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AND AGENCIES

## EUROPEAN COMMISSION

**Commission Notice on the application of Articles 2, 3, 4 and 5 of Directive 2009/33/EC of the European Parliament and of the Council on the promotion of clean road transport vehicles in support of low-emission mobility**

(2020/C 352/01)

**Introduction**

The purpose of this notice is to provide guidelines for national authorities, Contracting Authorities, Contracting Entities and operators on the application of the provisions of articles 2, 3, 4 and 5 of the Clean Vehicles Directive (Directive 2009/33/EC <sup>(1)</sup>) on the promotion of clean road transport vehicles in support of low-emission mobility, as amended by Directive (EU) 2019/1161 <sup>(2)</sup>.

It presents an overview of frequently asked questions (FAQs) in relation to the transposition and implementation of these provisions, concerning in particular the scope of the Directive, the definition of 'clean vehicles', the minimum procurement targets, the counting of the vehicles, and the use of the Tenders Electronic Daily (TED) database under different procurement scenarios (including e.g. retrofitted vehicles, replacement of vehicles in the framework of existing contracts, etc.).

This Notice should be read in conjunction with other relevant provisions of the Directive. It clarifies provisions already contained in the applicable legislation, and does not extend in any way the obligations deriving from such legislation nor introduce any additional requirements on the concerned competent authorities and operators.

This Notice is merely intended to assist Contracting Authorities, Contracting Entities, transport operators and national competent authorities in the application of the Directive. The views expressed on this Notice cannot prejudice any future position of the Commission on the matter. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law.

**Questions related to the scope of the Directive**

1. *Table 1 in the Annex to the Directive lists Refuse collection services among the services included in the scope of the Directive. Aren't refuse collection vehicles excluded from the scope of the Directive in accordance with Article 3(2)(a)?*

Article 3(2)(a) exempts from the scope of the Directive, among others, the vehicles referred to in Article 2(3)(c) of Regulation (EU) 2018/858 <sup>(3)</sup> on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, i.e. 'Any self-propelled vehicle designed and constructed specifically to perform work and that, because of its construction characteristics, is not suitable for carrying passengers or for transporting goods, and that is not machinery mounted on a motor vehicle chassis.'

Refuse collection vehicles do not fall within this category; they are normally type approved as vehicles of category N<sub>2</sub> or N<sub>3</sub>, in accordance with Regulation (EU) 2018/858. As such, they are not exempted from the scope of the Clean Vehicles Directive.

<sup>(1)</sup> OJ L 120, 15.5.2009, p. 5.

<sup>(2)</sup> Directive (EU) 2019/1161 of the European Parliament and of the Council of 20 June 2019 amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles (OJ L 188, 12.7.2019, p. 116).

<sup>(3)</sup> OJ L 151, 14.6.2018, p. 1.

2. *May all vehicles used by e.g. armed forces or police be exempted from the Directive?*

No. In accordance with Article 2 of the Directive read in conjunction with the relevant provisions of Regulation (EU) 2018/858, only those vehicles that have been 'specifically designed and constructed or adapted' for use by those services may be exempted. So, for example, a police van with special equipment and flashing lights can be exempted; on the other hand, a normal van used by the police services to transfer documents from one office to another may not be exempted.

3. *If the police procures regular vehicles with the intent to specifically adapt them to its purposes (i.e. because they have an in-house mechanic), is this covered by the Directive or not? If the police purchases a regular vehicle and in this (or in a separate) procurement procedure also procures services which lead to a specific adaptation, is the procurement of the vehicle covered by the Directive or not?*

In the first case – procurement of standard vehicles to be adapted in-house – the procurement is for a vehicle which is not 'specifically designed and constructed or adapted' for use by the police. Therefore, this procurement may not be exempted from the scope of the Directive.

In the second case – procurement of a vehicle and its subsequent adaptation to the specific needs of the services – if the vehicle and the adaptation services are procured in the same procedure, then the vehicles being procured may be considered as 'specifically adapted' and may therefore be exempted. If the adaptation services are procured separately, however, the procurement of the vehicle will not meet the criteria specified in Article 2 of the Directive, and therefore it may not be exempted.

In this context, it should also be recalled that the Directive defines the minimum national targets as a minimum share of clean vehicles in the aggregate number of vehicles procured in a Member State. Even if a specific set of vehicles falls within its scope, the Directive does not automatically prescribe a minimum percentage for their specific procurement. In the examples above, even if the vehicles fall within the scope of the Directive, the Member State may decide not to set any target for their specific procurement, and ensure that the national target is met by increasing the targets for other fleets accordingly; further details on this aspect are provided in relation to questions about the national targets.

4. *Does the Directive also apply to public service contracts awarded through direct award as defined under Regulation (EC) 1370/2007 (\*) on public passenger transport services by rail and by road?*

Yes. In accordance with Article 3(1)(b) of the Directive, public service contracts under Regulation (EC) 1370/2007 which have as their subject matter the provision of passenger road transport services in excess of a threshold which shall be defined by Member States not exceeding the applicable threshold value set in Article 5(4) of that Regulation, fall within the scope of the Directive, regardless of the procedure used for their award (competitive tendering procedure or direct award).

In this regard, it is important to clarify that the key element to determine whether or not a contract falls within the scope of the Directive is the threshold referred to in Article 3(1)(b) of the Directive, and not the procedure used to award the contract: therefore, a contract for an amount below the threshold set by the Member State may be excluded even if it is awarded through a competitive procedure. On the other hand, if e.g. the Member State sets a lower threshold according to Article 3(1)(b) of the Directive and a direct award is admissible above this (national) threshold, then a direct award may be within the scope of the Directive.

5. *When centralised procurement is applied, the awarded contract might be above the minimum threshold set in the Directive, whereas the individual contracting authority's contracts would have been below the threshold if they had been awarded separately. Can such contracts be exempted from the application of the Directive?*

No. If the total value of the procurement is above the threshold, it shall not be excluded from the scope of the Directive, even though individual elements, taken separately, would have been below the threshold.

6. *In accordance with Article 5(2) of the Directive, the date to be taken into account is the date of the award of the contract. Does this refer to the date of the contract award notice in the TED or conclusion of the contract itself?*

Article 5(2) of the Directive stipulates that 'For the purpose of calculating the minimum procurement targets, the date of the public procurement to be taken into account is the date of completion of the public procurement procedure, by way of awarding of the contract.'; in accordance with this article, the date to be taken into account, is therefore the date of the contract award notice in the TED database.

(\*) OJ L 315, 3.12.2007, p. 1.

7. *Does Article 5(2) mean that contracts whose procedure was launched before the transposition date of Directive (EU) 2019/1161 will be within its scope if their date of award falls after 2 August 2021?*

No. As specified in Article 3(1), the Directive only applies to contracts whose procurement procedure has started after 2 August 2021.

In this context, it should also be noted that contracts whose date of award falls within the second reference period (i.e. after 31 December 2025) will be counted for that period, even though the procurement procedure has started during the first reference period (i.e. between 2 August 2021 and 31 December 2025).

Please see also questions 27-29 for more details about the way this provision applies to individual contracts awarded under Framework Agreements or Dynamic Purchasing.

### Questions related to the clean vehicle definition

8. *Article 4(4)(b) of the Directive defines heavy-duty clean vehicles as heavy-duty vehicles using alternative fuels – as defined in Articles 2(1) and 2(2) of Directive 2014/94/EU (Alternative Fuels Infrastructure Directive) <sup>(5)</sup>. Are hybrid and plug-in hybrid vehicles also included in this definition?*

Article 2(2) of the Alternative Fuels Infrastructure Directive (Directive 2014/94/EU) specifies that “electric vehicle” means a motor vehicle equipped with a powertrain containing at least one non-peripheral electric machine as energy converter with an electric rechargeable energy storage system, which can be recharged externally’. In line with this definition, and in accordance with Article 4(4)(b) of the Directive, heavy-duty plug-in hybrid vehicles are considered as clean vehicles, while non-plug-in hybrid vehicles are not considered as clean heavy-duty vehicles.

9. *Do plug-in hybrid heavy-duty vehicles need to also use alternative fuels (e.g. biofuels) in its internal combustion engine, in order to qualify as clean vehicles in accordance with Article 4(4)(b) of the Directive?*

No. In accordance with Article 4(4)(b) of the Directive, a plug-in hybrid vehicle as defined under Article 2(2) of the Alternative Fuels Infrastructure Directive (Directive 2014/94/EU) is considered as a clean vehicle even if it uses conventional fuels for its internal combustion engine.

This can be further clarified by considering that a plug-in hybrid vehicle will be recharged using electricity; the electricity charging represents the alternative fuel used by the plug-in hybrid vehicle, which allows it to be considered as a vehicle falling within the scope of Article 2(2) of the Alternative Fuels Infrastructure Directive (unlike non-plug-in hybrid vehicles, which are not recharged: in their case, the electricity is exclusively produced on-board, and the vehicle is only fuelled with conventional diesel/petrol).

10. *Do trolleybuses fall within the scope of the Directive? Can they be counted as clean vehicles for the purposes of the Directive?*

Yes. The Directive applies to the award of road transport vehicles. According to Article 4(3) of the Directive, ‘road transport vehicle’ means a vehicle of category M or N, as defined in points (a) and (b) of Article 4(1) of Regulation (EU) 2018/858. The latter refers to ‘motor vehicles’, defined as any power-driven vehicle that is designed and constructed to be moved by its own means, that has at least four wheels, is complete, completed or incomplete, and has a maximum design speed exceeding 25 km/h (Article 3(16) of the Regulation). Trolleybuses comply with this definition and are therefore considered as road transport vehicles in the context of EU type approval legislation. This was confirmed by the Commission services in response to a question by Italy at the sixth meeting of the Type Approval Authorities Expert Group, where it was clarified that trolleybuses were covered - at that time- by Directive 2007/46/EC <sup>(6)</sup> establishing a framework for the approval of

<sup>(5)</sup> OJ L 307, 28.10.2014, p. 1.

<sup>(6)</sup> OJ L 263, 9.10.2007, p. 1. Pursuant to Article 88 of Regulation (EU) 2018/858, Directive 2007/46/EC is repealed with effect from 1 September 2020.

motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles and by UNECE Regulation No 107 <sup>(7)</sup> on uniform provisions concerning the approval of category M<sub>2</sub> or M<sub>3</sub> vehicles with regard to their general construction.

As also explicitly clarified in Recital 18 of the Directive <sup>(8)</sup>, trolleybuses are always considered as clean vehicles in accordance with Article 4(4)(b). If they only run connected to the grid or use a zero-emission engine while not connected thereto, they also count as zero-emission vehicles. If a trolleybus also uses a non-zero-emission engine – e.g. when a diesel engine is used to allow the bus to run while not connected to the grid – then a trolley bus shall not be considered a zero-emission bus, but it is still counted as a clean vehicle, similarly to a plug-in hybrid bus.

11. *Can trams also be counted as clean vehicles under the Directive?*

No. Trams do not fall within the scope of the Directive, as they are part of the railway system and are not considered as road transport vehicles under Regulation (EU) 2018/858. As such, they cannot be counted under the Clean Vehicles Directive.

### **Questions related to the minimum procurement targets**

12. *Does every public procurement contract/every Contracting Authority and Contracting Entity need to meet the minimum targets?*

No. The Directive leaves full flexibility to the Member States in the way they distribute the effort among different Contracting Authorities ('CA') and Contracting Entities ('CE'). A Member State may decide to set the same target for all CA/CEs, or higher targets for some and lower targets – or even no target at all – for others, as long as the minimum target is met at national level.

In this context, it should also be noted that – while the Directive does not set requirements for individual contracts – it is possible for each Member State, in the transposition of the Directive, to introduce such requirements (e.g. requiring a minimum share of clean vehicles in each procurement).

Depending on the institutional responsibilities within each Member State, it could be possible to delegate the detailed allocation to different governance levels – for example by setting targets (the same or differentiated) for each region, and allowing them to further differentiate between different CA/CEs within its territory, provided its overall target is met.

Possible examples of how the effort may be shared among different CA/CEs in a Member State could include setting different requirements based on the type of CA/CE involved (e.g. higher targets for national/regional level bodies, lower targets for local ones), on the size of the relevant public administration (e.g. higher targets for larger cities/provinces, lower targets or even no target for smaller ones), on the specific characteristics of different geographical areas (e.g. higher targets for areas with higher GDP/capita, and/or areas that are more subject to air quality problems), or any other approach and criteria that a Member State considers relevant.

13. *Is compliance with the targets assessed on a yearly basis?*

No. Compliance of each Member State with its minimum procurement targets is assessed on the basis of the whole reference period (2 August 2021 to 31 December 2025 and 1 January 2026 to 31 December 2030 respectively), with no differentiation based on when each procurement took place (within the reference period).

However, it should be noted that, in the transposition of the Directive, Member States may decide to require Contracting Authorities and/or Contracting Entities to comply with national targets on a yearly basis.

<sup>(7)</sup> <https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=12920&no=1>

<sup>(8)</sup> 'It should be noted that trolley buses are considered to be zero-emission buses, provided that they run only on electricity or that they use only a zero-emission powertrain when they are not connected to the grid, otherwise they still count as clean vehicles.'

**Practical example – questions 12-13**

The following example illustrates the possible distribution of the effort in a fictional Member State with only three Contracting Authorities ('CA')/Contracting Entities ('CE') on its territory, and a minimum procurement target for buses of 45 % for the first period. In this example, procurement of buses through contracts that fall within the scope of the Directive takes place as follows:

Contracting Authorities/Entities	Number of buses procured in 2021	Number of buses procured in 2022	Number of buses procured in 2023	Number of buses procured in 2024	Number of buses procured in 2025	Total buses procured in the reference period
Contracting Authority/Entity 1	5	0	10	20	10	<b>45</b>
Contracting Authority/Entity 2	0	10	0	0	5	<b>15</b>
Contracting Authority/Entity 3	10	10	5	5	10	<b>40</b>
Total MS	15	20	15	25	25	<b>100</b> <b>Target = 45</b>

In order to ensure compliance with the Directive, this Member State needs to ensure that 45 out of the 100 buses that are procured during the reference period are clean vehicles. This could be achieved in several different ways, such as, for example:

- By setting a 45 % minimum target for all three CA/CE; in this case, CA/CE 1 would be required to buy 20 clean buses out of 45, CA/CE 2 7 out of 15, and CA/CE 3 18 out of 40, for a total of 45 out of 100
- By setting a 100 % target for CA/CE 1, and no requirement for the two other CA/CEs; this would also lead to a total of 45 clean buses out of 100
- By setting a 50 % target for CA/CE 1 and 3, and a 30 % target for CA/CE 2, leading to a total of 46 clean buses out of 100
- By setting a 60 % target for CA/CE 1 and 3, and no target for CA/CE2 (total 51 clean buses out of 100)

In all these cases, for the purposes of the Directive it would make no difference when the clean buses are procured within the period (i.e. a bus will be counted in the same way irrespective of whether it is procured in 2022 or in 2025). This does not however prevent the Member State from setting yearly requirements at national level.

14. *The Directive covers different types of contracts, including purchase, lease, rent of the vehicles, as well as public service and service contracts; Articles 5(4) and 5(5) of the Directive specify that the number of vehicles under each contract should be counted differently in the case of purchase/lease/rent or hire-purchase of vehicles (Article 5(4)) and of public service and service contracts (Article 5(5)). Should the vehicles in these different types of contracts be counted all together or separately for the purpose of meeting the targets?*

As reflected in tables 3 and 4 in the Annex to the Directive, one minimum target is set per vehicle category (i.e. light-duty vehicles, trucks, buses) for each Member State, without differentiating between different types of contract (i.e. vehicle purchase, rent, services, etc.).

In accordance with Article 5(1) of the Directive, these minimum targets are calculated as minimum percentages of clean vehicles in the total number of road transport vehicles covered by the aggregate of all contracts within the scope of the Directive, without differentiating between the different types of contract (i.e. vehicle purchase, rent, hire-purchase, service contract, etc.).

Articles 5(4) and 5(5) of the Directive clarify how the number of vehicles covered by each individual contract should be counted for different contract types (e.g. vehicle purchase or service contracts). Once the number of vehicles under each individual contract is calculated in accordance with these provisions, compliance with the targets can be verified on the basis of the sum of all procured vehicles under all the relevant contracts, and the share of clean vehicles out of this total.

### Questions related to vehicle purchase by service providers under public service contracts

15. *How are vehicles to be counted under a public service contract? Should we consider the purchases of new vehicles by the service provider? How can these be monitored?*

In accordance with Article 5(5) of the Directive, in the case of services contracts referred to in Articles 3(1)(b) and 3(1)(c) – i.e. public service contracts and the services contracts listed in Table 1 of the Annex to the Directive – all the vehicles to be used for the provision of the service in question must be counted.

This approach ensures a coherence between the two different methods of procurement (purchase/lease/hire-purchase as referred to in Article 3(1)(a) and public service and service contracts as referred to respectively in Article 3(1)(b) and (c)), and minimises administrative burden.

A purchase/lease/hire-purchase contract represents the procurement of a certain number of vehicles by a Contracting Authority/Contracting Entity; for that reason, all vehicles covered by such a contract are counted. In a similar way, through a service contract, a Contracting Authority/Contracting Entity is procuring the use of a certain number of vehicles to provide a service; the number of vehicles that the service provider will use to provide that service will therefore be counted, irrespective of whether the service provider is buying new vehicles or using existing ones.

16. *If the service contract is concluded for a period of time longer than the reference period, shall the vehicles used be counted for the following reference period as well?*

No. As specified in Article 5 of the Directive, the date of awarding of the contract determines in which reference period the procured vehicles should be counted. Even though a service contract signed during the first reference period may still be in force during the second period, the vehicles under that contract will only count for the first period.

17. *In the case of a service contract, how shall the vehicles used for the performance of the service be counted if their number changes over time (regular changes or one-off changes) during the reference period?*

The number of vehicles to be used in the provision of the services covered by the contract will be registered at the time of awarding the contract.

Substantial changes to the number of vehicles used will typically have budget implication, and require some form of revision or amendment of the contract, which should be reported.

Minor changes which do not necessitate a modification of the contract will not be recorded under the Directive; while this means that the final number of vehicles reported under the Directive might not be fully accurate, it was considered by the co-legislators that this represents a good compromise between accuracy and the amount of administrative burden that would be required in order to ensure a full monitoring in real-time.

18. *What happens if the service provider of a public service or servicecontract referred to in Articles 3(1)(b) or 3(1)(c) is itself also a Contracting Entity ('CE') or Contracting Authority ('CA') subject to the obligations laid down in Directives 2014/24/EU <sup>(9)</sup> on public procurement and 2014/25/EU <sup>(10)</sup> on procurement by entities operating in the water, energy, transport and postal services sectors? Do it have to also register the purchase of new vehicles that are used to provide the service?*

If the service provider is subject to the obligation to apply the procurement procedures set out in Directive 2014/24/EU or Directive 2014/25/EU, so that they apply to purchases of the vehicles that are used in the provision of the service, the Clean Vehicles Directive also applies to those purchases.

<sup>(9)</sup> OJ L 94, 28.3.2014, p. 65.

<sup>(10)</sup> OJ L 94, 28.3.2014, p. 243.

In this regard, it should also be recalled that the Directive only applies to contracts that fall within the scope of Directives 2014/24/EU and 2014/25/EU or of Regulation (EC) 1370/2007; if a contract between two CA/CEs does not fall within the scope of these legal instruments, then it is also outside the scope of the Clean Vehicles Directive. In this case, however, the procurement of vehicles by the latter CA/CE would still fall within the scope of the Clean Vehicle Directive (unless it is excluded due to other circumstances).

### Practical examples – questions 15-18

The following examples illustrate how the points described in questions 15, 16, 17 and 18 will work in practice:

Case 1: during the reference period, a Contracting Authority purchases 10 buses. All 10 buses are counted for the purpose of the minimum procurement target.

Case 2: during the reference period, a Contracting Authority awards a contract to run its bus network to an entity, which is not a Contracting Authority or Contracting Entity as defined in Directives 2014/24/EU and 2014/25/EU; the contract foresees that this will require the use of 10 buses. All those 10 buses count for the purpose of the target, irrespective of whether the service provider buys new buses or uses existing ones; eventual replacements of buses will not count for the purpose of the minimum procurement target, and do not need to be monitored/registered.

Case 3: during the reference period, a Contracting Authority awards a contract to run its bus network to another Contracting Authority or Contracting Entity, which is subject to the requirements of Directives 2014/24/EU and 2014/25/EU; the contract foresees that this will require the use of 10 buses. All those 10 buses count for the purpose of the target, irrespective of whether the service provider buys new buses or uses existing ones. Additionally, if during the reference period the second Contracting Authority/Contracting Entity procures one or more buses (e.g. buys a new bus to replace one of those used under the services contract), this will also be counted for the purpose of the minimum procurement target and should be reported accordingly. Please note that in this case the purchase of the bus by the second Contracting Authority/Contracting Entity would count irrespective of whether or not they are used in the services contract.

Case 4: during the reference period, a Contracting Authority awards a contract to run its bus network to another Contracting Authority or Contracting Entity, which is subject to the requirements of Directives 2014/24/EU and 2014/25/EU. The services contract foresees that this will require the use of 10 buses; however, this contract is outside the scope of those two Directives. In this case, no vehicles will be registered for the services contract, as it is outside the scope of the Directive; however, if during the reference period the second Contracting Authority/Contracting Entity procures one or more buses (e.g. buys a new bus to replace one of those used under the services contract), this will also be counted for the purpose of the minimum procurement target and should be reported accordingly. Please note that in this case as well the purchase of the bus by the second Contracting Authority/Contracting Entity would count irrespective of whether or not they are used in the services contract.

### Questions related to retrofitting

19. *In accordance with Article 5(3) of the Directive, retrofitted vehicles that meet the definition of clean and/or zero-emission vehicle may be counted for the purpose of meeting the minimum procurement targets. How should the number of retrofitted vehicles be reflected in the TED database and reporting?*

It is expected that in most cases the retrofitting of vehicles will not be visible in the TED database – e.g. because it is performed in-house, or because it is the subject of a service contract outside the scope of the Directive. The Directive offers Member States the possibility of using retrofitting as a cost-effective way to meet the targets, but in most cases the use of this option will need to be reported separately, outside the collection of information from TED that will be performed by the Commission.

In this regard, it should be recalled that, in accordance with Article 10(2) of the Directive, Member States shall submit to the Commission a Report on the implementation of the Directive, including the number and the categories of vehicles covered by the relevant contracts, based on the data provided by the Commission from the TED Database. Compliance with the minimum procurement targets will be assessed primarily on the basis of this Report, and not only on the basis of the figures extracted from the TED Database by the Commission.

If retrofitting is used to meet the minimum procurement targets, and is not reflected in the figures reported in the TED database, Member States should collect from the relevant Contracting Authorities and Contracting Entities, and include in the Report referred to in Article 10(2), the number of vehicles (for each category) that meet the definition of clean vehicle and/or zero-emission vehicle as a result of retrofitting. In this way, those vehicles will be taken into account for the purpose of assessing compliance with the minimum procurement targets.

20. *How should retrofitted vehicles be counted in practice, in the case where vehicles that had already been procured before the reference period are retrofitted to meet the clean vehicle definition during the reference period? And in the case where new non-clean vehicles are purchased and then retrofitted within the same reference period?*

Both the retrofitting of vehicles that were procured before the beginning of the reference period and the purchase and subsequent retrofitting of vehicles during the same reference period can be counted, although the way this should be done and their effective impacts in terms of the minimum procurement targets would be slightly different, as shown in the following examples.

#### **Practical examples – question 20**

##### Case 1

A Contracting Authority purchases 10 new diesel buses during the reference period. For the purpose of the minimum procurement targets, it has procured 10 vehicles, of which none are clean.

##### Case 2

A Contracting Authority purchases 10 new battery-electric buses during the reference period. For the purpose of the minimum procurement targets, it has procured 10 clean (zero-emission) vehicles.

##### Case 3

A Contracting Authority owns 10 diesel buses, which were procured before the entry into force of the new Directive. During the reference period, it retrofits them to run exclusively on electricity. For the purpose of the minimum procurement targets, it has procured 10 clean (zero-emission) vehicles. In this sense, the impact of this case is effectively the same as that of case 2.

##### Case 4

A Contracting Authority purchases 10 new diesel buses during the reference period; it then retrofits them to battery-electric during the same period. In this case, two separate procurements will be recorded: first, the procurement of 10 non-clean vehicles (same as in case 1), then the procurement (through retrofitting) of 10 zero-emission clean vehicles (same as in case 3). So, in total this will be counted as the procurement of 20 vehicles, of which 10 are zero-emission and 10 are non-clean.

#### **Questions related to the use of the TED Database**

21. *How will the TED database be used to monitor the implementation of the Directive? What are Contracting Authorities and Contracting Entities required to encode in the TED database for the purposes of the Directive?*

For every procurement that falls within the scope of the Directive, the information that needs to be collected is the following: the total number of vehicles covered by the procurement; the number of vehicles (out of this total) which qualify as 'clean vehicles' as defined in Article 4(4) of the Directive, and the number of vehicles (out of the total number of vehicles) that qualify as 'zero-emission heavy-duty vehicles' in accordance with Article 4(5) of the Directive.

This information is known at the time of award of the contract, and it is often already provided in one of the open text fields of the TED database. Since there is currently no requirement to provide this information, however, this is not always the case; furthermore, even when this information is provided in the TED database, it is not always encoded in the same text field, as there is no clear requirement in this sense. At the moment, it is therefore not possible to retrieve this information automatically from the TED database, and the manual extraction of the relevant information is very time-consuming.



For these reasons, the next version of the eForms, introduced by Commission Implementing Regulation (EU) 2019/1780 <sup>(1)</sup> establishing standard forms for the publication of notices in the field of public procurement, will include the following three fields, for all contracts with a CPV code relevant to the Directive:

- BT-715 Vehicles – The number of all vehicles (regardless of whether clean or not) falling within the scope of Directive 2009/33/EC. These vehicles have either been purchased, leased, rented, hired-purchased or their use has been contractually committed to for the provision of a purchased service falling within the scope of the Directive 2009/33/EC.
- BT-716 Vehicles Clean – The number of clean vehicles as defined by and falling within the scope of Directive 2009/33/EC. These vehicles have either been purchased, leased, rented, hired-purchased, or their use has been contractually committed to for the provision of a purchased service falling within the scope of Directive 2009/33/EC..
- BT-725 Vehicles Zero Emissions – The number of zero-emission heavy-duty vehicles as defined by and falling within the scope of Directive 2009/33/EC. These vehicles have either been purchased, leased, rented, hired-purchased or their use has been contractually committed to for the provision of a purchased service falling within the scope of Directive 2009/33/EC.

Once these new eForms are in place, it will be possible to automatically extract the number of road transport vehicles and the number of clean and zero emissions road transport vehicles. This will make registration and monitoring of orders easier for all Member States. The Commission will collate this information and publish it on its website.

It should be noted that the fields mentioned above (BT-715, BT-716 and BT-725), which will be used for monitoring via eForms, are optional. If Member States intend to allow the monitoring of the Directive implementation through the TED database, it is recommended that they make these fields mandatory at national level. If these fields are not used in a Member State, some form of dedicated monitoring and reporting system will need to be set up at national level.

22. *Member States are required to bring into force the laws, regulations and administrative provisions necessary to comply with Directive 2019/1161 by 2 August 2021; however, the new eForms including the dedicated fields in the TED database will only be available as of 14 November 2022. How will progress be monitored in the meantime?*

The inclusion of the dedicated fields (number of vehicles, number of clean vehicles, number of zero-emission vehicles) in the new eForms will allow the automatic extraction of information from the TED database. For the period between the end of the transposition period (2 August 2021) and the putting in place of the new eForms for TED, the information about the number of vehicles, clean vehicles and zero-emission vehicles covered by each contract can be encoded in text field II.2.14) 'Additional information'. In the transposition and implementation of the Directive, Member States are encouraged to specify that this free text field should be used for this purpose in order to facilitate the collection of this information.

23. *In the context of the Contract award notices published in the TED, a problem could arise in contracts that cover vehicles of different categories, for which different percentages are fixed (e.g. buses and cars). In such a case, how should the Contracting Authority/Contracting Entity report the procurement?*

Based on current experience, we expect only a relatively limited number of contract award notices to be concerned by this issue. In general, Contracting Authorities and Contracting Entities should be encouraged to use separate lots for different vehicle categories when possible.

In those cases where a contract award notice needs to cover different vehicle categories, we recommend the following approach:

- Include the CPV codes for both vehicle categories; select as main CPV code the one for the vehicle category with the largest number of vehicles involved, and the one(s) for other vehicle categories as secondary CPV codes (so e.g. if the notice concerns 10 buses and 5 vans, choose as main CPV code the one for buses, and as secondary CPV code the one for vans)
- Only record in the dedicated fields the number of vehicles of the category with the largest numbers involved (so e.g. if the notice concerns 10 buses and 5 vans, only include the 10 buses)
- Include the number of other vehicles in field II.2.14) 'Additional information'

<sup>(1)</sup> OJ L 272, 25.10.2019, p. 7.

24. *What happens when a Contracting Authority or Contracting Entity uses the eForms of the TED database for contracts that are outside the scope of the Directive, e.g. because they are below the minimum thresholds, or because the procured vehicles are exempted from the scope of the Directive? How can we avoid that the vehicles covered by these contracts are counted for the purpose of the minimum procurement targets under the Directive despite being out of its scope?*

If an eForm is used for a contract that does not fall within the scope of the Directive (e.g. because its value is below the threshold), the dedicated fields (number of procured vehicles within the scope of the Directive, number of clean vehicles, number of zero-emission vehicles) should either be left empty or filled in with '0', so that the corresponding number of vehicles will not be counted when extracting the figures from the TED database.

25. *Article 3(1)(b) of the Directive allows Member States to determine a minimum threshold for public services contracts, which can be equal to or lower than the one set in Article 5 (4) of Regulation (EC) 1370/2007. If a Member State sets a lower threshold, how can these contracts be monitored in the TED database?*

If a Member State decides to set a lower threshold, in principle it should be possible to encode public service contracts with a lower value than the EU threshold referred to in Article 5(4) of Regulation (EC) 1370/2007 in the TED database.

If a given contract already has to be registered in the TED database under national rules, it is easy to encode the number of road vehicles in the relevant eForm with minimum additional administrative burden.

If a contract does not currently have to be reported, different options are available for reporting; all, however, entail a certain level of administrative burden:

- Member States may require that contract to be reported in the TED database.
- Alternatively, Member States may require contracting authorities and contracting entities to report the number of road vehicles (and clean and zero-emission road vehicles) in these contracts at national level; the Member State could then include these figures in the national report without using the TED database. The need to have a parallel reporting for the number of vehicles covered by these relatively small contracts would also imply a certain level of additional administrative burden.

We would invite Member States to take into account the respective merits and impacts of these different options when deciding on this issue in the context of the transposition of the Directive.

### **Questions related to procurement started before the end of the transposition period**

26. *Are ongoing services contracts signed before 2 August 2021 affected by the Directive? How should the replacement of vehicles in the framework of these contracts be treated?*

Framework contracts or public service contracts for public transport services that were concluded before 2 August 2021 do not fall within the scope of the Directive. Furthermore, as explained in relation to question 13 above, even if a services contract falls within the scope of the Directive, the number of vehicles to be taken into account for the purpose of the minimum procurement target is the number of vehicles to be used to provide the service, and not the number of vehicles that might be replaced by the service provider during the contract.

However, as explained in more detail in relation to question 14 above, the service provider might be required to report the purchase of vehicles, if it is itself a Contracting Authority or Contracting Entity subject to the requirements of Directives 2014/24/EU or 2014/25/EU.

**Practical examples – questions 17, 18 and 26**

Case 1: before 2 August 2021, a Contracting Authority has awarded a contract to run its bus network to an entity, which is not a Contracting Authority or Contracting Entity as defined in Directives 2014/24/EU and 2014/25/EU. The service contract is outside the scope of the Directive and is not counted for the purpose of the minimum procurement targets. None of the buses involved in the contract count for the purpose of the target; eventual replacements of buses will also not be counted, and do not need to be monitored/registered.

Case 2: before 2 August 2021, a Contracting Authority has awarded a contract to run its bus network to a public transport agency, which is also a Contracting Authority or Contracting Entity subject to the requirements of Directives 2014/24/EU and 2014/25/EU. The service contract is outside the scope of the Directive and is not counted for the purpose of the minimum procurement targets. However, the procurement of buses by the public transport agency falls within the scope of the Directive. Therefore, if during the reference period the agency replaces one or more of the buses used to provide the service, this purchase will be counted for the purpose of the minimum procurement target and should be reported accordingly (please note that in this case the purchase of the bus would count irrespective of whether they are used for the service contract).

**Questions related to the application of the Directive to Framework Agreements and Dynamic Purchasing Systems****27. How are the requirements of the Directive applied to tendering under the Dynamic Purchasing System or within Framework Agreements?**

The Directive applies to individual contracts awarded within a Framework Agreement or under Dynamic Purchasing Systems. The individual contract award notices should be considered for the purposes of the Directive, in line with the provisions of Article 5(2). They can be reported as follows:

- For Dynamic Purchasing Systems, in accordance with Article 50(3) of Directive 2014/24/EU, ‘Contracting authorities shall send a contract award notice within 30 days after the award of each contract based on a dynamic purchasing system. They may, however, group such notices on a quarterly basis. In that case, they shall send the grouped notices within 30 days of the end of each quarter.’
- For individual contracts within a Framework Agreement, the way eForms can be used is clarified in the eForms Policy Implementation Handbook; please see in particular the following extract from the Handbook:

‘eForms could be used for the publication of contract award notices for individual contracts within a framework agreement, every quarter (and reference to the notice setting the framework agreement) which is not required by the Procurement Directives \*. This obligation can be further segmented depending on the type of framework agreement: e.g. for all framework agreements, or only for framework agreements with multiple economic operators.

Publishing contract award notices about contracts awarded within framework agreements is necessary for ensuring transparency about the actual amount of taxpayers’ money being spent and, in the case of framework agreements with multiple economic operators, for ensuring additional transparency on who is actually receiving the money. (In addition, it is necessary for precise measuring of vehicles purchases under the Clean Vehicles Directive).

\* This is done in eForms by publishing a contract award notice with repeated Tender (BG-320) and Contract (BG-310).’

28. *Does the Directive apply to tendering under previously established Dynamic Purchasing Systems or Framework Agreement, when the Directive enters into force during the period of validity of the system?*

No. In accordance with Article 3(1) of the Directive, only contracts whose call for competition has been sent after 2 August 2021 fall within its scope. A Dynamic Purchasing System or Framework Agreement whose call for competition was sent before that date would therefore fall outside the scope of the Directive, even though individual contracts based on that dynamic purchasing system might be awarded after that date. Please see also question 7.

29. *If a Framework Agreement or Dynamic Purchasing System is established during the first reference period, but individual contracts are awarded during the second period, for which period should the corresponding vehicles be counted?*

In accordance with Article 5(2) of the Directive, the date to be considered is the date of award of the contract. In the case of Framework Agreements or Dynamic Purchasing Systems, this is the date of award of the individual contracts. Therefore, in the case of individual contracts awarded during the second reference period as part of a Framework Agreement or Dynamic Purchasing System which was established during the first reference period, the vehicles concerned will be counted for the second reference period.

Please see also question 7.

### **Questions related to procurement involving contracting authorities from different Member States**

30. *If joint procurement is organised involving Contracting Authorities/Contracting Entities from different Member States – for example if a European Grouping of Territorial Cooperation organises joint procurement of clean buses on behalf of its members in different Member States – how should this be reported in the TED database, in order to ensure that the vehicles are allocated correctly to the relevant Member State for the purposes of the minimum procurement targets?*

Joint procurement as described above will be recorded as one entry in the TED database; the corresponding vehicles would therefore be automatically allocated to the Member State where the lead Contracting Authority/Contracting Entity is established. In order to ensure that the vehicles are allocated correctly between the Member States involved for the purposes of the minimum procurement targets, the distribution of vehicles, clean vehicles and zero-emission vehicles across Member States should be encoded in field II.2.14) 'Additional information'. The Commission services will then manually correct the counting of these vehicles in the system, to reflect their actual distribution between the Member States involved.

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