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From: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 12 February 2019

To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
the European Union

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Subject: COMMISSION DELEGATED REGULATION (EU) .../... of 12.2.2019
amending and correcting Delegated Regulation (EU) No 480/2014 as
regards the provisions on financial instruments, simplified cost options,
audit trail, scope and content of audits of operations and methodology for
the selection of the sample of operations and Annex III

Delegations will find attached document C(2019) 788 final.

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COMMISSION DELEGATED REGULATION (EU) .../...

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EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018¹ amended Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006².

This proposal is a consequential amendment stemming from the above mentioned changes in the basic act and contains also some clarifications of existing provisions. The alignment is necessary to ensure legal consistency between the basic act and the corresponding rules in Commission Delegated Regulation (EU) No 480/2014³.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

Consultation of experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making⁴, in accordance with Article 149(3a) of Regulation (EU) No 1303/2013 has been carried out on 22 November 2018.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Articles 38(1), 38(4), 40(4), 61(8) and 67(1) of Regulation (EU) No 1303/2013 as well as the definition of beneficiary in Article 2(10)(a) were amended and provisions in the Delegated Regulation should reflect these changes. Equally, new Articles 43a, 68a and 68b were introduced in Regulation (EU) No 1303/2013 and the provisions in Delegated Regulation (EU) No 480/2014 should be amended to take account of these new elements.

The opportunity is taken also to provide clarifications to Articles 27 and 28 of Delegated Regulation (EU) No 480/2014 as regards audits and samples of operations.

¹ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 1).

² OJ L 347, 20.12.2013, p. 320.

³ OJ L 138, 13.5.2014, p. 5.

⁴ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission of 13 April 2016 on Better Law-Making (OJ L 123, 12.5.2016, p. 1).

COMMISSION DELEGATED REGULATION (EU) .../...

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amending and correcting Delegated Regulation (EU) No 480/2014 as regards the provisions on financial instruments, simplified cost options, audit trail, scope and content of audits of operations and methodology for the selection of the sample of operations and Annex III

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006⁵, and in particular Article 38(4), Article 39a(7), Article 40(4), Article 41(3), Article 42(6), point (b) of Article 61(3), the second paragraph of Article 68, the first subparagraph of Article 125(8), Article 125(9) and Article 127(7) thereof,

Whereas:

- (1) Commission Delegated Regulation (EU) No 480/2014⁶ lays down, among others, specific rules on the role, liabilities and responsibility of bodies implementing financial instruments, as well as on the related selection criteria and financial products. Following the amendment of Title IV of Part Two of Regulation (EU) No 1303/2013 by Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council⁷, Delegated Regulation (EU) No 480/2014 should be amended to be in line with those changes.
- (2) In Article 38(1) of Regulation (EU) No 1303/2013, a new implementation option for combining funds from the ESI Funds with EIB financial products under the European Fund for Strategic Investment was introduced, the conditions of which were set out in detail in the new Article 39a thereof. Accordingly, the legal basis and scope of certain provisions of Delegated Regulation (EU) No 480/2014 on the role, liabilities and responsibility of bodies implementing financial instruments, as well as on the related

⁵ OJ L 347, 20.12.2013, p. 320.

⁶ Commission Delegated Regulation (EU) No 480/2014 of 3 March 2014 supplementing Regulation (EU) No 1303/2013 of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund (OJ L 138, 13.5.2014, p. 5).

⁷ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 1).

selection criteria and financial products should be amended in order to include also a reference to Article 39a of Regulation (EU) No 1303/2013.

- (3) In Article 38(4) of Regulation (EU) No 1303/2013, the rules for direct award to publicly-owned banks or institutions were clarified. Article 7 and 10 of Delegated Regulation (EU) No 480/2014 should be amended accordingly. As the changes in Article 38 of Regulation (EU) No 1303/2013 of the European Parliament and of the Council apply from 1 January 2014, the amendments in Article 7 to Delegated Regulation (EU) No 480/2014 should apply from 1 January 2014. As the changes in Article 39a of Regulation (EU) No 1303/2013 of the European Parliament and of the Council apply from 1 January 2018, the amendment in Article 10 to Delegated Regulation (EU) No 480/2014 should apply from 1 January 2018.
- (4) The new Article 43a of Regulation (EU) No 1303/2013 clarifies the rules governing the differentiated treatment of investors in case of profit and risk sharing. Articles 6(1) and 9(1) of Delegated Regulation (EU) No 480/2014 should be amended accordingly.
- (5) Article 40 of Regulation (EU) No 1303/2013 was amended in order to enable the designated authorities to obtain the necessary assurance when carrying out their obligations with regard to verifications, checks and audits on the basis of consistent, qualitative and timely reports to be provided by the EIB or other international financial institutions in which a Member State is a shareholder. Accordingly, and based on lessons learned concerning the implementation of paragraphs 3 and 4 of Article 9 of Delegated Regulation (EU) No 480/2014, those paragraphs should be deleted.
- (6) Article 9 of Delegated Regulation (EU) No 480/2014 lays down additional specific rules on the management and control of financial instruments set up at national, regional, transnational or cross-border level. In addition, point (c) of paragraph 1 of that Article contains a mistaken reference to Regulation (EU) No 1305/2013 for the EAFRD which should be corrected.
- (7) References in the relevant provisions of Delegated Regulation (EU) No 480/2014 should be aligned to the terminology in the amended provisions in Regulation (EU) No 1303/2013 in relation to the direct award, the differentiated treatment of investors, the State aid law term 'investor operating under the market economy principle' as well as to reflect the same treatment of international financial institutions as the EIB in accordance with Article 40 of Regulation (EU) No 1303/2013.
- (8) Article 61(8) of Regulation (EU) No 1303/2013 was amended by Regulation (EU, Euratom) 2018/1046 in order to provide that it does not apply to operations for which support constitutes State aid. Article 19(6) of Delegated Regulation (EU) No 480/2014 provides that the establishment of financial discount rates is to be done at Member State level. However, in order to ensure a homogenous and smooth review of major projects as far as financial profitability indicators are concerned for projects under State aid, Article 19(6) of Delegated Regulation (EU) No 480/2014 should be deleted in order to allow for project-specific financial discount rates reflecting the nature of the investor or the sector.
- (9) In addition, Articles 67, and 68 of Regulation (EU) No 1303/2013 on simplified cost options were amended and Articles 68a and 68b were introduced by Regulation (EU, Euratom) 2018/1046. Therefore, Articles 20 and 21 of Delegated Regulation (EU) No 480/2014 should be amended accordingly to ensure correct references to the provisions of Regulation (EU) No 1303/2013.

- (10) Specific rules should also be provided for in this Regulation with regard to the audit trail and the audit of operations laid down in Articles 25 and 27 of Delegated Regulation (EU) No 480/2014 respectively as regards the new form of support to operations through financing not linked to costs referred to in point (e) of the first subparagraph of Article 67(1) Regulation (EU) No 1303/2013.
- (11) In order to ensure a coherent approach on obtaining assurance on the reliability of data relating to indicators and milestones, it is appropriate to specify in Article 27(2) of Delegated Regulation (EU) No 480/2014 that this element should be part of the audit work on audit of operations.
- (12) Article 28(8) of Delegated Regulation (EU) No 480/2014 specifies the sample selection procedure where conditions for the proportional control arrangements provided for in Article 148(1) of Regulation (EU) No 1303/2013 apply. In order to clarify the available options for the audit authority, the provision should be amended to state that the decision to use either the exclusion or replacement of sampling units should be taken by the audit authority based on its professional judgement. Taking into account that this clarification has already been provided to Member States, it is appropriate for that amendment to apply retroactively with effect from the date of entry into force of this Regulation as first adopted.
- (13) Article 28(9) of Delegated Regulation (EU) No 480/2014 on the sub-sampling methodology should be amended to clarify the different possible levels of sub-sampling in complex operations and to cover all particularities, including non-statistical sampling methods and specific characteristics of operations implemented under the European territorial cooperation goal. Taking into account that this clarification has already been provided to Member States, it is appropriate for that amendment to apply retroactively with effect from the date of entry into force of this Regulation as first adopted.
- (14) Due to the changes of the definition of 'beneficiary' in point (a) of Article 2(10) of Regulation (EU) No 1303/2013 introduced by Regulation (EU, Euratom) 2018/1046, certain data fields in Annex III of Delegated Regulation (EU) No 480/2014 should be amended accordingly.
- (15) In accordance with Article 149(3a) of Regulation (EU) No 1303/2013, the measures provided for in this Regulation have been subject to consultation of experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making⁸.
- (16) In order to ensure legal certainty and to limit discrepancies between the amended provisions of Regulation (EU) No 1303/2013 which apply from 2 August 2018 or earlier in accordance with Article 282 of Regulation (EU, Euratom) 2018/1046 and the provisions of this Regulation to a minimum, this Regulation should enter into force on the day following that of its publication in the *Official Journal of the European Union*.
- (17) Delegated Regulation (EU) No 480/2014 should therefore be amended and corrected accordingly,

⁸ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission of 13 April 2016 on Better Law-Making (OJ L 123, 12.5.2016, p. 1).

HAS ADOPTED THIS REGULATION:

Article 1

Delegated Regulation (EU) No 480/2014 is amended as follows:

- (1) Article 6 is amended as follows:
 - (a) the sub-title is replaced by the following:

‘(Third subparagraph of Article 38(4) and Article 39a(7) of Regulation (EU) No 1303/2013)’;
 - (b) in paragraph 1, point (d) is replaced by the following:

‘(d) differentiated treatment of investors operating under the market economy principle and of the EIB, when using the EU guarantee pursuant to Regulation (EU) 2015/2017, as referred to in Article 37(2)(c) and Article 43a of Regulation (EU) No 1303/2013, is proportionate to the risks taken by these investors and is limited to the minimum necessary to attract such investors, which shall be ensured through terms and conditions and procedural safeguards’;
- (2) Article 7 is amended as follows:
 - (a) the sub-title is replaced by the following:

‘(Third subparagraph of Article 38(4) and Article 39a(7) of Regulation (EU) No 1303/2013)’;
 - (b) in paragraph 1, the introductory wording is replaced by the following:

‘1. When selecting a body to implement a financial instrument in accordance with point (a) of Article 38(4), subpoint (iii) of point (b) of Article 38(4), point (c) of Article 38(4) and Article 39a(5) of Regulation (EU) No 1303/2013, the managing authority shall satisfy itself that this body fulfils the following minimum requirements:’;
 - (c) paragraph 3 is replaced by the following:

‘3. Where a body that implements a fund of funds, including the EIB and an international financial institution in which a Member State is a shareholder, further entrusts implementation tasks to a financial intermediary, it shall ensure that the requirements and criteria referred to in paragraphs 1 and 2 are met in respect of that financial intermediary’;
 - (d) the following paragraph 4 is added:

‘4. Without prejudice to paragraph 3, when the body implementing a financial instrument under Article 39a(5) of Regulation (EU) No 1303/2013 of Regulation (EU) No 1303/2013 is the EIB or an international financial institution in which a Member State is a shareholder, paragraphs 1 and 2 shall not apply’;
- (3) in Article 8, the sub-title is replaced by the following:

‘(Third subparagraph of Article 38(4) and Article 39a(7) of Regulation (EU) No 1303/2013)’;
- (4) Article 9 is amended as follows:

- (a) the title is replaced by the following:
‘Management and control of financial instruments referred to in points (b) and (c) of Article 38(1) of Regulation (EU) No 1303/2013
(Article 40(4) of Regulation (EU) No 1303/2013)’;
- (b) paragraph 1 is amended as follows:
(i) the introductory wording is replaced by the following:
‘1. For operations involving support from programmes to financial instruments referred to in points (b) and (c) of Article 38(1) of Regulation (EU) No 1303/2013, the managing authority shall ensure that:’;
(ii) point (e) is amended as follows:
(aa) point (ii) is replaced by the following:
‘(ii) documents identifying the amounts contributed by each programme and under each priority axis to the financial instrument, the expenditure that is eligible under the programmes and the interest and other gains generated by support from the ESI Funds and re-use of resources attributable to the ESI Funds in accordance with Articles 43, 43a and 44 of Regulation (EU) No 1303/2013’;
(ab) point (iv) is replaced by the following:
‘(iv) documents demonstrating compliance with Articles 43, 43a, 44 and 45 of Regulation (EU) No 1303/2013’;
- (c) in paragraph 2, the second subparagraph is replaced by the following:
‘For operations involving support from programmes to financial instruments under the EAFRD, the audit bodies shall ensure that financial instruments are audited throughout the programming period until closure in the framework of systems audits and audits of operations in accordance with Article 9(1) of Regulation (EU) No 1306/2013 of the European Parliament and of the Council*.

* Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agriculture policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008 (OJ L 347, 20.12.2013, p. 549).’;

- (d) paragraphs 3 and 4 are deleted.

- (5) Article 10 is replaced by the following:

‘Article 10

Rules for withdrawal of payments to financial instruments and consequent adjustments in respect of applications for payment

(Article 41(3) of Regulation (EU) No 1303/2013)

Member States and managing authorities may withdraw contributions from programmes to the financial instruments referred to in points (a) and (c) of Article 38(1) and the financial instruments referred to in point (b) of Article 38(1) implemented in accordance with points (a), (b), and (c) of Article 38(4) of

Regulation (EU) No 1303/2013 only if the contributions have not already been included in an application for payment as referred to in Article 41 of that Regulation. However, as regards financial instruments supported by the ERDF, the ESF, the Cohesion Fund and the EMFF, contributions may also be withdrawn if the next payment application is amended to withdraw or replace the corresponding expenditure.’;

(6) in Article 13, paragraph 5 is replaced by the following:

‘5. Where the majority of the capital invested in financial intermediaries providing equity is provided by investors operating under the market economy principle and the programme contribution is provided *pari passu* with those investors, the management costs and fees shall conform to market terms and shall not exceed those payable by the private investors.’;

(7) in Article 19, paragraph 6 is deleted;

(8) in Article 20, the sub-title is replaced by the following:

‘(Second paragraph of Article 68 of Regulation (EU) No 1303/2013)’;

(9) in Article 21, the sub-title is replaced by the following:

‘(Second paragraph of Article 68 of Regulation (EU) No 1303/2013)’

(10) Paragraph 1 of Article 25 is amended as follows:

(a) the first subparagraph is amended as follows:

(i) point (d) is replaced by the following:

‘(d) in relation to costs determined in accordance with point (d) of Article 67(1) and point (a) of the first paragraph of Article 68 of Regulation (EU) No 1303/2013, the audit trail shall demonstrate and justify the calculation method, where applicable, and the basis on which the flat rates have been decided, and the eligible direct costs or costs declared under other chosen categories to which the flat rate applies.’;

(ii) the following point (da) is inserted:

‘(da) in relation to financing which is not linked to costs referred to in point (e) of the first subparagraph of Article 67(1) of Regulation (EU) No 1303/2013, the audit trail shall allow verification of the achievement of the financing conditions and reconciliation of the underlying data relating to the conditions for the reimbursement of expenditure;’;

(iii) point (e) is replaced by the following:

‘(e) in relation to costs determined in accordance with points (b) and (c) of the first paragraph of Article 68 and with Articles 68a(1) and 68b of Regulation (EU) No 1303/2013, Article 14(2) of Regulation (EU) No 1304/2013 prior to the entry into force of Regulation (EU, Euratom) 2018/1046 and Article 20 of Regulation (EU) No 1299/2013, the audit trail shall allow the eligible direct costs to which the flat rate applies to be substantiated and verified.’;

(b) the second subparagraph is replaced by the following:

‘For costs referred to in points (c) and (d), the audit trail shall allow the calculation method used by the managing authority to be verified for compliance with Article 67(5), Article 68 of Regulation (EU) No 1303/2013 and Article 14(3) of Regulation (EU) No 1304/2013 prior to the entry into force of Regulation (EU, Euratom) 2018/1046.’;

(11) Article 27 is amended as follows:

(a) paragraph 2 is amended as follows:

(i) in the first subparagraph, the following point (d) is added:

‘(d) that the data relating to indicators and milestones is reliable’;

(ii) the following second subparagraph is inserted:

‘Only the following aspects laid down in point (a) shall apply to operations subject to the financing which is not linked to costs referred to in point (e) of the first subparagraph of Article 67(1) of Regulation (EU) No 1303/2013: that the operation has been implemented in accordance with the approval decision and fulfilled any conditions applicable at the time of the audit concerning its functionality, use and objectives to be attained.’;

(b) the following subparagraph is added in paragraph 3:

‘For operations subject to the form of support referred to in point (e) of the first subparagraph of Article 67(1) of Regulation (EU) No 1303/2013, audits of operations shall verify that the conditions for reimbursement of expenditure to the beneficiary have been met.’;

(12) Article 28 is amended as follows:

(a) paragraph 8 is replaced by the following:

‘Where conditions for the proportional control provided for in Article 148(1) of Regulation (EU) No 1303/2013 apply, the audit authority may either exclude the items referred to in that Article from the population to be sampled or maintain the items in the population to be sampled and replace them if selected. The decision to use either exclusion or replacement of sampling units should be taken by the audit authority based on its professional judgement.’;

(b) in paragraph 9, the second and third subparagraphs are replaced by the following:

‘However, depending on the characteristics of sampling unit, the audit authority may decide to apply sub-sampling. The methodology for selection of the sub-sampling units shall follow the principles allowing projection at the level of the sampling unit.’;

(13) Annex III is amended as follows:

(a) data field 2 is replaced by the following:

‘Information whether the beneficiary is a public law body or a private law body or a natural person’;

(b) data field 46 is replaced by the following:

‘Amount of eligible expenditure in payment claim forming the basis for each payment to the beneficiary, accompanied, for operations subject to the form of

support referred to in point (e) of the first subparagraph of Article 67(1) of Regulation (EU) No 1303/2013, by a reference to the corresponding fulfilled financing condition’;

(c) data field 80 is replaced by the following:

‘The total amount of eligible expenditure incurred by the beneficiary and paid in implementing the operation included in each payment application, accompanied, for operations subject to the form of support referred to in point (e) of the first subparagraph of Article 67(1) of Regulation (EU) No 1303/2013, by a reference to the corresponding fulfilled financing condition’;

(d) data field 87 is replaced by the following:

‘In the case of State aid where Article 131(5) of Regulation (EU) No 1303/2013 applies, the amount of the advance included in a payment application which, within three years of the payment of the advance, has been covered by expenditure paid by the beneficiary or, where Member States have decided that the beneficiary is the body granting the aid pursuant to point (a) of Article 2(10), by the body receiving the aid’;

(e) data field 88 is replaced by the following:

‘In the case of State aid where Article 131(5) of Regulation (EU) No 1303/2013 applies, the amount paid to the beneficiary under the operation or, where Member States have decided that the beneficiary is the body granting the aid pursuant to point (a) of Article 2(10), to the body receiving the aid, as an advance included in a payment application which has not been covered by expenditure paid by the beneficiary and for which the three-year period has not yet elapsed’.

Article 2

Point (c) of Article 9(1) of Delegated Regulation (EU) No 480/2014 is corrected as follows:

‘(c) management verifications are carried out throughout the programming period and during the set-up and implementation of the financial instruments in accordance with Article 125(4) of Regulation (EU) No 1303/2013 for the ERDF, the ESF, the Cohesion Fund and the EMFF, and in accordance with Article 58(1) and (2) of Regulation (EU) No 1306/2013 for the EAFRD’.

Article 3

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

Point (2) of Article 1 shall apply from 1 January 2014.

Point (5) of Article 1 shall apply from 1 January 2018.

Point (12) of Article 1 and Article 2 shall apply from 14 May 2014.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 12.2.2019

For the Commission
The President
Jean-Claude JUNCKER