 12-2-2009

For the Commission
László KOVÁCS
Member of the Commission