1. What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?

Since 1999, five purely contractual PPP set-ups have been applied in the Netherlands. All of them are in the form of a Design, Build, Finance & Maintain/Operate contract, whereby the private sector is asked to take responsibility for the design, building, maintenance/operation and financing, advance or otherwise.

These contracts do not have any separate legal framework. The five contracts referred to above could be concluded under the existing legislation. A contract whereby the final user compensates the private party (the concession holder) directly for the service to be provided (as in a real toll set-up) did not occur in the Netherlands yet. One of the obstacles for this is that specific legislation has been created in the Netherlands for the levying of toll with restrictions on the collection of toll.

2. In the Commission’s view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?

So far the negotiations procedure has proved sufficiently adequate to award concession contracts. If the competitive dialogue procedure would provide more opportunities for companies to have a dialogue with prospective contract-awarding authorities without running the risk of an invalid tendering procedure, this competitive dialogue procedure would be the preferred one, provided that no further requirements are set with respect to the tendering procedure, which is complex enough as it is.

3. In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.

No.
4. Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?

Dutch building companies have participated in such procedure. In our opinion, the tendering rules are interpreted by the Tendering Agencies in a stricter manner than necessary to prevent unequal treatment from occurring. As a result, the degree of freedom is limited and it is difficult to translate the wishes of the final user in a correct manner. Particularly, matching the designing party to the final user may be complex due restricted possibilities for consultation. In addition, the procedure’s requirements are extensive and the process is time-consuming. Organisation of financing in combination with the tendering procedure causes problems, both regarding the accrual of costs and acquiring sufficient security. These problems occur with the financiers’ due diligence. In the current Dutch procedure this expensive procedure is undertaken simultaneously with the negotiating phase, whereas due diligence should actually, according to its nature, be reserved for a phase in which there is no competition any longer.

5. Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?

Yes, the legal framework is sufficiently detailed. For the time being, language barriers and specific properties (financing structure and size) of the Dutch market do not make it attractive to foreign tenderers. In view of the limited number of projects, competition in the current Dutch market is already rather prominent as far as purely contractual PPP set-ups are concerned.

6. In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?

No.

7. More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

If this would be so, we think that the same regulatory framework may be used for both sub-categories of purely contractual PPP set-ups.

8. In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?
Yes, the finest example is the Zuiderzeelijn project. The government adopts private initiative and then markets it on the market with open competition, and it even arouses enthusiasm among the competition abroad with regard to the project.

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<th>9. In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?</th>
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<td>Private initiative will succeed only, if the initiative itself is appreciated. Thus private initiatives must be rewarded, irrespective of whether the party proposing the initiative is going to carry it out. Thus the development of the initiative must be rewarded, and then this initiative may be adopted by the government and be marketed whilst involving the competition.</td>
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<th>10. In contractual PPPs, what is your experience of the phase which follows the selection of the private partner?</th>
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<td>Four out of five projects in the Netherlands are now in the phase of execution.</td>
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<th>11. Are you aware of cases in which the conditions of execution – including the clauses on adjustments over time – may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?</th>
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<td>No, contracts have provisions to prevent the pushing up of prices. In view of the transfer of the risk to private parties in the PPP set-ups, which is an important motive for the added value of these set-ups, the involvement of other service providers is not desirable. For they will disrupt the balance between the integral service and the distribution of risks. Individual provisions in the contract itself must prevent unfair competition from occurring. Consequently, such provisions are prevailing in the contracts we are cognisant of.</td>
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<th>12. Are you aware of any practices or mechanisms for evaluating tenders which have a discriminatory effect?</th>
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<td>No.</td>
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13. Do you share the Commission’s view that certain “step-in” type arrangements may present a problem in terms of transparency and equality of treatment? Do you know of other “standard clauses” which are likely to present similar problems?

No, step-in type arrangements are an integral part of the set-up. Without such rights a PPP set-up cannot be structured and PPP set-ups will cease to exist. Step in type arrangements are an indispensable component for effecting the transfer of risks and the linking of performance to financing. Without step-in rights, financiers do not have any guarantee to safeguard their investments and they will cease to invest in PPP projects.

14. Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?

No.

15. In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.

No.

16. In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?

The concession holder himself must be able to decide whether and how to attract subcontractors. For the contract awarding authority has secured the best contract (party) by integrally contracting out the entire service. Further guidelines will undo this optimum organisation and only be a cause for pushing up costs. The concession holder must not have any obligations at Community level with regard to the subcontracting of components of contractual PPP projects.

17. In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

No.
18. What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not?

No specific experience, although we think that European rules on tendering are not/have not been complied with as strictly as in the case of purely contractual PPP set-ups. In view of the fact that, only recently, a number of projects has as yet been put out to tender after intervention of the legal system, it may be assumed that the current regulatory framework provides sufficient handles for guaranteeing the compliance with equal competition.

19. Do you think that an initiative needs to be taken at Community level to clarify or define the obligations of the contracting bodies regarding the conditions requiring a call for competition between operators potentially interested in an institutionalised project? If so, on what particular points and in what form? If not, why not?

If any authority wishes to participate in an institutional PPP, and contributes funds or other means, such set-up must be open to participation on the basis of competition, without any other considerations playing a part. It is, however, very well possible that the current regulatory framework provides sufficient opportunities to do so.

20. In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?

None.

21. Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of “good practice” in this framework which could serve as a model for the Union? If so, please elaborate.

Apparently, a procedure has been developed in the United States whereby private initiatives are encouraged with due observance of competition by limiting the timeframe of the tendering procedure. This enables the private party that takes the initiative to take a lead on the competition where its initiative is concerned (for they have made preparations at their own initiative).

22. More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?

Yes, PPP is a continually changing and developing market. Thus, items for consideration may alter as yet.