

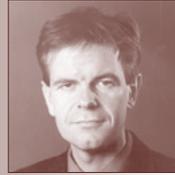
**President:**

**Gian Alfonso Borromeo, IT**



**Director:**

**Frank Kehlenbach, EIC**



President Gian Alfonso Borromeo represents EIC as Vice-President on the FIEC Steering Committee. The EIC Secretariat in Berlin is managed by Frank Kehlenbach (Director) and Hasso von Pogrell (Assistant Director).

**Organisation**

European International Contractors (EIC) is registered as a legally independent association under German law in Berlin, Germany. EIC has as its members construction industry federations from 15 European countries which are directly or indirectly affiliated to the European Construction Industry Federation (FIEC) in Brussels.

In accordance with a Protocol signed between both federations in 1984, and reaffirmed in 2002, EIC and FIEC carry out complementary tasks. Whilst FIEC represents the European construction industry in the context of the European harmonisation and integration process, the work of EIC aims primarily at improving the operating conditions for the European construction industry on the international level. For this purpose, EIC maintains close relations with all international and other organisations whose policy is of relevance for the international construction business, for instance with the European Commission's DG Trade, DG Development and EuropeAid, the European Bank for Reconstruction and Development (EBRD), the Organisation of Economic Co-operation and Development (OECD) and the World Bank.

In 2006, the Members of the EIC Board were the following:

Gian Alfonso Borromeo	(Astaldi)	Italy	President
Johan Beerlandt	(Besix)	Belgium	Vice-President
Lefty Panayiotou	(Costain)	United Kingdom	Treasurer
Thomas Alm	(Skanska)	Sweden	
Michel Démarre	(Colas)	France	
Norbert Hoffmann	(Bilfinger Berger)	Germany	
Ebbe Malte Iversen	(Per Aarsleff)	Denmark	
Alcibiades Lopez Cerón	(FCC)	Spain	
Antonio Mota	(Mota-Engil)	Portugal	
Gerrit Witzel	(Strukton Groep)	The Netherlands	

**Tasks and Objectives**

**EIC has the objectives**

- to represent and promote the interests of the European construction industry in all matters relating to the international construction business;
- to foster the exchange of views with international and other relevant organisations in order to improve the political, financial, economic and legal environment for European international contractors; and
- to offer European contractors a unique forum for the exchange of experience in all matters relating to the international construction business.

Within the broad range of operating conditions influencing the work of European international contractors abroad, the following framework conditions have been identified as priority issues for the EIC activities:

**I. Donor-financed infrastructure projects**

EIC calls continuously on the Multilateral Development Banks (MDBs), and in particular the European Commission and the EBRD, to duly take into consideration the intrinsic link between infrastructure investments and economic and social development and hence to expand their commitments for infrastructure projects. In this context, EIC strongly advises donors against the "budgetary aid" approach as far as infrastructure is concerned and instead asks the MDBs to rely on the "project approach" for infrastructure investments. Last but not least, EIC is also a constant advocate of integrating quality-related aspects into the procurement process.

Infrastructure needs are huge on a global scale and EIC observes funding difficulties world-wide for new construction, rehabilitation and maintenance. Whilst construction demand exceeds available funds also in much of the industrialised world and in many emerging markets, the governments in the developing world face a particular challenge in providing its people with access to quality infrastructure services. This is particularly true for Africa where governments MDBs sharply reduced the share of resources allocated to infrastructure during the 1990s. The corresponding lack of infrastructure and services on the African continent severely constrains economic growth and hinders social development.

Against this background, the European Union recently decided to focus its development aid on Africa and adopted a new "EU Strategy for Africa". One of the main actions that underpin this new policy is the creation of the "EU-Africa Partnership on Infrastructure", presented in July 2006, which forms the EU's policy response to the infrastructure gap that hinders Africa's development. In the corresponding Communication, the European Commission estimates that e.g. Sub-Saharan Africa needs to spend approximately 5% of its GDP on infrastructure investment and a further 4% on operations and maintenance between 2005 and 2015. The Partnership proposed by the European Commission allocates a total of 5.6 billion € from the 10<sup>th</sup> European Development Fund (EDF, 2008-2013) to support regional development in four priority areas: transport, energy, water, and information technology and telecommunications network. In addition, the EU and the European Investment Bank (EIB) have agreed terms for the creation of a Trust Fund in order support infrastructure investments in Africa. Under this new instrument, up to 320 million € in grants and loans are earmarked for the years 2006-2007.

EIC certainly appreciates the renewed interest of the European Commission and other donors in developing the infrastructure sector. At the same time, EIC is concerned about the tendency amongst the international donor community to move from the so-called classic approach, i.e. external assistance through project grants and loans, to the budgetary approach or "sector wide approaches", i.e. external assistance grants to the partner country's budget. EIC, therefore, drafted a **Position Paper on the EU-Africa Partnership for Infrastructure** in which we held the view that, as far as infrastructure is concerned, the "classic project approach" is clearly preferable, since transaction costs are lower for the European Commission than for the African partner governments which, in many cases, do not possess

the necessary capacity skills to effectively manage the overall contracting process. Moreover, the capital-intensive nature of infrastructure projects, their political sensitivity, their complexity and the risks associated with their implementation (including unethical practices) speak for a high degree of centralised planning and co-ordination.

EIC presented its corresponding concerns and queries in the framework of the high-level "EU-Africa Business Forum" organised by the European Commission on 16-17 November 2006 in Brussels which provided a unique opportunity to strengthen the dialogue between business and the Commission. The Forum was attended by some 100 businessmen from Europe and Africa and by high-level officials from the European Commission, including Commissioners for External Trade, *Peter Mandelson*, and for Development and Humanitarian Aid, *Louis Michel*. At the end of the 2-day deliberations, the Forum adopted an official Final Declaration in which business agreed that EU-Africa economic relations should be increased to foster more political momentum and commitment to create a better investment and business climate in Africa. **EIC was successful in embedding the following statements into the Final Declaration** (dated 29 November 2006) which shall be of importance for the follow-up process:

- "Business considers that the project approach for infrastructure projects should be maintained and the EC's infrastructure management capabilities reinforced with resources from the private sector and robust project delivery mechanisms should be adopted. The technical and environmental quality of projects and the procurement process for infrastructure works should be improved";
- "The European Commission should form an Africa Task Force to address the strategic, policy, trade and infrastructure challenges related to creating a level playing-field with competitors from other regions; key areas to focus on should be export financing, export credit insurance and public procurement";
- "There is a lack of long-term contracts including maintenance for improved predictability for the road transport";
- "To pre-qualify for Commission funding, companies should to respect environmental, social, ethical and financial standards within the EU *acquis communautaire*".

## II. Promotion of Public-Private Partnerships

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**EIC promotes the PPP concept world-wide as an alternative procurement method which brings additional Value for Money through the introduction of the life-cycle cost concept. Through its publications on PPP, EIC helps to build institutional capacity in this area on a global scale.**

Despite the renewed interest of donors in infrastructure financing the gap between the infrastructure needs and the conventional financial resources – from international aid funds and national budgets – will remain a fact for the foreseeable future. Whereas Official Development Assistance (ODA) has been rising from 2003 to 2005 by 50% from 70 billion US\$ to 106 billion US\$, commitments from the 22 member countries of the OECD Development Assistance Committee decreased in the year 2006 to 103.9 billion US\$ in aid, down by 5.1% from 2005, in constant 2005 dollars. This figure includes US\$ 19.2 billion of debt relief, notably exceptional relief to Iraq and Nigeria; excluding debt relief, other forms of aid fell by 1.8%. EIC regrets that less than 25% of the ODA are in fact disbursed for infrastructure investments, i.e. transport, energy and water projects. Consequently, a new balance has to be found between public and private sector roles for infrastructure financing and services provision.

Current experience in many countries shows that by means of private participation in public infrastructure service delivery, the scope for private investment in infrastructure can be enlarged. Whilst the PPP concept has flourished over the past years mainly in sectors that generate adequate cash flows, such as telecom, ports, airports and natural gas pipelines, the right blend between public and private funding has yet to be determined for transport and water infrastructure projects, where the social acceptance of user fees is either missing or its level is not adequate to guarantee the necessary return on investment.

With the aim of providing the public sector as well as MDBs with a user-friendly consultation document for the efficient preparation and implementation of privately developed infrastructure projects, EIC published in April 2003 the *"EIC White Book on BOT/PPP"*, reflecting the broad expertise of its member companies acting as investors and concessionaires in view to the political, financial, economic and legal requirements for successful BOT/PPP models. Doing this effort, EIC developed

21 "Key recommendations" in order to improve the project environment, the project preparation, the tendering procedures, the linking of the various types and sources of financing as well as the distribution of risks between the parties involved.

When presenting the recommendations of the "EIC White Book" in the political debate, we noticed, however, several recurring misconceptions with a potential to undermine the credibility of the entire PPP philosophy. EIC, therefore, published in October 2006 with the *"EIC Memorandum on Frequently Asked Questions on PPP"* a political supplement with a more general response in order to contribute the European industry's viewpoint to the ongoing debate on the national, European and international levels. With this Memorandum, EIC advocates the concessionaire's perception, i.e. the perspective of those companies that actually are prepared to put their shareholders' money at risk. The new EIC Memorandum seeks to explain why the PPP concept has a strategic advantage over the conventional project programming and for which types of infrastructures or public sector buildings a Government would benefit from entering into a comprehensive partnership instead of separating the design, construction and operation phases. Subsequent to the launch of the document on 29 September 2006 in Valencia, **EIC presented the new PPP Memorandum at various political conferences organised by the OECD, the EBRD and the European Commission.**

## III. Standard Bidding Documents and International Standard Forms of Contract

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**EIC constantly monitors the latest trends in International Competitive Bidding and Conditions of Contract in order to advise its member companies on the risks and pitfalls of these standard bidding or contract documents. EIC also liaises with the responsible draftsmen in order to ensure that the sample documents provide for a level playing-field between employer and contractor.**

Since the publication of the so-called FIDIC "New Books" back in 1999, EIC has published three "EIC Contractors' Guides" to this new suite of standard contract forms. These EIC Guides are rather critical of the general tendency in the 1999 FIDIC "New Books" to burden more construction risks than in the past on the contractor. All EIC Guides have been published in the world's leading construction law magazine and are on distribution via EIC's website.

Presently, the EIC Working Group "Contract Conditions" is working on an *"EIC Contractor's Guide to the MDB Harmonised Edition of the FIDIC Conditions of Contract for Construction"*. The origin of the so-called MDB Harmonised Edition dates back to the year 2003 when FIDIC was approached by the World Bank which was at the time leading a process of elaborating Master Procurement Documents for all the MDBs. At the World Bank's request, FIDIC gave in 2005 its permission – under a licensing agreement – to incorporate a modified version of the 1999 FIDIC "New Red Book" as the General Contract Conditions for the harmonised procurement documents. Upon initially scrutinising the "MDB Harmonised Edition", EIC was surprised that none of its comments in the EIC Contractor's Guides had been considered by the draftsmen. Conversely, in balance, the new version increased the risk to contractors even further than the 1999 precursor. Since the MDB Harmonised Version originally should have become the official Second Edition of the FIDIC "New Red Book", EIC drafted within a very short period of time in January 2005 an *"EIC Position Paper on the 2<sup>nd</sup> Edition of the FIDIC "New Red Book"* which led FIDIC in April to the decision to abstain from publishing a 2<sup>nd</sup> Edition of the "New Red Book".

FIDIC continued, however, collaborating with the World Bank on producing a harmonised version of the "New Red Book". The initial MDB Harmonised Edition was then published in the year 2005 as part of the World Bank's and the Asian Development Bank's new Standard Bidding Documents for Works. Subsequently, EIC submitted its critical comments under the umbrella of the global construction confederation, CICA, directly to the World Bank's Procurement Department and, in December 2005, many of the comments of both EIC and CICA were accepted by the Bank's management staff. A revised "MDB Harmonised Edition of the FIDIC New Red Book" was published in March 2006 which, as a matter of fact, takes into account several comments from the "EIC Contractor's Guides", but which still falls short of an acceptable industry standard when it comes to the independence of the Engineer or the use of the Security – a criticism which is notably shared also by FIDIC itself! EIC awaits the final negotiations on this important document between the World Bank and FIDIC to be held in May 2007 and will then publish its respective Contractor's Guide in the course of the year.

#### IV. Market Access Barriers in international construction

**EIC assists the European Commission in identifying crucial market access barriers for the European construction industry in key international markets. A particular focus has been placed on the discriminatory qualification system in the Chinese construction market which de facto closes the door to foreign competition.**

EIC and FIEC are both members of the European Services Forum (ESF), a network of leading European service providers and European associations in the trade services sector, which has been set up in 1998 to support the European Commission in the negotiations on the General Agreement on Trade in Services (GATS). Whilst EIC concentrates on the "export interests" of the European construction industry, FIEC, for its part, looks after the aspects linked to the "import" of construction services into Europe from other regions and countries.

Since the failure of the 5<sup>th</sup> Ministerial Conference in Cancún on 14 September 2003, EIC has shifted its focus of attention on the commitments of the PR China subsequent to its WTO accession in 2001. China had then agreed to open its domestic market to trade and services, which gave cause for high expectations, also in the construction sector. However, with the issuance of new regulations by China's Ministries of Construction and of Commerce in September 2002, international contractors were faced with new obstacles, preventing their access to the Chinese construction market. Whilst the granting of the possibility for foreign construction companies to establish wholly foreign-owned enterprises (WFOE) in China posed a step in the right direction, a number of provisions of the new qualification system imposed constraints that are excessive and not in line with China's GATS obligations (e.g. residency requirements, limitations on the number of foreign engineers, capital requirements). The new Chinese "grading" system, introduced for both WFOEs and Sino-foreign Joint Ventures, is *de facto* closing the market to most foreign contractors, since it excludes experience, assets and qualification gathered outside the Chinese market. Most importantly, the new regulations eliminate the "foreign contractor" status that had been in place for many years, and under which licenses to foreign companies were awarded on a project basis. As a consequence, the share of foreign participation in the Chinese construction market, which amounted to 6% before WTO accession, has fallen to below 1% today. A recent study commissioned by the European

Commission estimates that, assuming that pre-WTO conditions were still in place, the value of European construction companies' market share would be 5.2 billion US\$ higher than it is under current conditions!

Despite the permanent criticism of EIC and other trade representations in China as well as the many policy interventions of European trade missions to China, the legal situation of foreign contractors in China has not significantly improved over the past five years. In the "**EIC Position Paper on Market Access Barriers in the Construction Sector in China**", prepared for a high-level EU Trade Conference on China on 07 July 2006 in Brussels, EIC has asked the European Commission to negotiate with the Chinese Government that the actual restrictions for foreign contractors should be reduced through the following measures:

- A resumption of the former Decree No. 32 or, alternatively, an extension of types of work allowed for international contractors;
- The implementation of licenses for project management, construction management and other construction-related services;
- More flexibility in the application of the capital and asset requirements and the approval of internationally well-established banking instruments, such as bank guarantees, insurance bonds, Letters of Credit, etc.;
- The mandatory acknowledgement of international references and the grading of Sino-foreign consortia and Joint Ventures according to the upper qualification grades of the two entities;
- In case of an acquisition of a local construction company by or a merger with a foreign company, the Chinese authorities may not be entitled to re-assess the skill qualification of that local company, as this would retroactively threaten the value of the transaction.

EIC and FIEC jointly presented these and other requests at a Round Table on Construction Services in connection with the above-mentioned EU Trade Conference. Moreover, both federations called on the European Commission to eventually suspend its amicable negotiations with the Chinese Government on better market access for European international contractors in favour of starting formal proceedings under the WTO umbrella.

## **V. Environmental, social and ethical standards in Export Credit Insurance**

**EIC calls for a reasonable wording and interpretation of new environmental, social and ethical standards in the context of the relevant OECD Agreements on export credit finance and insurance in order not to aggravate the competitiveness of European international contractors vis-à-vis its competitors from non-OECD countries.**

Over the past years, EIC has observed that the OECD Export Credit Group has introduced and tightened framework regulation on environmental, social and ethical aspects of export finance and export credits which puts a serious disadvantage on the OECD industry vis-à-vis its Non-OECD competitors. In 2001 and 2003, the OECD Committee adopted and revised the so-called "*OECD Common Approaches on Environment*" which stipulate that export finance or insurance may only be granted if the applicant can prove that the project in question observes relevant international standards. At the same time, the export credit agencies are asked to disclose to the public confidential information for environmentally sensitive projects. A renewed tightening of the rules is anticipated for the year 2007 when, for the first time, the "Common Approaches" shall make a reference to the "*International Finance Corporation's (IFC) Performance Standards*" and thus to the core labour standards of the International Labour Organisation (ILO).

In May 2006, the export credit agencies (ECAs) of the OECD agreed, by adopting a new "*OECD Action Statement on Bribery*", on stricter measures aimed at export contracts that are tainted by bribery. The new agreement replaces and in many areas strengthens the existing OECD document adopted in the year 2000. It provides for much greater disclosure by exporters and applicants, who are required to inform the ECA if they are the subject of charges or past convictions in a national court (or an equivalent administrative measure) in a five-year period preceding the application for bribing a foreign public official. They are also required to disclose information on agents' identities, as well as the size and purpose of agents' fees and commissions "upon demand". The agreement also significantly increases the obligations of ECAs, which must now routinely check whether an exporter or applicant appears on any of the publicly available debarment lists of the international financial institutions (IFIs), such as the World Bank. In the event that it is listed, or has disclosed violations of national anti-bribery laws, then the ECA must undertake "enhanced due diligence"

before proceeding with its application. If before credit is approved there is "credible evidence" of bribery, under the new measures, ECAs are required to suspend approval of the application while carrying out further investigations. Credible evidence is defined as "evidence of a quality which, after critical analysis, a court would find to be reasonable and sufficient grounds upon which to base a decision on the issue if no contrary evidence were submitted".

Whilst being itself in favour of high a standard of competition in the international construction business, EIC is nevertheless concerned about this race to ever increasing international standards insofar as it creates an unlevel playing-field in certain market segments. The administrative impact flowing from international "soft law" such as the latest *"IFC Performance Standards and Disclosure Policy"*, the *"OECD Common Approaches on the Environment"* and *"OECD Action Statement on Bribery"* – as justified as these agreements may be – only reinforce the distortion of competition between competitors from OECD and non-OECD signatories without committing the client or the host government. As a **Member of the OECD's Business and Industry Advisory Committee (BIAC)**, EIC was able to ensure during the consultation on the *"OECD Action Statement on Bribery"* that corrective action, such as denial of payment, indemnification, or refund of sums, shall only be possible if bribery has in fact been proven (and not on the basis of mere assumptions) and that the attribution of activities of the exporter's "subsidiaries" or "affiliated entities" are not relevant in the exporter's consultation with his ECA.

For the future, EIC sees now an obligation on the OECD and its Member States to focus any future standard-setting policy on applying the same standards to non-OECD exporters. By doing so, EIC forms an important counterweight to other non-business stakeholders within the regular OECD Consultations on export credit insurance.

## **VI. Dialogue with the World Bank and the OECD on Procurement Policy**

**Apart from the technical review of the World Bank's Standard Bidding Documents, EIC has entered into a political discussion with both the World Bank and the OECD Development Assistance Committee on the benefits and risks of an increased use of Country Systems in Procurement. EIC is very much concerned that further decentralisation in procurement will bring less harmonisation and efficiency in aid-funded infrastructure delivery, since the application of a multitude of national systems leads to a watering down of international standards.**

The international donor community decided in March 2005 in the context of the so-called *"Paris Declaration on Aid Effectiveness"* to strengthen national procurement systems and to "progressively rely on partner country systems for procurement when the country has implemented mutually agreed standards and processes". This principal policy decision has led within the Europe Union to the so-called *"European Consensus on Development"*, jointly agreed in December 2005 by the European Commission, the Council and the Parliament, according to which the European Commission intends "to progressively increase the budget support aid modality, as a means of strengthening ownership".

On 17 May 2005, EIC President Borromeo met in Berlin with the World Bank's Director of Procurement Operations Policy, Mr. Armando R. Araujo, for a discussion on the Bank's pending proposal entitled *"Increasing the Use of Country Systems in Procurement"*. The World Bank then clarified its belief that if certain key clients can be convinced to use domestic procurement rules equivalent to those prescribed by the World Bank, this might be a good incentive for other countries of the region to follow-up. Since the beginning of this initiative, EIC is very much concerned that further decentralisation

in procurement will bring less harmonisation and efficiency in aid-funded infrastructure delivery, since the application of a multitude of national systems leads to both a watering down of international standards and a limitation of international competition. EIC, therefore, submitted in July 2005 its respective **Position Paper on "Country Procurement Systems"** not only to the World Bank senior management, but also to all European Executive Directors in the Bank in order to sensitise them for its perspective.

In order to create the necessary preconditions in the partner countries with respect to procurement capacity, the World Bank and the OECD Development Assistance Committee (OECD-DAC) subsequently set up a "Joint Venture for Procurement" (JV), which has the task to produce a methodology on benchmarking, monitoring and evaluating development capacity in this area. At present, 22 pilot countries – 6 in Francophone Africa, 7 in Anglophone Africa, 1 in Latin America and 8 in Asia – have volunteered and have been selected as JV pilot countries. Whilst in the past, apparently, the only private sector contact point for the JV was FIDIC, there now seems to be a willingness of the World Bank and the OECD-DAC to involve the OECD industry in the further monitoring process. Following a formal **Consultation between the OECD's Business and Industry Advisory Committee (BIAC) with leading World Bank and OECD representatives** on 03 April 2007 in Paris, World Bank and OECD-DAC have agreed to share future research analysis concerning the Country Procurement System of the pilot countries with BIAC and thus with EIC.

## VII. EIC General Assemblies

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In the General Assembly held on 28 April 2006 in Zurich, Switzerland, EIC organised a **Workshop on "Risk Mitigation in the International Construction Market"**. With a record attendance of more than 100 participants, the meeting witnessed an informative exchange of opinions between representatives of the private insurance industry, European international contractors and the FIDIC President. The Presidents of both EIC and FIDIC called jointly on the international donor institutions, such as the World Bank, EuropeAid and the EBRD, to implement a more sustainable framework for the procurement of infrastructure works and to proceed to a truly quality-orientated selection process for both consultants and contractors. FIDIC President Padilla considered the prevalent lowest evaluated cost approach as inappropriate, since it inevitably leads to selecting the "*lowest cost designer, lowest cost supervision and lowest cost contractor, using lowest cost materials and lowest cost workmanship*". EIC President Borromeo added that if the donor institutions really wished to achieve the sustainable development of infrastructure networks in developing countries, then they first have to develop a more sustainable procurement process.

The 2006 autumn General Assembly took place on 29 September 2006 in Valencia, Spain, and examined market opportunities in the **Workshop on "The Future of Public-Private Partnerships"**. Again, almost 100 participants discussed with the experts from the private sector as well as from the EBRD and World Bank's Multilateral Investment Guarantee Agency (MIGA) the recent trends in structuring and tendering PPP projects as well as some failure and success stories of PPP projects. EIC also launched in the framework of this Conference its new "EIC Memorandum on Frequently Asked Questions on PPP".

The 2007 General Assemblies are scheduled to take place on 20 April 2007 in London, United Kingdom, and on 12 October 2007 in Cascais, Portugal. In London, the Workshop will deal with "**The British Perspective on the Market Opportunities for European Contractors**", in Cascais, the Workshop will centre on the "**Opportunities for European Contractors in the field of Renewable Energies**".

More information can be downloaded from the EIC website under <http://www.eicontractors.de>