

# AN INTRODUCTION TO PUBLIC PROCUREMENT IN LUXEMBOURG

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# SPEAKER



## **Marc THEWES**

Avocat à la Cour,  
Partner at THEWES & REUTER

Chargé de cours associé  
at the University of Luxembourg

Member of the Luxembourg Council  
of State

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# TODAY'S TOPICS

- What is “public procurement”.
- Luxembourg procurement law and what is special about it.
- Presentation of the various tender procedures, with a special focus on :
  - the possibilities for negotiation, and
  - and framework agreements.
- Some practical advice on how to prepare for public procurement.
- A discussion of some of the difficulties raised by electronic tendering
  - electronic signatures, electronic submissions, and
  - electronic invoices.

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# WHAT IS “PUBLIC PROCUREMENT”?

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# DEFINITION

**Public procurement contracts are:**

*“contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services.”*

Art. 3 of the Luxembourg public procurement law

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# DEFINITION

## 4 key elements:

1 **contracts** for 2 **pecuniary interest** concluded in writing between one or more economic operators and one or more 3 **contracting authorities** and having as their object 4 **the execution of works, the supply of products or the provision of services.**”

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# A CONTRACT FOR PECUNIAIRY INTEREST

## 1 A contract?

- Rules out unilateral awards, e.g. if a government orders a public entity to implement a given policy (noting that the public entity will then have to tender out contracts unless it has the capacity *in house* to implement the policy)

## 2 For pecuniary interest?

- A price is paid
- The payment does not necessarily have to be in the form of money

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# CONTRACTING AUTHORITIES

## 3 Contracting authorities?

- A central concept of EU Procurement law, designating

*‘contracting authorities’ means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law*



# CONTRACTING AUTHORITIES

## 3 Contracting authorities?

- A central concept of EU Procurement law, designating

*'contracting authorities' means the <sup>a</sup>State, regional or local authorities, <sup>b</sup>bodies governed by public law or <sup>c</sup>associations formed by one or more such authorities or one or more such bodies governed by public law*

# CONTRACTING AUTHORITIES

## 3 **Contracting authorities?**

### b *Bodies governed by public law*

*“Bodies that have all of the following characteristics:*

*(a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;*

*(b) they have legal personality; and*

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# CONTRACTING AUTHORITIES

## 3 Contracting authorities?

### b Bodies governed by public law

*(c) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.”*

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# CONTRACTING AUTHORITIES

## 3 Contracting authorities?

*'contracting authorities' means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law*

# CONTRACTING AUTHORITIES

## 3 Contracting authorities?

- The Luxembourg State (for the most part the Ministry of Health) for vaccines and the implementation of other prevention policies
- Hospitals, including “private” hospitals because they are *bodies governed by public law*, mainly due to how they are financed

# CONTRACTING AUTHORITIES

## 3 Contracting authorities?

- the Federation of Luxembourg Hospitals (“FHL”), which is an *association* of hospitals and operates as a *central purchasing body* on behalf of its members.

4. de représenter ses membres vis-à-vis de tiers pour les prises de position et actions décidées en commun et de mener pour le compte de ses membres les négociations en vue de la passation de conventions de tous genres avec des tiers,

# CONTRACTING AUTHORITIES

## 3 Contracting authorities?

A new player...

- The Grouping of Acute Hospitals (“*Groupement des hôpitaux aigus*” or “GHA”), an *association* of the four large hospitals (CHEM, HRS, CHL CHdN)

L'association a pour objet:

1. la reprise du stock national d'équipement de protection individuelle, de matériel et de médicaments pour les établissements hospitaliers et le secteur de la santé et des soins ainsi que le réapprovisionnement et la gestion à l'avenir de ce stock;

# CONTRACTING AUTHORITIES

## 3 Contracting authorities?

And...

- The High Commission for National Protection (“*Haut-Commissariat à la Protection Nationale*” or “HCPN”),

pour les marchés de la protection nationale :

- pour les fournitures ou services qui sont déclarés secrets ;
- pour les fournitures ou services nécessaires à la protection des intérêts vitaux ou des besoins essentiels de tout ou partie du pays ou de la population, et en particulier les fournitures ou services relatifs à la prévention et la gestion de crises ;
- pour les fournitures d'effets d'équipement et de matériel d'intervention ainsi que d'effets personnels de protection et de sécurité des membres des unités d'intervention.



# CONTRACTING AUTHORITIES

## 3 Contracting authorities?

Another new player...

- The Grand-Ducal Fire and Rescue Corps (“*Corps grand-ducal d’incendie et de secours*” or “GCDIS”).
  - Newly authorised by a law of 20 July 2020 to hold stocks of medicines
  - Is a public establishment created by a law in 2018, i.e. a contracting authority
  - Buys its supplies directly

Pour ce qui est du paragraphe 1<sup>er</sup>, points 5<sup>o</sup> et 6<sup>o</sup>, et sans préjudice des dispositions spécifiques applicables aux services de l’État, l’approvisionnement de médicaments peut se faire auprès du fabricant, de l’importateur, du titulaire d’autorisation de distribution en gros de médicaments ou d’une autorité compétente d’un autre pays.

# WORKS, SUPPLIES OR SERVICES

**4** the execution of works, the supply of products or the provision of services?

- Relevant because different thresholds and different procedures apply
- Worth noting that contracts are often “mixed”, i.e. they combine supplies and services

# COMMENTS

- Any contract for the supply of medicinal products to a « contracting authority » is a public procurement contract, even when no formal procedure (i.e. call for tenders) was followed.
- The number a formal procedures for the procurement of medicinal products is on the increase, and it is a trend that is likely to continue.

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# LUXEMBOURG PUBLIC PROCUREMENT LAW

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# **A COMPLEX LEGAL FRAMEWORK**

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# EUROPEAN BACKGROUND

## Mainly :

- Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (**General Directive**)
- Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of **review procedures concerning the award of public contracts**

## Of lesser relevance :

- Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the **water, energy, transport and postal services** sectors
- Directive 2009/81/CE of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of **defence and security**

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# LUXEMBOURG LEGISLATION

## Mainly :

- The Law of 8 April 2018 on **public procurement**, divided into three main “Books”:
  - Book I : General provisions
  - Book II : Provisions relating to public procurement of a certain importance
  - Book III : Provisions specific to public contracts in the water, energy, transport and postal services sectors
- The Grand-Ducal Regulation of 8 April 2018 **implementing** the Law of 8 April 2018 on public procurement
- The Grand-Ducal Regulation of 27 August 2013 regarding the **use of electronic means** in public procurement procedure (as amended in 2019)
- The Law of 10 November 2010 regarding **review procedures** concerning the award of public procurement contracts (as amended in 2018)

# LUXEMBOURG LEGISLATION

## Of lesser relevance :

- Loi du 26 décembre 2012 sur les marchés publics de **défense** et de **sécurité**
- Loi sur les marchés publics du 25 juin 2009 (no longer in force but still applicable to tenders initiated before the 2018 Law)



# UNDERSTANDING HOW IT WORKS

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# SECTORS AND THRESHOLDS

- Which rules apply firstly depends on the “Activity sector” of the Contracting authority
  - National Defence ?
  - Water, energy, transport or postal services ?
  - Otherwise : The General rules apply, i.e. Books I and II of the 2018 Law
- Within Books I and II, which rules apply depends on whether the “estimated value” of the proposed procurement is above or below certain “thresholds”

# THE CURRENT THRESHOLDS

GENERAL REGIME (Books I and II)	Since 1 January 2020
Services and supplies for « Central Government Authorities » (the State, including the HCPN)	139 000 €
Services and supplies for « Sub-central contracting authorities » (everybody else, including hospitals, FHL, etc.)	214 000 €
Services for Social services and other Specific Services Listed in Annex I	750 000 €
Works (e.g. construction of buildings)	5 350 000 €

(This is a simplified presentation)

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# HOW THE THRESHOLDS WORK

Estimated value:  
Below 139 000 € / 214 000 €

Book I

Estimated value:  
Above 139 000 € / 214 000 €

Book II  
+ Book I

whenever there are no rules specific to Book II

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# THE CORRECT VALUATION OF THE CONTRACT

## **Art. 12(5) of the 2018 Public Procurement Law**

In principle, the valuation should be based on the total amount payable under the contract :

*The calculation of the estimated value of a procurement shall be based on the total amount payable, net of VAT, as estimated by the contracting authority, including any form of option and any renewals of the contracts as explicitly set out in the procurement documents.*

*Where the contracting authority provides for prizes or payments to candidates or tenderers it shall take them into account when calculating the estimated value of the procurement.*

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# THE CORRECT VALUATION OF THE CONTRACT

## **Art. 12(5) of the 2018 Public Procurement Law**

If there are several lots, their value must be added up:

*Where a proposed work or a proposed provision of services may result in contracts being awarded in the form of separate lots, account shall be taken of the total estimated value of all such lots.*

In the case of framework agreements:

*With regard to framework agreements and dynamic purchasing systems, the value to be taken into consideration shall be the maximum estimated value net of VAT of all the contracts envisaged for the total term of the framework agreement or the dynamic purchasing system.*

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# THE CORRECT VALUATION OF THE CONTRACT

## Art. 12(5) of the 2018 Public Procurement Law

For repeat purchases, a reference period of 12 months is used:

*In the case of public supply or service contracts which are regular in nature or which are intended to be renewed within a given period, the calculation of the estimated contract value shall be based on the following:*

- a) either the total actual value of the successive contracts of the same type awarded during the preceding 12 months or financial year adjusted, where possible, to take account of the changes in quantity or value which would occur in the course of the 12 months following the initial contract;*
- b) or the total estimated value of the successive contracts awarded during the 12 months following the first delivery, or during the financial year where that is longer than 12 months.*

# THE CORRECT VALUATION OF THE CONTRACT

## Art. 53 of the 2018 Public Procurement Law

*The choice of the method used to calculate the estimated value of a procurement shall not be made with the intention of excluding it from the scope of this Directive. A procurement shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons.*

The tendering authority must not underestimate its need or split up the contract.

The valuation must be based on objective criteria, such as :

- Knowledge carried over from a previous tender
- Market consultation
- Expert advice
- Public price

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# THE CORRECT VALUATION OF THE CONTRACT

## Art. 53 of the 2018 Public Procurement Law

*The choice of the method used to calculate the estimated value of a procurement shall not be made with the intention of excluding it from the scope of this Directive. A procurement shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons.*

Possible methods :

- Knowledge carried over from a previous tender
- Market consultation
- Expert advice
- Public price

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# A KEY FACTOR :THE DURATION OF THE CONTRACT

## Art. 16 of the 2018 Public Procurement Law

*Public contracts may not be concluded for a term exceeding the duration of the fiscal year, except in one of the following cases;*

- a) in the case of public contracts relating to rental, leasing and hire-purchase leases;*
- b) when due to the importance or the specialty of the works, supplies or services, the contracts cannot be carried out during the financial year in which they are concluded. In this case, the duration must be adapted to the nature of the contract to either hold account of the effective completion time of the works, supplies or services, i.e. to optimize the economic conditions completion of the contract. However, the duration of these contracts cannot exceed 10 years, not including the one at during which the contracts were concluded;*
- c) in the case of very large-scale works, supplies or services (...)*

# A KEY FACTOR :THE DURATION OF THE CONTRACT

## Maximum duration

- General rule: 10 years (Art. 16 of the 2018 Law)
- Framework agreements: 4 years (Art. 22 of the 2018 Law)
- Negotiated procedures without publication: 3 years (Art. 64 of the 2018 Law)

# **WHAT'S DIFFERENT BETWEEN BOOKS I AND II ?**

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# KEY DIFFERENCES BETWEEN BOOKS I AND II

## **Publicity and transparency**

- Book I tenders are published only in Luxembourg (on the Public procurement portal and in the daily press) vs Book II tenders are published on TED, then locally. Note : It is possible to voluntarily publish Book I tenders also on TED but this is not common.
- Book I awards are not published

# KEY DIFFERENCES BETWEEN BOOKS I AND II

## Available procedures (I/2)

- Book I is very flexible for small tenders
  - Up to an estimated value of 60 000 € not formal requirement applies (no tender notice, the purchasing authority can negotiate directly with any supplier).
  - For an estimated value between 60 000 € and 123.121,60 € (the second figure is adjusted to inflation annually) an added requirement to invite at least three tenders applies, but there is still no publicity and
- If the value exceeds 123.121,60 € the flexibility ends and the rule is that “contracting authorities (must), as a rule, conclude their contracts of works, supplies and services through the open procedure”. Other procedures are available only in specific circumstances.

# KEY DIFFERENCES BETWEEN BOOKS I AND II

## Available procedures (2/2)

- In Book I it is an “all or nothing” approach : either the purchasing authority enjoys almost complete freedom, or they have to adhere to a strict open procedure.
- In Book II, on the other hand, intermediate procedures are admissible under conditions that are relatively easy to meet (e.g. the need to adapt an existing solution, or “specific circumstances related to the nature, the complexity or the legal and financial make-up ”). These are :
  - Competitive procedure with negotiation
  - Competitive dialogue

# KEY DIFFERENCES BETWEEN BOOKS I AND II

## Electronic tendering

- In Book II tenders electronic submissions are compulsory:
  - Submissions must be made using the Public procurement platform
  - The signatures on the Submission must be in electronic form (more on that later)
  - Exceptions are only admissible in specific instances, set out in the Law
- In Book I tenders paper submissions remain possible :
  - Submissions are in paper form unless the contracting authority specifies otherwise in the tender documents
  - In practice, most contracting authorities opt for electronic tendering



# PROCUREMENT PROCEDURES

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# **TYPOLOGIES**

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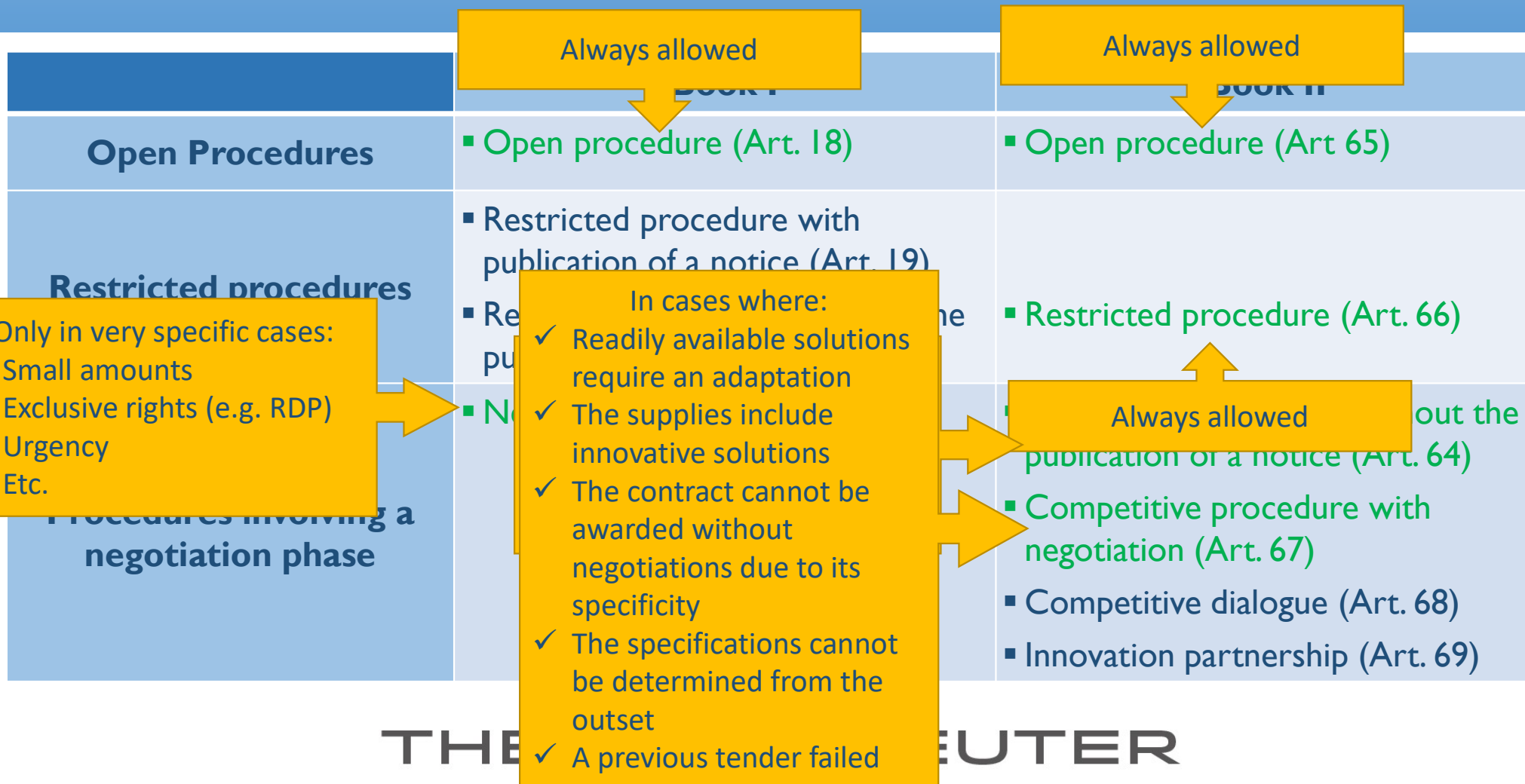
# OVERVIEW

	Book I	Book II
Open Procedures	<ul style="list-style-type: none"><li>▪ Open procedure (Art. 18)</li></ul>	<ul style="list-style-type: none"><li>▪ Open procedure (Art 65)</li></ul>
Restricted procedures	<ul style="list-style-type: none"><li>▪ Restricted procedure with publication of a notice (Art. 19)</li><li>▪ Restricted procedure without the publication of a notice (Art. 20)</li></ul>	<ul style="list-style-type: none"><li>▪ Restricted procedure (Art. 66)</li></ul>
Procedures involving a negotiation phase	<ul style="list-style-type: none"><li>▪ Negotiated procedure (Art. 20)</li></ul>	<ul style="list-style-type: none"><li>▪ Negotiated procedure without the publication of a notice (Art. 64)</li><li>▪ Competitive procedure with negotiation (Art. 67)</li><li>▪ Competitive dialogue (Art. 68)</li><li>▪ Innovation partnership (Art. 69)</li></ul>

# OVERVIEW

	Book I	Book II
Open Procedures	<ul style="list-style-type: none"><li>▪ Open procedure (Art. 18)</li></ul>	<ul style="list-style-type: none"><li>▪ Open procedure (Art 65)</li></ul>
Restricted procedures	<ul style="list-style-type: none"><li>▪ Restricted procedure with publication of a notice (Art. 19)</li><li>▪ Restricted procedure without the publication of a notice (Art. 20)</li></ul>	<ul style="list-style-type: none"><li>▪ Restricted procedure (Art. 66)</li></ul>
Procedures involving a negotiation phase	<ul style="list-style-type: none"><li>▪ Negotiated procedure (Art. 20)</li></ul>	<ul style="list-style-type: none"><li>▪ Negotiated procedure without the publication of a notice (Art. 64)</li><li>▪ Competitive procedure with negotiation (Art. 67)</li><li>▪ Competitive dialogue (Art. 68)</li><li>▪ Innovation partnership (Art. 69)</li></ul>

# OVERVIEW



THE TENDER

# **FOCUS ON: NEGOTIATION**

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# TYOLOGY

## **Negotiated procedures**

- Direct negotiation with operators.
- Considered highly suspicious
- Exceptional/derogatory procedures
- Only accepted in specific instances

**VS**

## **Procedures with a negotiation phase**

- Negotiation with operators who have been selected through an open process.
- Considered a useful tool to achieve the best result
- Fairly widely available in Book II
- Non-existent in Book I

*NEGOTIATED PROCEDURES  
(IN THE STRICT SENSE)*

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# NEGOTIATED PROCEDURES

- Books I, II and III all contain a form of negotiated procedure where
  - the contracting authority freely chooses which economic operators it contacts
  - without having previously published a notice
  - with whom it negotiates the terms of the contract freely (in particular without being held by award criteria determined beforehand).
- Such such are:
  - the “Negotiated procedure” (“procédure négociée”) in of Book I (Art. 20);
  - the “negotiated procedure without prior publication” (“procédure négociée sans publication préalable”) of Book II (Art. 64)
  - And corresponding procedures in Book III and in the Law on Defence Procurement

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# NEGOTIATED PROCEDURES

## **These procedures are exceptional and under surveillance**

- They can only be used in specific circumstances, which are listed limitatively, p.ex.:
  - the failure of a previous tender (no offer was received or all offers received were defective);
  - where there is only one possible supplier
  - for reasons of extreme urgency brought about by unforeseeable events.
- The use of these procedures is subject to supervision:
  - in Book II, a justification report must be sent to the EU Commission
  - in Book I, the advice of the “Commission des soumissions” must be sought (in certain cases at least)

# NEGOTIATED PROCEDURES

## Cases where a negotiated procedure is admissible in Book II (Art. 64(2))

Where no tenders or no suitable tenders or no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered

Where the works, supplies or services can be supplied only by a particular economic operator due to the protection of exclusive rights, including intellectual property rights, but only “when no reasonable alternative or substitute exists”.

In so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with

Where the products involved are manufactured purely for the purpose of research, experimentation, study or development.

For additional deliveries by the original supplier which are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire supplies having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance

*PROCEDURES  
INCLUDING A NEGOTIATION PHASE*

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# PROCEDURES INCLUDING A NEGOTIATION PHASE

- These are procedures where :
  - the contracting authority negotiates the conditions of their offers with several (at least 3) economic operators which have previously been selected in a competitive procedure;
  - award the contract to the economic operator who has submitted the most economically advantageous “Best and final offer” (“BAFO”) applying award criteria which have been previously been set (and which are not open to negotiation).

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# PROCEDURES INCLUDING A NEGOTIATION PHASE

- In Book II procedures are:
  - the “competitive procedure with negotiation” (“Procédure concurrentielle avec négociation”, Art. 67);
  - the “Competitive dialog” (“Dialogue compétitif”, Art 68);
  - the “Innovation partnership” (“Partenariat d’innovation” (Art. 69)
- There are no such procedures in Book I
- Similar procedures exist in Book III and in the Law on Defence Procurement

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# PROCEDURES INCLUDING A NEGOTIATION PHASE

## Conditions for applying these procedures (Art. 65)

Where the needs of the contracting authority cannot be met without adaptation of readily available solutions.

Where the works, supplies or services include design or innovative solutions.

Where the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of the risks attaching to them.

Where the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical references

Where, in response to an open or a restricted procedure, only irregular or unacceptable tenders are submitted. In such situations contracting authorities shall not be required to publish a contract notice where they include in the procedure all of, and only, the tenderers (...) which, during the prior open or restricted procedure, submitted tenders in accordance with the formal requirements of the procurement procedure.

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# PROCEDURES INCLUDING A NEGOTIATION PHASE

## Common characteristics

- selection of participants in an open process;
- a negotiation phase, often with several rounds, during which the participants get the opportunity to improve their offer;
- strict respect of equality and protection of business secrets;
- a minimum number of participants (five in the case of the competitive procedure with negotiation; three for a competitive dialogue) with a possibility to reduce their number gradually during the negotiation;
- predetermined and published award criteria.

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# PROCEDURES INCLUDING A NEGOTIATION PHASE

## **The object of the negotiation**

The topic of the negotiation is different for each type of procedure:

- in a competitive procedure with negotiation the aim is to “improve the content” of the tender offer, i.e. to make it economically more advantageous;
- in a competitive dialogue the aim is “to identify and define the means best suited to satisfying the needs of the contracting authority”, i.e. to find a solution that best answers the needs and requirements set out in the contract notice;
- innovation partnerships are meant to foster the development and subsequent purchase of “an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market”

The contracting authority will chose procedure based on its needs.

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*RENEGOCIATING THE CONTRACT.  
HOW FAR IS IT POSSIBLE TO GO?*

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# CONTRACT MODIFICATIONS

- Public procurement contracts can be modified during their term under the conditions set in Art. 43 of the 2018 Public Procurement Law.
- Best-case scenario: The contract contains an explicit revision clause (Art. 43(I), a)) :

*“Contracts and framework agreements may be modified without a new procurement procedure (...) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options.”*

- No limitation as to the value;
- However, the overall nature of the contract must not change;
- And the clause must be clear, precise and unequivocal.

# CONTRACT MODIFICATIONS

- If there is no revision clause :
  - Small modifications with a cumulative value of up to 10% are allowed (Art. 43(2));
  - The purchase of additional items which were not included in the original contract is allowed for a value of up to 50% of original contract are allowed if a change of contractor is not possible for economic or technical reasons (Art. 43(1), b)).
  - Unforeseen circumstances (“circumstances which a diligent contracting authority could not foresee”) can also justify an increase in value of up to 50%;
  - In general, “non-substantial” modifications are allowed

# CONTRACT MODIFICATIONS

The notion of **non-substantial modification** in Art. 43(1), e) of the 2018 Law comes from the case law of the CJEU (*Succhi di Frutta* and *Presstext* cases)

- if refers to changes which would not have had any impact on the original public procurement procedure if the change had already been made public then (such as : allowing for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or attracting additional operators);
- Only modifications which do not change the economic balance of the contract or the framework agreement in favour of the contractor can be deemed non-substantial.

**FOCUS ON:  
FRAMEWORK AGREEMENTS**

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# FRAMEWORK AGREEMENTS

- Definition (Art. 4 of the 2018 Law)

*A framework agreement means an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.*

- Not a public procurement procedure but rather a purchasing technique that Contracting authorities use to select potential suppliers.
- Framework agreements are concluded in accordance with one of the procedures described in Book I or II. Which book applies depends on the estimated value of the contracts that will be concluded on the basis of the Framework agreement.

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# FRAMEWORK AGREEMENTS

- Advantages of framework agreements:
  - Streamlined procedure (after a single call for competition, the contracting authority can place an order with operators who are part of the framework agreement for 4 years);
  - Protection against price hikes;
  - Ability to meet a random need (unless the procurement documents provide for it, there are no guaranteed quantities)

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# FRAMEWORK AGREEMENTS

- Disadvantages of framework agreements:
  - No guarantee of business for suppliers, unless minimum guaranteed quantities are specified;
  - Suppliers who didn't take part or who were unsuccessful are locked out for a long time
  - Framework agreements are unresponsive to change (new suppliers, new products);

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# FRAMEWORK AGREEMENTS

- 2 Limitations :
  - The duration of a framework agreement cannot exceed 4 years ;
  - According to recent CJEU case law, the contracting authority must, au the outset, publish the presumed quantity or value, and once this is reached, the framework agreement ends:

***the contract notice must indicate the estimated quantity and/or value as well as a maximum quantity and/or value of the products to be supplied under a framework agreement and that once this limit has been reached, the said framework agreement will have exhausted its effects..***

Judgment of the Court (Fourth Chamber) of 17 June 2021, *Simonsen & Weel A/S v Region Nordjylland og Region Syddanmark*, case C-23/20.

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# FRAMEWORK AGREEMENTS

- The contents of a framework agreement:
  - Purpose of the framework agreement: The framework agreement must obviously state with sufficient precision what is its object, that is to say what are the works, services and supplies that the contracting authority subsequently intends to acquire by means of public contracts awarded on the basis of the framework agreement. Only contracts that fall within the scope of the framework agreement may in fact subsequently be awarded under the procedure of Art. 22 of the 2018 Law.
  - Price: Prices do not have to be fixed definitively. They just need to be determinable.
  - Quantities: The contracting authorities do not need to commit to fixed quantities.

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# FRAMEWORK AGREEMENTS

- Contracts based on a framework agreement (call-off contracts)
  - if the framework agreement already defines all the terms of the contract (and, in the case of a framework agreement with several operators, the objective conditions allowing to appoint the successful tenderer), the subsequent contract can be directly awarded without a new notice and competition (Art. 22(3) and 22(4)).
  - if certain terms of the contract remain to be specified, the contracting authority shall proceed either by consulting the economic operator, in the case of a framework agreement concluded with a single company (Art. 22(3), 2)) or by placing the economic operators in competition (Art. 22(4), b) and c)).

# FRAMEWORK AGREEMENTS

- Framework agreements can be concluded with a single operator or with several operators:
  - above all this is a choice dictated by reasons of expediency: some contracts can easily be executed in parallel by several operators while for others it is preferable to have only one interlocutor
  - this choice must be made beforehand because it must be indicated in the contract notice.

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# FRAMEWORK AGREEMENTS

- In the case of a framework agreement with several operators:
  - if all the terms of the contract are known, the framework agreement must provide for a mechanism in order to select the operator, e.g.:
    - “cascade”
    - “rotation” (e.g. in alphabetical order)
    - “first responder”
  - if certain terms of the contract remain to be specified: a new, simplified competition only between the operators forming part of the framework agreement takes place and the contract is awarded to the one who has submitted the best offer according to the award criteria set out in the contract notice.

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# FRAMEWORK AGREEMENTS

- Caution: Framework agreements are “closed clubs”. It is not possible to bring in new contracting authorities or new companies (except for example in the event of a merger)

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# TAKING PART IN A TENDER PROCEDURE

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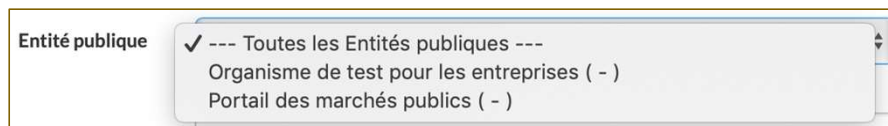


# **ACCESS TO INFORMATION ABOUT THE TENDER**

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# ACCESS TO CONTRACT NOTICES (1/2)

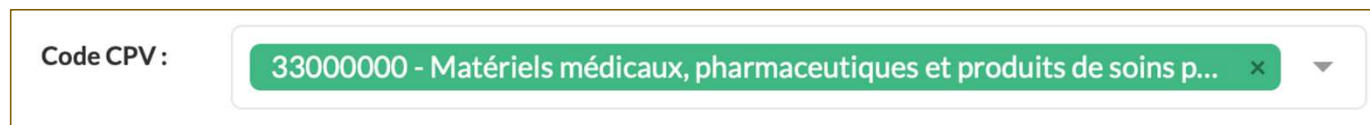
- In Luxembourg, all contract notices are published on the Public procurement portal (“Portail des marchés publics”): <https://pmp.b2g.etat.lu/>.
  - Notably, the interface is only available in French even though the tender notices are often in German or English
  - At first glance, only very rudimentary research tools are available :



Entité publique

- ✓ --- Toutes les Entités publiques ---
- Organisme de test pour les entreprises (-)
- Portail des marchés publics (-)

- Instead, try using the CPV-Code search with code 33000000 (“Medical equipments, pharmaceuticals and personal care products”) :



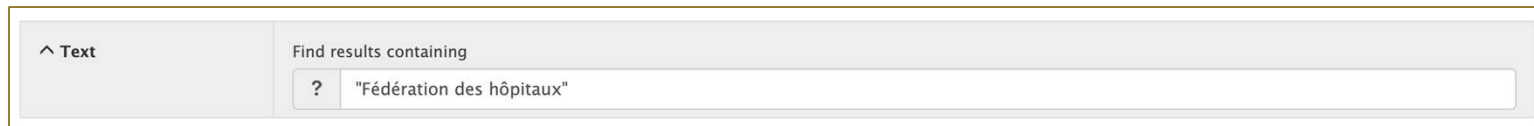
Code CPV :

33000000 - Matériels médicaux, pharmaceutiques et produits de soins p... x

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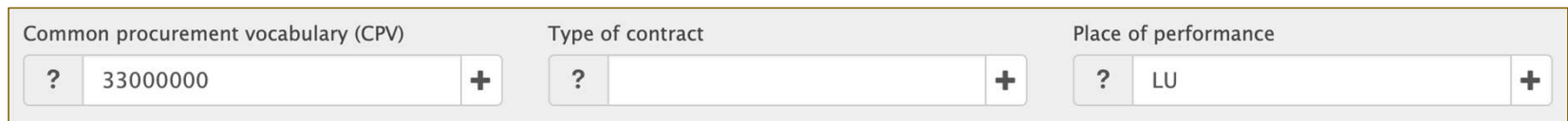
# ACCESS TO CONTRACT NOTICES (1/2)

- Contract notices for tenders governed by Book II are also published on the “TED”-Platform (for Tenders Electronic Daily) of the European publications’ office.
  - Multi-lingual interface
  - But: The notices as such are not translated
  - It is possible to do an “advanced search” for a specific text string



^ Text Find results containing  
? "Fédération des hôpitaux"

- Alternatively, do an advanced search with the CPV Code and the place of performance



Common procurement vocabulary (CPV) Type of contract Place of performance  
? 33000000 + ? + ? LU +

# ACCESS TO PROCUREMENT DOCUMENTS (1/2)

- In Luxembourg, procurement documents are made available on the Public Procurement Portal: <https://pmp.b2g.etat.lu/>.
- The Contract notices must contain the full download link.
- The download is free, no registration is required
- The advice is often given that operators should register, because then they automatically receive further notices (e.g. Q&A's or amended procurement documents)
- Caution : Once registered, there is a requirement to use only the Portal for any communication with the Contracting authority:

(3) Une fois l'opérateur économique inscrit à une procédure de passation de marché ou d'attribution d'un contrat de concession par le biais du portail, les communications électroniques entre l'opérateur économique et le pouvoir adjudicateur ou l'entité adjudicatrice ont lieu exclusivement au moyen du portail.»

# ACCESS TO PROCUREMENT DOCUMENTS (2/2)

Livre I <sup>er</sup>	Livres II et III
<p><b>RMP, Art.44(4) :</b></p> <p><i>“En règle générale, les pouvoirs adjudicateurs mettent à disposition une version électronique du dossier de soumission sur le portail des marchés publics ”</i></p>	<p><b>RMP, Arts 162(I) et 240(I) :</b></p> <p><i>“Les pouvoirs adjudicateurs offrent, par moyen électronique, un accès gratuit, sans restriction, complet et direct aux documents de marché (...) ”</i></p>
<p><b>RME, Art 6(I)</b></p> <p><i>“Aucune inscription ou identification n’est nécessaire pour consulter et télécharger les avis et les documents de marché ou de concession publiés sur le portail.”</i></p>	

# **WHAT TO DO IF THE TENDER DOCUMENTS ARE CONFUSING?**

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# WHAT TO DO IF THERE ARE QUESTIONS

- ⊘ Never rely on one's own understanding, "common sense" or previous experience from a different tender.
- ! If there are questions or doubts, they must be raised before the offer is submitted (Art. 39 of the 2018 Regulation):

*A tenderer who finds ambiguities, errors or omissions in the tender documents, is required, under threat of inadmissibility, to report them to the contracting authority at least seven days before the date of submission of tenders, unless a longer period is stipulated in the tender documents.*

- ✓ Seek legal advice (in house or outside counsel)
- ✓ Take advantage of the possibility to ask questions (no later than 7 days before the offer is due, or before the date set out in the tender documents).

# **ELECTRONIC TENDERING**

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# **ELECTRONIC SIGNATURES**

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# NOTION

An electronic signature is (Art. 1321-I of the Lux. Civil Code):

*Data which is inextricably linked to the document, guarantees its integrity, identifies the person who applies it and manifests their adherence to the content of the document.*

Key elements:

- The signature is linked to the document
- It identifies the individual who signs
- It expresses his or her adhesion to the document signed

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# SECURITY LEVELS

The European eIDAS Regulation recognises three security levels :

- **qualified** electronic signatures, created by a qualified electronic signature creation device, and which is based on a qualified certificate for electronic signatures
- **advanced** electronic signature, created using data that is under the user's control
- **Simple electronic signatures**, which are not based on an electronic certificate

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# LUXEMBOURG REQUIRES A QUALIFIED SIGNATURE

- Seules les signatures électroniques répondant à toutes les caractéristiques suivantes sont acceptées :
  - La signature électronique doit avoir été créée par un dispositif de création de signatures électroniques qualifiées (*Qualified certificate for electronic signature*) au sens du [règlement \(UE\) n° 910/2014](#) du Parlement européen et du Conseil du 23 juillet 2014 sur l'identification électronique et les services de confiance pour les transactions électroniques au sein du marché intérieur et abrogeant la [directive 1999/93/CE](#) ("eIDAS"), permettant de signer des documents de façon électronique avec l'assurance que ces signatures ont, dans tous les pays de l'Union européenne (UE), une valeur juridique équivalente à celle d'une signature manuscrite.
  - La signature électronique qualifiée doit figurer sur une des listes de confiance (« EU Trusted Lists »), telles que définies à l'article 22 du règlement eIDAS. Une vérification de la validité de la signature électronique doit pouvoir être effectuée sur le site « Trusted List Browser » (<https://webgate.ec.europa.eu/tl-browser/>).
  - Les certificats de signature électronique des Utilisateurs doivent être accessibles :
    - dans le magasin des certificats personnels de Windows, pour les utilisateurs sous système d'exploitation Windows (avec Internet Explorer, Safari ou Firefox comme navigateur), ou
    - sous forme de fichier P12, protégé par mot de passe, dans tous les autres cas.
  - Pendant une période de transition, tous les certificats de signature émis avant le 01/10/2018 ("Date de début de validité") par une Autorité de certification référencée dans les « EU Trusted Lists » sont acceptés, et ceci jusqu'à leur expiration.
- La fonctionnalité de validation/vérification de signature repose sur le dispositif *Digital Signature Services* (DSS) de CEF Digital de la Commission européenne.

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## WHAT NEEDS TO BE SIGNED (ELECTRONICALLY) ?

- Documents which need to be signed because of an explicit legal provision :
  - the tender itself (the offer)
  - the solidarity commitment (requires only if the offer is made by a consortium)
- Any documents for which the tender documents require a signature

# CASE LAW ON ELECTRONIC SIGNATURES

- Order of the President of the Administrative Tribunal of 29 July 2020, n° 44625 du rôle)
- Facts:
  - The offer was not signed electronically.
  - The tenderer had scanned a paper signature.
  - The contracting authority had rejected the offer
  - The tenderer was seeking interim relief : that the award be suspended until the full court has had time to review the issue

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# CASE LAW ON ELECTRONIC SIGNATURES

- The President denied the suspension, on the grounds that :
  - It is a novel question and without any precedent a judge in summary proceedings cannot anticipate on what the full court will decide.
  - *Prima facie*, the arguments put forward to argue that the contracting could not reject the offer on the grounds that it was not signed electronically do not appear convincing.
  - There is certainly no rule requiring the contracting authority to invite the tenderer to repair his mistake by signing his offer electronically.

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# CASE LAW ON ELECTRONIC SIGNATURES

- It is not excessively formalistic to require an offer to be signed electronically.
- It is difficult to draw firm conclusions from this one case.

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## PRACTICAL ADVICE

- Determine from an early stage on who will sign the tender and ensure that they have the capability to sign the tender with a qualified electronic signature.
- Use the verification tool available on the Public Procurement Portal
- Explore the possibilities of obtaining an emergency signing certificate
- Have the board appoint a special proxy with powers to sign the tender (the board meeting does not need to be held electronically and the proxy can be anyone with a valid signing certificate)

# UPLOADING THE OFFER

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## UPLOADING THE OFFER

- The offer can be uploaded by any person who has an account on the Public Procurement Portal
- Confusingly, it is not possible to register more than one user for a given economic operator. It is however possible for a company to register several times, each time with a different individual as a user
- Registering as a user with the portal requires a lesser security level than the signature. For instance, it works with national ID card chips.

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# UPLOADING THE OFFER

- The upload is time sensitive and must be finished before the date and time set in the contract notice and tender documents. Late uploads will be marked in the contracting authority's interface and be rejected

<input type="checkbox"/>	N° du pli Lots répondus	Entreprise	Date et heure de remise	
<input type="checkbox"/>	EI 1 1 / 2		17:40:32	E (4 -
<input type="checkbox"/>	EI 2 2 / 2		20:52:32	E (8 -
<input type="checkbox"/>	EI 3 1 / 2		11:12:16	E (2 -
<input type="checkbox"/>	EI 4 1 / 2		11:16:32	E (2 -
<input type="checkbox"/>	EI 5 2 / 2		11:29:20	E ( -
<input type="checkbox"/>	EI 6 1 / 2		11:57:04	E (2 -
<input type="checkbox"/>	EI 7		12:01:20	E (9 -

Actions groupées

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## UPLOADING THE OFFER

- If the tenderer uploads several versions of his tender, only the last one will be taken into account.
- Caution: each upload must be complete and contain all the required documents. The tenderer will not be allowed to open earlier tenders to search for missing documents

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# **THE FALL-BACK COPY**

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## THE FALL-BACK COPY

- It is possible to submit a fall-back copy of the tender on a USB-Stick or DVD.
  - Fall-back copies must be submitted within the same time frame as the (main) tender
  - The physical support (USB-Stick or DVD) must be clearly labeled (who is it from, which tender it concerns and the words “Copie de sauvegarde”)

## THE FALL-BACK COPY

- The fall-back copy will only be opened.
  - If the main tender submitted through the Portal cannot be opened, or
  - If the main tender submitted through the Portal contains damaged or corrupted files, including if malware is detected
- Otherwise, the fall-back copy is destroyed

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# ELECTRONIC INVOICES

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# CURRENT LEGAL FRAMEWORK

## Law of 16 May 2019 on electronic invoicing in the context of public contracts and concession contracts

- implements the European e-invoicing standard
  - Directive 2014/55/EU on electronic invoicing in Public Procurement
  - Common European standard on electronic invoicing (EN 16931)
- In force since 18 April 2019
- Effects
  - Companies may issue e-invoices
  - Contracting authorities must accept invoices

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# UPCOMING NEW LEGISLATION

## Draft law Nr 7750 :

- Goes further than the European minimum.
- E-invoicing will become compulsory for all economic operators
  - Only invoices complying with the European standard (EN 16931) will be accepted
  - Invoices will need to be sent using the PEPPOL (“Pan-European Procurement Online) Network. (Note :The Belgian Mercurius system is PEPPOL)
- When ?
  - Between 5 and 15 months after the law enters into force, depending on the size of the company

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# UPCOMING NEW LEGISLATION

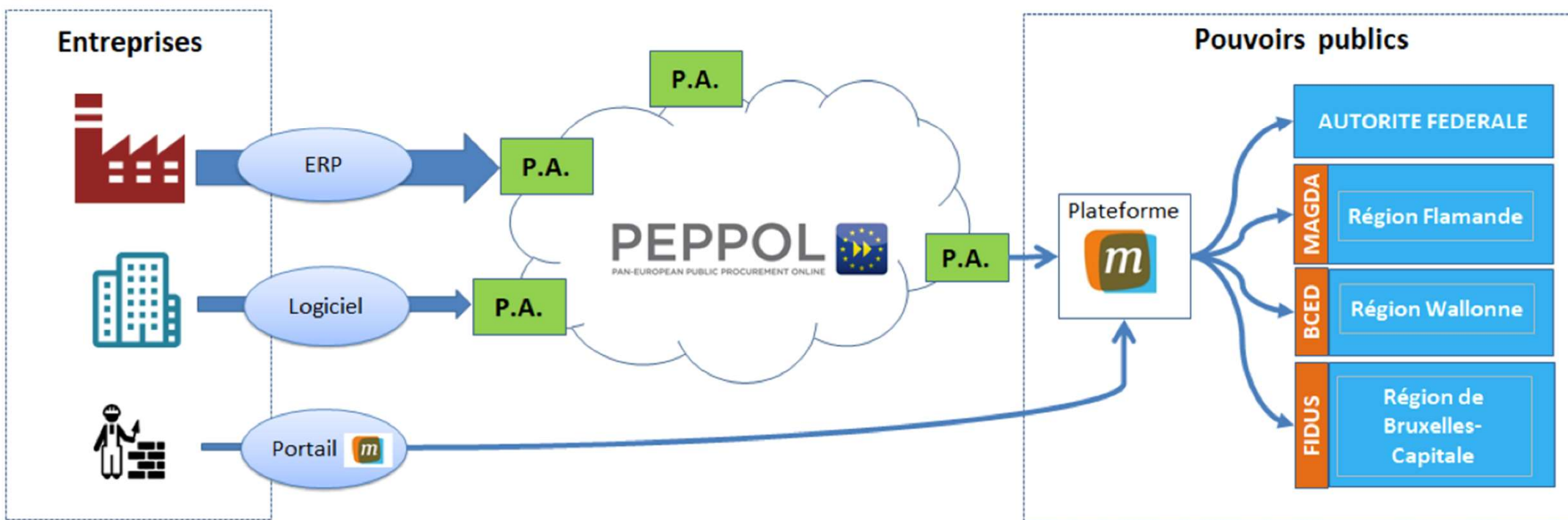
- Gradual entry into force
  - 15 months after the law comes into force for small companies which satisfy at least two of the following criteria for the 2019 fiscal year :
    - Annual balance of less than 4,4 million Euros
    - A net turnover of less than 8,8 millio Euros
    - Less than 50 employees
  - 10 Months for medium-sized companies satisfying at least 2 of the following criteria :
    - Annual balance of less than 20 million Euros
    - A net turnover of less than 40 millio Euros
    - Less than 250 employees
  - 5 Months for everyone else

# UPCOMING NEW LEGISLATION

- The new rule will immediately apply to contracts that were awarded prior to the new law (different from Belgium)
- Potentially difficult time for contracting authorities, which will need to be ready in the shortest time of 5 Months
- Government attempt to ease the transition:
  - Purchasing authorities will be allowed to use the Luxembourg State's access point until they have established their own
  - Two free tools will be made available to economic operators i) to generate e-invoices and ii) to send these invoices manually

# SCHEMATIC PRESENTATION

Schéma 3 : Facturation électronique des entreprises vers les pouvoirs publics via Mercurius



Source : Note explicative sur la facturation électronique, 19 février 2019, site internet des marchés publics de Wallonie : <https://marchespublics.wallonie.be/files/Facturation%20électronique%20VF.pdf>

**Thank you!**

**THEWES & REUTER**

[marchespublics@thewes-reuter.lu](mailto:marchespublics@thewes-reuter.lu)

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