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Proposal for a

COUNCIL DECISION

**amending Decision No 940/2014/EU as regards products eligible for exemption from or a
reduction in dock dues**

EXPLANATORY MEMORANDUM

The Treaty on the Functioning of the European Union (TFEU) applies to the outermost regions of the Union. The French outermost regions, however, are excluded from the territorial scope of the VAT and excise duty directives.

The TFEU, in particular Article 110, does not in principle authorise any difference in the French outermost regions between the taxation of local products and the taxation of products from metropolitan France, the other Member States or non-member countries. However, Article 349 TFEU envisages the possibility of introducing specific measures for those regions because of the existence of permanent handicaps affecting the economic and social situation of the outermost regions. Such measures concern various policies, including taxation.

The dock dues tax is an indirect tax in force only in the French outermost regions of Martinique, Guadeloupe, French Guiana, Réunion and Mayotte. This tax applies to imports of products, irrespective of their origin, and to supplies of goods for consideration by persons engaged in production activities. In principle, it applies in the same way to locally produced products and to imported products.

However, Council Decision No 940/2014/EU of 17 December 2014 authorises France to apply, until 31 December 2020, exemptions or reductions to dock dues in respect of certain locally produced products. The Annex to the Decision contains the list of products to which the tax exemptions or reductions may be applied. The difference between the taxation of locally produced products and that of other products may not exceed 10, 20 or 30 percentage points, depending on the product. Part A of the Annex lists the products for which the difference in taxation may not exceed 10 percentage points, Part B those for which it may not exceed 20 percentage points and Part C those for which it may not exceed 30 percentage points.

The Council Decision of 17 December 2014 sets out the reasons underlying the adoption of the specific measures: remoteness, raw-material and energy dependence, the obligation to build up larger stocks, the small size of the local market combined with a low level of export activity, etc. The combination of these handicaps increases production costs and therefore the cost price of locally produced products, so that without specific measures they would be less competitive than those produced elsewhere, even taking into account the cost of transporting such products to the French outermost regions. This would make it harder to maintain local production. The specific measures contained in the Council Decision of 17 December 2014 were thus designed to strengthen local industry.

Article 3 of the Council Decision of 17 December 2014 states that the French authorities must submit to the Commission, by 31 December 2017, a report on the application of the tax arrangements authorised by the Decision in order to check the impact of the measures taken and their contribution to the promotion or maintenance of local economic activities in the light of the handicaps affecting the outermost regions. On the basis of that report, the Commission must present a report to the Council giving a full economic and social analysis and, where appropriate, a proposal for adapting the provisions of Decision No 940/2014/EU.

On 12 February 2018 the French authorities accordingly submitted their report to the Commission. Specific evaluation reports for each of the French outermost regions accompanied by requests to adapt the list of products eligible for differentiated taxation were sent on 15 March 2018 for French Guiana, Martinique and Guadeloupe, on 4 June 2018 for Réunion and, without requesting an update of the list, on 28 August 2018 for Mayotte. An additional request for the inclusion of a new product was made on 26 October 2018.

Requests to update the lists sent by the French authorities mainly involve requests for the inclusion of new products on lists (50), but also requests for the reclassification of products on a list allowing for a greater tax differential (28) and for the relevant product category to be expanded (7), plus a few requests for codes to be updated (9 products in French Guiana). These requests are designed to make businesses competitive again by compensating for part of the extra production costs entailed by local production.

The Commission report referred to in Article 3 of Decision No 940/2014/EU provides an economic and social analysis of the application of dock dues arrangements following the entry into force of the Decision and proposes acceding to the French authorities' request to update the lists.

This is because, in the case of some local production operations, declining or tumbling prices, price offensives, problems in the building industry, falling market shares and/or rising additional production costs threaten the survival of operations and of jobs.

In addition, the development of new production activities is constrained or jeopardised by additional production costs which undermine their ability to compete with low-cost products imported from metropolitan France or Asia.

These circumstances call for the introduction of or increase in tax differentials for the local production activities in question, which represent a vital issue for the regions concerned.

This report has been submitted to the Council today. It is accompanied by the Council's present proposal.

The purpose of this proposal is to adapt the list of products eligible for a tax differential to reflect the economic changes which have occurred since the adoption of Decision No 940/2014/EU.

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

On 15 March 2018 the French authorities asked the Commission to present a draft technical adaptation to Council Decision No 940/2014/EU of 17 December 2014. The request was accompanied by reports justifying the requested adaptations. On the basis of those reports, the Commission has today submitted to the Council a report containing an economic and social analysis of the application of the dock dues arrangements and justifying the need to adapt Decision No 940/2014/EU.

• Consistency with existing policy provisions in the policy area

This initiative is consistent with the priorities determined by the policy directives set out in Article 349 TFEU, which acknowledges that the structural social and economic situation of France's outermost regions including Guadeloupe, French Guiana, Martinique, Réunion and Mayotte is compounded by their remoteness, insularity, small size, difficult topography and climate, economic dependence on just a few products, the permanence and combination of which severely restrain their development. Accordingly, Article 349 states that the Council, on a proposal from the Commission and after consulting the European Parliament, shall adopt specific measures aimed, in particular, at laying down the conditions of application of the Treaties to those regions, including common policies. The objective of adapting the lists of products eligible for differentiated taxation is to promote and maintain certain local production activities which are particularly at risk, thereby boosting employment in the overseas departments. This adaptation deepens the single market and makes these local

outputs competitive again by compensating for the disadvantages resulting from their geographical and economic situation.

- **Consistency with other Union policies**

Under the third paragraph of Article 349 TFEU the Council adopts measures taking into account the special characteristics and constraints of the outermost regions without undermining the integrity and the coherence of the Union legal order, including the internal market and common policies. Decision No 940/2014/EU and the parameters on which it is based were deemed consistent with the EU's other policies. This initiative constitutes a limited adaptation of the Annex to Decision No 940/2014/EU. The other parameters of Decision No 940/2014/EU are unchanged. Under these conditions, the adaptation of the list of products eligible for a tax differential will have no impact at all on the consistency of Decision No 940/2014/EU with the EU's other policies.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

Article 349 of the Treaty on the Functioning of the European Union (TFEU).

- **Subsidiarity (for non-exclusive competence)**

Only the Council is authorised, on the basis of Article 349 TFEU, to adopt specific measures to adjust the application of the Treaties to the outermost regions, including the common policies, because of the permanent handicaps which affect the economic and social conditions of those regions.

The proposal therefore complies with the principle of subsidiarity.

- **Proportionality**

The proposal complies with the principle of proportionality for the reasons set out below.

It concerns only products for which inclusion on/amendment to the list of products has proved necessary.

Similarly, the maximum differential proposed for each product covered by this proposal is limited to what is necessary in view of the additional costs affecting the local production concerned. In this way, the tax burden on products imported into the French overseas regions and departments will not exceed what is necessary to offset the lower competitiveness of products manufactured locally compared with imported products.

Within the legal framework of Decision No 940/2014/EU, the only way to incorporate or amend the tax differentials applicable to local products is to amend the existing Decision. Its purpose is to update Decision No 940/2014/EU.

- **Choice of instrument**

Proposed instrument: Council Decision.

No other instruments would have been suitable.

The text to be amended is itself a Council Decision, adopted on the same legal basis (Article 349 TFEU).

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

• Ex-post evaluations/fitness checks of existing legislation

A. It follows from the first paragraph of Article 349 TFEU, as interpreted by the Court of Justice in Joined Cases C-132/14 to C-136/14,¹ that the ‘specific measures’ it refers to are adopted ‘taking into account’ the ‘structural social and economic situation’ of the outermost regions, which is ‘compounded’ by a number of factors ‘the permanence and combination of which severely restrain their development’. The first paragraph of Article 349 TFEU therefore presents these factors as elements that compound the structural social and economic situation of the outermost regions which the Council must take into account, pursuant to the third paragraph of Article 349 TFEU, when adopting specific measures. In the light of the Court’s interpretation and for the reasons set out below, the Commission takes the view that immediate adaptation of the list of products eligible for a tax differential is the only appropriate solution:

- The proposed amendments will make it possible to respond to the economic changes which have taken place since the adoption of Decision No 940/2014/EU (declining or tumbling prices, price offensives, problems in the building industry, falling market shares and/or rising additional production costs), thereby avoiding immediate and probably irreparable damage to some vulnerable local production activities.

Some new activities in these regions are affected by high production costs which hamper their competitiveness, and face significant competition from cheap imports.

- Some local production activities are facing an increase in additional production costs. Additional costs not offset by differentiated taxation threaten the existence of local businesses, which are all the more vulnerable given that most of them are SMEs (68 % of them have fewer than 20 employees).

- This initiative is an essential measure to support and maintain local production in the French outermost regions. Dock dues have a direct impact on local businesses. They enable new local activities to be developed in spite of high additional production costs.

This is because it is crucial to maintain local production activities in the French outermost regions, where unemployment, especially among young people, is the highest in Europe.

B. First, it should be noted that adapting the list of products to which differentiated taxation may be applied is the only way of ensuring the maintenance and development of local production activities in these outermost regions.

Second, it is an adjustment measure with limited economic implications, because the initiative is restricted to transactions effected in the French outermost regions. Its impact is therefore geographically limited to territories which are not part of the Community within the meaning of the VAT Directive (2006/112/EC) and the Excise Directive (2008/118/EC).

Furthermore, the products for which the French authorities requested inclusion or reclassification on lists represent declared local production of EUR 225 million in 2016 and imports roughly equivalent to EUR 212 million. The categories represented by these products are very diverse.

¹ CJEU, 15 December 2015, Joined cases C-132/14 to C-136/14, *Commission v Council*, EU:C:2015:813.

For each of these products, the Commission checked the justification for differentiated taxation and whether it was proportionate by ensuring that differentiated taxation did not undermine the integrity and coherence of the EU legal order, including the internal market and common policies. In particular, it checked whether local production existed and whether significant imports occurred which could jeopardise the maintenance of local production and whether there were additional costs which increased the cost price of local production compared with goods produced outside the Community, thereby making locally produced products less competitive.

For all these products, imports are performing well, increasing by almost 5 % over the period 2014-16.

With regard to local products occupying almost the entire market so that the share of 'imported' products is very low, the Commission satisfied itself that there was an imminent and grave risk to local production.

The Commission also carried out a mid-term assessment of the application of dock dues arrangements in the French outermost regions on the basis of the reports submitted by the French authorities pursuant to Article 3 of Decision No 940/2014/EU. In its report submitted to the Council today, the Commission concluded that the dock dues arrangements had no significant effects on competition and trade.

Finally, in addition to the immediate adaptation of the lists, a comprehensive review of the Decision, applying 'better regulation' tools, will be carried out when the arrangements are renewed. Work on this will start at the beginning of 2019.

- **Stakeholder consultations**

See paragraph above.

All stakeholders will be consulted as part of the comprehensive review of Decision No 940/2014/EU.

- **Collection and use of expertise**

Not applicable.

- **Impact Assessment**

See paragraph above.

- **Regulatory fitness and simplification**

Not applicable.

- **Fundamental rights**

Not applicable.

4. BUDGETARY IMPLICATIONS

The proposal has no impact on the budget of the Union.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

A comprehensive review of Decision No 940/2014/EU, applying 'better regulation' tools, will be carried out when the arrangements are renewed. Work on this will start at the beginning of 2019.

- **Explanatory documents (for directives)**

Not applicable.

- **Detailed explanation of the specific provisions of the proposal**

Not applicable.

Proposal for a

COUNCIL DECISION

amending Decision No 940/2014/EU as regards products eligible for exemption from or a reduction in dock dues

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 349 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Parliament¹,

Acting in accordance with a special legislative procedure,

Whereas:

- (1) Council Decision No 940/2014/EU of 17 December 2014 concerning the dock dues in the French outermost regions authorises the French authorities to apply exemptions or reductions to dock dues for products produced locally in the French overseas departments and listed in the Annex to the Decision. The maximum authorised tax differential is, depending on the products and the overseas department in question, 10, 20 or 30 percentage points.
- (2) In accordance with Article 3(2) of Decision No 940/2014/EU, on 12 February 2018 the French authorities presented to the Commission a report on the application of the taxation arrangements provided for in that Decision. Specific evaluation reports for each of the French outermost regions accompanied by requests to adapt the list of products eligible for differentiated taxation were sent on 15 March 2018 for French Guiana, Martinique and Guadeloupe, on 4 June 2018 for Réunion and, without requesting an update of the list, on 28 August 2018 for Mayotte. An additional request for the inclusion of a new product on the list was made for French Guiana on 26 October 2018.
- (3) On the basis of the report submitted by the French authorities, the Commission presented to the Council the report provided for in the second subparagraph of Article 3(2) of Decision No 940/2014/EU and a proposal for amendments to the Decision. These adaptations concern Martinique, Guadeloupe, French Guiana and Réunion. They consist of the inclusion of new products on the list and of an increase - for certain products - of the authorised differential.
- (4) In the case of French Guiana, they also involve updating the Combined Nomenclature codes in the Annex to Decision No 940/2014/EU.

¹ OJ C, p.

- (5) The adaptation of the lists is justified in each case in view of the additional costs of locally produced products compared with equivalent imported products produced in the Union.
- (6) The adaptations that should be made are mostly to be entered to the lists in the Annex to Decision No 940/2014/EU for products which were already produced locally in 2014 and for which no application for inclusion on lists had been submitted in 2014.
- (7) In French Guiana the products concerned are cement (product 2523 29 00) and wooden furniture (products 9403 30, 9403 50 00, 9403 60 and 9403 90 30).
- (8) In Martinique the products concerned are some plastic pellets (product 3907 61 00) and cold rooms (product 8418 69 00).
- (9) In Guadeloupe the products concerned are some meats (product 0210 12 19), some sauces (product 2103 90 90), denatured ethyl alcohol (product 2207 20 00), some fertilisers (products 2833, 2834 and 2836), some cosmetics (products 3303 00 90 and 3304 99 00), some cooling liquids (product 3820 00 00) and paper and paperboard boxes and cases (product 4819 10 00).
- (10) In Réunion the products concerned are some printed products (product 4911 99), some hygiene products (products 4818 20 10 and 4818 20 91), some spare parts for vehicles (products 8511 40 00, 8511 50 00 and 8511 90 00), some ventilation ducts and their accessories (products 7306 30 80, 7306 61 92 and 7307 99 80), solar water heaters (product 8419 90 85), some fertilisers (3102 10 90) and some tomato purées (product 2002 90 11).
- (11) In the agricultural sector, requests for inclusion or reclassification on lists are motivated by the need for local producers to diversify their production in order to better cope with the vagaries of the weather. The products to be entered on the lists in the Annex to Decision No 940/2014/EU for Martinique are certain vegetables (products 0709 30 00, 0709 40 00, 0709 93 90, 0714), avocados (product 0804 40 00), for Guadeloupe pineapples (product 0804 30) and peppers (product 0904 22 00) and for Réunion onions (product 0703 10 19) and garlic (product 0703 20 00). In addition, some vegetables (product 0706), some peppers (product 0709 60) and pineapples (products 0804 30 and 0805) for Martinique should be reclassified on list B.
- (12) For certain products already entered on the lists in the Annex to Decision No 940/2014/EU the maximum differential concerned should either be extended to subheadings of the Combined Nomenclature to which it does not apply at present, or increased.
- (13) For example, in Martinique yoghurts (product 0403 10), some plastic construction products (product 3925) should be reclassified from list B to list C, while frozen vegetables (product 0710), prefabricated buildings (product 9406), some items of jewellery (products 7113 and 7117) and solar water heaters (product 8419 19) should be reclassified from list A to list B.
- (14) In Guadeloupe, all prepared or preserved meat (product 1602) and not just heading 1602 41 10, all prepared or preserved fish (product 1604 20) and not just prepared or preserved salmon (product 1604 20 10) and, with regard to fertilisers, headings 3102, 3103, 3104 and 3105, and not just subheadings 3102 90, 3103 90, 3104 20 and 3105 20, should be entered on list B. Yoghurts (product 0403 10), some non-alcoholic

beverages (products 2202 10 00 and 2202 99 19²) and some building materials (products 3925 10 00 and 3925 90 80) should also be reclassified from list B to list C.

- (15) In the agri-food industry in Réunion, sugar cane (product 1701), canned tomatoes (product 2002 10) and some coatings (product 3214 10 90) should be reclassified from list A to list C, some canned dried vegetables (products 2005 51 00 and 2005 99 80), some paints (products 3208 and 3209), polyethylene films and bags (3920 10 and 3923 21), and some boxes and cartons (4819 20 00) should be reclassified from list B to list C, and some fruit purées (2007 99 50) should be reclassified from list A to list B.
- (16) In Martinique, an error concerning the tariff heading entered on the list in the Annex to Decision No 940/2014/EU should be corrected and heading 2204 29 should be replaced by heading 2204 21.
- (17) Lastly, products for which local production did not exist in 2014 but has since started or for which there are specific plans to commence operations in the near future should be entered on the lists of products eligible for differentiated taxation. In French Guiana, the products in question are derived from screen printing activities such as printed jackets (product 6110 30 91), printed baby accessories (product 6111 20 90), printed raincoats (product 6201 19 00), printed dresses (product 6204 42 00), printed household linen (product 6302 91 00), printed caps (product 6505 00 30) and printed mugs (product 6212 00) and ‘energy wood’ (product 4401 12 00).. In Guadeloupe the products concerned are some beers (product 2203), some waters not containing sugar (product 2201 10 90) and some filtering or purifying machinery (products 8421 21 00). In Réunion the products in question are certain hygiene products (products 4818 90 10).
- (18) Decision No 940/2014/EU should therefore be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

The Annex to Decision No 940/2014/EU is amended as set out in the Annex to this Decision.

Article 2

This Decision shall enter into force three days after the day of its publication in the *Official Journal of the European Union*.

Article 3

This Decision is addressed to the French Republic.

Done at Brussels,

For the Council
The President

² This code replaces code 2202 90 10 in the light of changes to the customs nomenclature.