Commission Delegated Regulation (EU) 2019/886 of 12 February 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

COMMISSION DELEGATED REGULATION (EU) 2019/886

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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 1083/2006[(1)], 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 480/2014[(2)] 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 Council[(3)], 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 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

Changes to legislation: *There are currently no known outstanding effects for the Commission Delegated Regulation (EU) 2019/886. (See end of Document for details)*

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 approrpriate 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-Making[(4)].

(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,

HAS ADOPTED THIS REGULATION:

Changes to legislation: *There are currently no known outstanding effects for the Commission Delegated Regulation (EU) 2019/886. (See end of Document for details)*

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[(5)].;

(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)