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2020/0133 (NLE)

Proposal for a

COUNCIL IMPLEMENTING DECISION

amending Council Implementing Decision (EU) 2018/1696 on the operating rules of the selection panel provided for in Article 14(3) of Council Regulation (EU) 2017/1939

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

Council Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO) was adopted by the Council on 12 October 2017 and entered into force on 20 November 2017.

In accordance with Article 20 of Council Regulation (EU) 2017/1939, the Commission is responsible for the establishment and initial administrative operation of the EPPO, until the latter has the capacity to implement its own budget.

A prerequisite for the setting up of the EPPO is the selection and appointment of its members and staff, in particular of the European Prosecutors, who, together with the European Chief Prosecutor, form the EPPO College. The EPPO College needs to take a number of key decisions of a general nature without which the EPPO cannot start its activities. These include, e.g. adopting the internal rules of procedure of the EPPO as well as the conditions of employment of the European Delegated Prosecutors, and appointing the European Delegated Prosecutors and the Administrative Director.

Article 16(1) of Council Regulation (EU) 2017/1939 requires each participating Member State to nominate three candidates who are (a) active members of the public prosecution service or judiciary of the relevant Member State, (b) whose independence is beyond doubt; and (c) who possess the qualifications required for appointment to high prosecutorial or judicial office in their respective Member States, and who have relevant practical experience of national legal systems, of financial investigations and of international judicial cooperation in criminal matters.

Furthermore, Article 16(2) of Council Regulation (EU) 2017/1939 states that after having received the reasoned opinion of the selection panel provided for in Article 14(3) of Council Regulation (EU) 2017/1939, the Council shall select and appoint one of the candidates to be the European Prosecutor of the Member State in question. If the selection panel finds that a candidate does not fulfil the conditions required for the performance of the duties of a European Prosecutor, its opinion shall be binding on the Council.

On 13 July 2018, the Council adopted Council Implementing Decision (EU) 2018/1696 on the operating rules of the selection panel provided for in Article 14(3) of Council Regulation (EU) 2017/1939.

Rule VII No. 2 of those operating rules states that the selection panel shall hear the candidates nominated by the Member States for the post of European Prosecutor and shall formulate an opinion on the candidates' qualifications to perform the duties of European Prosecutors. The panel shall expressly state whether or not a candidate nominated by a Member State fulfils the conditions set out in Article 16(1) of Council Regulation (EU) 2017/1939 and, failing which, shall, through its secretariat, request that the Member State concerned nominate a corresponding number of new candidates. The selection panel shall then rank the candidates according to their qualifications and experience. The ranking shall indicate the selection panel's order of preference and shall not be binding on the Council.

As a consequence of this rule, where a Member State does not provide three eligible candidates within a reasonable time, the selection panel cannot provide the Council with the reasoned opinion on the candidates and the selection procedure cannot be completed. This

could prevent the Council from appointing the European Prosecutor for that Member State in a timely manner and consequently delay the establishment and entry into operation of the EPPO.

Experience from the selection process for the first European Prosecutors revealed that a Member State might face significant difficulties in identifying and nominating eligible candidates, and in some exceptional cases, it might be objectively impossible to nominate the necessary number of eligible candidates within a reasonable time.

The aim of this proposal is to allow the selection panel to present reasoned its opinion to the Council on only two eligible candidates in exceptional and duly justified cases, i.e. where it is sufficiently established that it is objectively impossible for a Member State to find a third eligible candidate within a reasonable time, in spite of having deployed all necessary efforts to do so, given the exceptional circumstances encountered by that Member State. In those circumstances, the selection panel could send to the Council its reasoned opinion on only two eligible candidates, and the Council would be free to proceed on the basis of that opinion.

- **Consistency with existing policy provisions in the policy area**

The establishment of the EPPO is foreseen by Article 86 TFEU. The EPPO will be the first EU body with criminal investigation and prosecution powers into crimes affecting the financial interests of the Union and will be a completely new actor in the European judicial landscape. The EPPO is expected to lead to a more consistent and effective prosecution policy for crimes affecting the EU budget, resulting in a greater number of prosecutions, convictions and a higher level of dissuasion and recovery of fraudulently lost Union funds.

By submitting this proposal for an amendment of Council Implementing Decision (EU) 2018/1696, the Commission is complying with its obligation under Articles 20, 14(3) and 16(2) of Council Regulation 2017/1939. This proposal will enable to carry out the necessary selection and appointment procedures of the EPPO's European Prosecutors to be completed and the activities to start in a timely manner. This proposal is therefore fully consistent with existing policy provisions in the respective policy area.

- **Consistency with other Union policies**

This initiative is consistent with other Union policies and legislative developments aimed at strengthening the protection of the Union's financial interests.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The proposal is based on Article 291 TFEU in conjunction with Article 14(3) and 16(2) of Council Regulation (EU) 2017/1939.

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

The adoption and amendment of the operating rules of the selection panel provided for in Article 14(3) of Council Regulation (EU) 2017/1939 can only be done by the Union institutions, pursuant to an implementing power, and is thus an exclusive competence by nature, not subject to the principle of subsidiarity.

- **Proportionality**

This proposal is limited to what is necessary in order to attain the proposed objectives, and is therefore compliant with the principle of proportionality. This proposal is directly linked to

the entry into force of Council Regulation (EU) 2017/1939 and essential in ensuring a swift setting up and start of activities of the EPPO.

- **Choice of the instrument**

Article 14(3) in conjunction with Article 16(2) of Council Regulation (EU) 2017/1939 envisages this legal instrument.

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

Given the targeted and limited nature of this proposal, and the fact that it complies with the obligation put on the Commission in Article 14(3) in conjunction with Article 16(2) of Council Regulation 2017/1939, ex-post evaluations, stakeholder consultations and an impact assessment were not carried out.

4. BUDGETARY IMPLICATIONS

The proposal has no budgetary implications.

5. OTHER ELEMENTS

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

Given the nature of this measure, there is no need for implementation.

- **Explanatory documents (for directives)**

This proposal does not require Explanatory Documents on the transposition.

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

The amendment would allow the selection panel to present reasoned its opinion to the Council on only two eligible candidates in exceptional and duly justified cases, i.e. where it is sufficiently established that it is objectively impossible for a Member State to find a third eligible candidate within a reasonable time, in spite of having deployed all necessary efforts to do so, given the exceptional circumstances encountered by that Member State. In those circumstances, the selection panel could send to the Council its reasoned opinion on only two eligible candidates, and the Council would be free to proceed on the basis of that opinion.

Proposal for a

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amending Council Implementing Decision (EU) 2018/1696 on the operating rules of the selection panel provided for in Article 14(3) of Council Regulation (EU) 2017/1939

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO')¹, and in particular Articles 14(3),

Having regard to the proposal from the European Commission,

Whereas:

- (1) The European Public Prosecutor's Office was established to investigate, prosecute and bring to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union.
- (2) Regulation (EU) 2017/1939 provides that the Council is to appoint each European Prosecutor from amongst three qualified candidates nominated by each Member State after having received a reasoned opinion from the selection panel provided for in Article 14(3) of that Regulation.
- (3) The selection and appointment of the European Prosecutors, who together with the European Chief Prosecutor form the College of the EPPO, is a prerequisite for the establishment of the EPPO.
- (4) On 13 July 2018, the Council adopted Council Implementing Decision (EU) 2018/1696 on the operating rules of the selection panel provided for in Article 14(3) of Council Regulation (EU) 2017/1939².
- (5) Rule VII No. 2 of those operating rules states that the selection panel, based on its findings during the review and hearing, is to formulate an opinion on the candidates' qualifications to perform the duties of European Prosecutors and expressly state whether or not a candidate fulfils the conditions in Article 16(1) of Regulation (EU) 2017/1939. The selection panel is to provide reasons for its opinion. In the event that nominated candidates do not fulfil the conditions set out in Article 16(1) of Regulation (EU) 2017/1939, the same rule provides that the selection panel is, through its secretariat, to request that the Member State concerned nominate a corresponding number of new candidates.
- (6) As an exception to that rule, the selection panel should have the possibility to present its reasoned opinion to the Council on only two eligible candidates where it is sufficiently established that it is objectively impossible for a Member State to find a

¹ OJ L 283, 31.10.2017, p. 1.

² OJ L 282, 12.11.2018, p. 8–12

third eligible candidate within a reasonable time, in spite of having deployed all necessary efforts to do so, due to exceptional circumstances in that Member State. In such a situation, the selection panel should be able to submit to the Council its opinion on two eligible nominees, and the Council may proceed to the appointment on the basis of a list with only two eligible candidates.

- (7) Council Implementing Decision (EU) 2018/1696 should be amended accordingly.
- (8) In order to ensure the timely start of the activities of the EPPO, this implementing Regulation should enter into force on the day following that of its publication,

HAS ADOPTED THIS DECISION:

Article 1

In rule VII No. 2 of the annex to Council Implementing Decision (EU) 2018/1696 on the operating rules of the selection panel provided for in Article 14(3) of Council Regulation (EU) 2017/1939, the following paragraph is inserted after the second paragraph:

‘By way of exception, where it is sufficiently established that it is objectively impossible for a Member State to find a third eligible candidate within a reasonable time, in spite of having deployed all necessary efforts to do so, and given the exceptional circumstances in that Member State, the selection panel may, after consulting the Member State concerned and giving sufficient grounds, provide its reasoned opinion to the Council on only two eligible candidates.’

Article 2

This Decision shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

Done at Brussels,

For the Council
The President