ANTITRUST AND PUBLIC TENDERS: IS THIS A NEW CHALLENGE?

Francesco Anglani

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Abstract: This article analyses the interest shown by competition authorities in fighting bid-rigging cases, with the aim of illustrating – both at Italian and European level – the current common trends and whether competition authorities adopt specific measures to expand their enforcement against bid-rigging infringements. The article also focuses on the particular approach of the Italian Competition Authority, which recently analysed numerous bid-rigging cases involving omissive conduct (i.e., in which competitors agreed not to submit a bid) and adopted specific criteria to calculate fines when collusive conduct is alleged to have occurred in a public tender. Finally, the article provides a conclusive assessment of how to work towards a more uniform approach in fighting bid-rigging cases to strengthen public enforcement and avoid unnecessary proportionality distortions and violations of the equal treatment principle when quantifying fines.

1. INTRODUCTION

This article analyses the recent interest that competition authorities have demonstrated in antitrust infringements that occur in tender procedures (known as “bid-rigging” infringements), both at Italian and European level, with the aim of illustrating: (i) the main cases examined by competition authorities, and (ii) the approach followed by competition authorities to combat bid-rigging cases.

From a comparative perspective, some common trends exist among competition authorities: (i) the cases investigated at national level mainly relate to public tenders; (ii) several national authorities have published operational guidelines – and even held structured training courses – for contracting authorities to enable them to recognise and report bid-rigging infringements; and (iii) forms of closer cooperation between competition authorities and public prosecutors’ offices have been encouraged from both sides in various states.

Conversely, some authorities have created specific instrument to address this problem: for example, the Italian Competition Authority has provided rules for quantifying fines that are specifically designed for bid-rigging infringements, whereas the UK Competition Authority has a rewarding mechanism in place for people who report the existence of a cartel.

This article therefore: (i) offers a comparative overview of the existing trends at European level, focusing on the different techniques adopted by competition authorities to expand the enforcement against bid-rigging infringements; (ii) describes the specific features of the Italian system; and (iii) provides a conclusive assessment

1 Lawyer and Secretary of the Italian Antitrust Association.
on how to pursue a more uniform approach in fighting antitrust collusion in public and private tenders.

2. THE EUROPEAN FRAMEWORK: A COMPARATIVE OVERVIEW

From a comparative perspective, European Competition Authorities have increasingly focused their interest on fighting bid-rigging infringements, albeit each in different ways.

This section therefore investigates how the European Commission (“Commission”) and the German, French, Spanish and UK competition authorities have focused their enforcement activities on bid-rigging infringements, with the aim of: (i) identifying the main sectors analysed; (ii) ascertaining how many cases were examined and what collusive conduct was under investigation; and (iii) pointing out some special instruments adopted by competition authorities to prevent bid-rigging infringements.

2.1 European Commission

The Commission’s enforcement activity shows a clear growth in interest in the topic; indeed, it has analysed approximately 70 cases of anticompetitive horizontal agreements, nine of which concerned bid-rigging infringements — and of those nine cases, six occurred in the last four years.

The bid-rigging cases analysed by the Commission most frequently concerned private tenders (only one case involved a public tender) and the sectors analysed were heterogeneous, including: (i) the mushroom market, (ii) submarine tube production, and (iii) the supply of wiring for cars.

Typically, the conduct under investigation concerned illegal agreements through which competitors had artificially split territories and/or clients; only in rare cases did the agreements entail an artificial increase in market prices. In most cases, the illegal conduct consisted in complementary bids, whereas there were no cases of boycotted tenders, in which all the undertakings involved agree not to join the tender procedures.

With regard to fines, the Commission has always applied the same criteria provided for cartel infringements in the 2006 “Guidelines June 2014, case AT.39965 – Mushrooms; Decision of 11 December 2014, case AT.39780 – Envelopes; and Decision of 21 October 2015, case AT.39639 – Optical Disk Drives; Decision of 12 December 2016, case AT.39904 – Rechargeable Batteries.


for setting fines”\textsuperscript{5}, which also provides for the possibility to close the proceedings with a settlement\textsuperscript{6}.

\subsection*{2.2 Germany}

In recent years the German competition authority (\textit{Bundeskartellamt} – “GCA”) has intensified its investigations into collusive agreements in public tenders: indeed, five bid-rigging cases occurred in the last seven years\textsuperscript{7}.

Most cases analysed by the GCA concern price and customer protection agreements, aimed at dividing up tenders or projects among cartel members and/or coordinating their bids to raise prices. The sectors under investigation were heterogeneous and mainly concerned: (i) energy, (ii) vehicle construction and mechanical engineering, (iii) the metal industry, and (iv) the chemical industry.

The GCA has also highlighted the importance of cooperating with contracting authorities to better identify bid-rigging infringements. To this extent, in December 2014 the GCA issued a guidance brochure on how to discover inadmissible bid-rigging agreements\textsuperscript{8}. The brochure contains a list of typical indicators to help contracting authorities identify evidence of possible agreements among companies in tender procedures.

Another notable aspect marks out the approach followed by the GCA: the GCA closely cooperates with the public prosecutor’s office, as under German law bid-rigging is considered not only an antitrust infringement but also a criminal offence under Section 298 of the German Criminal Code (\textit{Staatsbuch}, StGB). The GCA has therefore organised several meetings between its officials and representatives of the public prosecutor’s office to exchange their experience of the prosecution of illegal agreements relating to private and public tenders\textsuperscript{9}.

Finally, the GCA does not provide for specific criteria for calculating the fine that can be imposed in the event of bid-rigging infringements: the same criteria used in cases involving classic cartels apply. However, the undertakings involved in the proceedings can ask for a settlement.


\textsuperscript{6} A settlement is typically used by the Commission to speed up the procedure for adopting a cartel decision when the parties admit to the Commission’s objections and in return receive a 10% reduction on the fine. See European Commission, Decision of 10 July 2013, case AT.39748 – \textit{Automotive Wire}; Decision of 25 June 2014, case AT.39965 – \textit{Mushrooms}; Decision of 10 December 2014, case AT.39780 – \textit{Envelopes}; and Decision of 12 December 2016, case AT.39904 – \textit{Rechargeable Batteries}.

\textsuperscript{7} See GCA Decision of 4 December 2010, case B11-26/05; Decision of 10 February 2011, case B12-11/09; Decision of 20 September 2012, case B10-101/11; Decision of 23 July 2013, case B12-16/12 and B12-19/12; and Decision of 28 August 2014, case B-3-123/11.

\textsuperscript{8} GCA, \textit{Wie erkennt man unzulässige Submissionsabsprachen?}, December 2014.

\textsuperscript{9} For more details please visit: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/15_04_2013_Erfahrungsaustausch-Staatsanwaltschaft.html
2.3  France

The French competition authority (Autorité de la Concurrence – “ADLC”) has a long tradition of dealing with competition infringements occurring in both public and private tenders. Indeed, the first decisions on this matter date back to the early 1990s. In the last 13 years the ADLC has investigated nine cases involving bid-rigging, the vast majority of which related to public tenders that were often of local interest. The main sectors involved in ADLC’s investigations have been, by far, construction and public services (waste collection, transport and road maintenance).

Although the ADLC does not focus on any particular type of infringement, it has developed a large decision-making practice on joint bidding by entities established specifically for a tender procedure (Groupement d’Intérêt Économique – “GIE”). The ADLC is therefore clearly paying a great deal of attention to the arguments undertakings submit to justify joint bids. These arguments typically relate to: (i) the technical complementarity of the bids submitted by the undertakings involved in the GIE, notably the pooling of their know-how and resources; and (ii) the rigid timeframe set by the tender and the simultaneity of the works (or services) needed, which require the undertakings to mobilise a significant amount of economic resources in a short period.

Additionally, it is not unusual for the ADLC to close proceedings with a dismissal decision. This typically occurs as a result of: (i) a lack of evidence corroborating the allegation of an anticompetitive information exchange; (ii) the mere conservation of the “historical supplies” (i.e., the undertakings involved in the tender are awarded the contracts they were already performing); and (iii) the lack of evidence that the joint bids aimed to restrict competition by object or effect.

Similar to the German competition system, the ADLC’s proceedings are closely connected to criminal proceedings, as bid-rigging infringements are considered criminal offences also in France. Consequently, two cases have occurred in which French criminal courts – after having already imposed penalties on the managers of the companies involved in the bid-rigging offence – have passed on to the ADLC the evidence collected during the criminal proceedings.

Another peculiarity of the interrelation between antitrust infringements and public tender procedures is that, under the French Public Procurement Code (Code des marchés publics), contracting authorities may exclude undertakings from a public tender if they are seriously suspected of being engaged in anticompetitive collusion.

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10 ADLC, Decision No. 04-D-50 of 3 November 2004; Decision No. 05-D-17 of 27 April 2005; Decision No. 05-D-24 of 31 May 2005; Decision No. 07-D-15 of 9 May 2007; Decision No. 09-D-03 of 21 January 2009; Decision No. 09-D-18 of 2 June 2009; Decision No. 09-D-20 of 11 June 2009; Decision No. 11-D-02 of 26 January 2011; and Decision No. 13-D-09 of 17 April 2013.

11 See Decision Nos. 07-D-15 and 11-D-02.
With regard to penalties, French competition law does not set out specific criteria to calculate fines that can be imposed for bid-rigging infringements (i.e., the same criteria used in cases involving classic cartels apply). However, undertakings can request that the ADLC close the proceedings with a settlement (procedure de transaction).

2.4 Spain

The Spanish competition authority (Comisión Nacional de los Mercados y la Competencia or the “CNMC”) has recently intensified its investigations into bid-rigging cases compared to previous years\(^\text{12}\). Four out of the 16 cartel decisions adopted in 2014 and two out of the 14 decisions adopted in 2015 concerned bid-rigging infringements. The increasing attention in this field is confirmed by the CNMC’s Action Plan of 2016\(^\text{13}\), whereby the CNMC’s Competition Directorate set the fight against bid-rigging infringements as one of the CNMC’s main objectives.

The main sectors involved in the cases examined by the CNMC were: (i) healthcare (purchase of medication and healthcare products by hospitals); (ii) maritime transport; (iii) port activities; and (iv) energy supply. Conversely, the conduct under investigation mainly related to market share agreements, clients allocations (e.g., the undertaking agreed not to submit a bid in certain tenders in exchange for subcontracting services) and price-fixing agreements.

The CNMC has also adopted additional measures to strengthen its public enforcement activity, notably: (i) it has created a working group to collect information on public tenders from the public administration and to develop new techniques for discovering bid-rigging infringements; (ii) it recently organised 14 courses to train approximately 750 public administration civil servants – mostly involved in public (rather than private) tender procedures – on how to detect bid rigging; and (iii) it has published guidelines for the contracting authorities that contain a check list to disseminate bid-rigging detection tools and encourage authorities to collaborate with the CNMC\(^\text{14}\).

The Spanish scenario also offers some notable aspects that characterise bid-rigging infringements. The first is that in 2017 criminal proceedings were brought for the first time to ascertain the existence of crimes relating to bid-rigging conduct in application of Section 262 of the Spanish Criminal Code\(^\text{15}\). The second is


\[^{13}\text{See CNMC, Plan de Actuación, October 2016, § 3.4.}\]

\[^{14}\text{See CNMC, Guía contra el fraude en la licitación pública, 2017.}\]

\[^{15}\text{Some companies allegedly entered into 15-year agreements, consisting in the allocation of public tenders for hydro-helicopter services. The companies investigated in the criminal proceedings agreed in advance which bid would be selected in each public tender. Consequently, only one company submitted a bid in each tender for the highest price without any competition. The investigation pointed out that the companies’ infringement might also constitute the criminal offences of money laundering and bribery. The case is therefore now under investigation by the competent criminal court (in application of Section 262}\]

that under Spanish Law No. 40/2015 (which amended the Spanish Code of Public Procurement – *Texto Refundido della Ley de Contratos del Sector Público*), undertakings involved in anticompetitive bid-rigging agreements – which have been confirmed by a final CNMC decision\(^{16}\) – can be excluded from subsequent public tenders by local contracting authorities.

Finally, with regard to applicable penalties, Spanish antitrust law provides no specific criteria to calculate the fines that can be imposed for bid-rigging infringements, nor does it allow the proceedings to be closed with a settlement.

### 2.5 United Kingdom

The former UK competition authority, the Office of Fair Trading (“OFT”), began its first collusive tendering investigation in 2004. It subsequently investigated eight cases of bid-rigging\(^{17}\) before its successor, the Competition and Markets Authority (“CMA”), took over in 2013. The main area of investigation for the OFT was – and, for the CMA, remains – roofing contractors, although the largest investigation was carried out into the construction industry\(^{18}\).

Most cases analysed by the UK competition authority concern cover bidding (or “cover pricing”). Cover bidding essentially involves one or more parties in a tender process submitting artificially high bids that were not intended to win the tender but were nonetheless submitted as genuine bids. Cover bids are therefore priced in such a way that gives a misleading impression as to the true extent of competition, thus distorting the process and potentially preventing other cheaper firms from being invited to tender.

Much like the German, French and Spanish competition authorities, in recent years the UK competition authority has shown considerable interest in bid rigging. In 2014, the CMA published guidelines entitled “Bid-rigging: advice for public sector procurers”\(^{19}\), which contain a summary on how to avoid, identify and address bid rigging during the public sector procurement process. The CMA also issued guidance entitled “Competition law risk: a short guide”, which explains what constitutes bid rigging and sets out examples of warning

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\(^{16}\) The decision must be “definitive” (i.e., confirmed by the court of first and second instance or no longer appealable).


\(^{18}\) The investigation culminated in the OFT’s decision that imposed fines of £129.2m on 103 construction companies, including both small, regional companies and large, listed companies with a national presence (OFT, Decision No. CA98/02/2009 of 21 September 2009, case CE/4327-04 – Bid rigging in the construction industry in England.

signs that public contracting authorities need to be aware of.

The CMA also launched several initiatives in 2016 to combat bid rigging: (i) it sent a letter on 20 June 2016 to contracting authorities to explain the seriousness of the issue and provide further guidance; (ii) it published a tool online on how to spot bid-rigging infringements; and (iii) it ran an awareness programme for civil servants. Moreover, in March 2017 it announced £100,000 rewards to employees who report the existence of a cartel agreement (in which they are not directly involved), and it is currently running a campaign to encourage cooperation.

Another key feature of the UK competition system is that companies that entered into an anticompetitive bid-rigging agreement are not, by law, automatically excluded from future public tenders by local contracting authorities. However, caselaw includes relevant comments on this point: in the decision *Bid-rigging in the construction industry in England*, the OFT recommended both public and private contracting authorities not automatically exclude infringing undertakings from bidding for future contracts. However, the OFT also emphasised the need for deterrence and did not rule out the possibility of recommending that companies be excluded from tender lists in any future cases.

Finally, similar to German, French and Spanish antitrust law, UK antitrust law contains no provisions on the criteria to be used in imposing fines for bid-rigging infringements, but undertakings do have the possibility to close the proceedings with a settlement.

### 3. The Italian Landscape

Similar to the approach followed at European level, the Italian competition authority ("ICA") has also shown increasing interest in bid-rigging infringements over recent years. The first steps in this direction date back to 2013, when the ICA published a "Vademecum", which consists of a set of guidelines instructing contracting authorities on the main conduct of undertakings that could constitute evidence of bid-rigging infringements. The aim was to enable contracting authorities to detect

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23 For more details please visit: https://stoppcarrels.campaign.gov.uk/


25 Only one instance exists of a party settling a bid-rigging investigation with the UK competition Authority: In the *Access control and alarm systems* case, Owens Installations Limited entered into a settlement agreement whereby it admitted its involvement in the alleged infringement and agreed to pay a fine (OFT, Decision No. CA98/03/2013 of 6 December 2013, case CE/9248-10 - Collusive tendering in the supply and installation of certain access control and alarm systems to retirement properties).
competition law infringements and report them to the ICA. The ICA subsequently entered into a joint protocol with the Italian anti-corruption authority (“IAA”) in 2014 that provides for closer cooperation between the two authorities regarding a mutual exchange of information and cooperation in investigations into bid-rigging infringements in the public procurement of goods and services. The introduction of these new instruments has encouraged the ICA’s activity and the number of bid-rigging cases it examines to increase consistently: notably, nine out of 15 bid-rigging cases relating to horizontal agreements have been examined in the last three years.


28 In the last 10 years the ICA has examined 100 anticompetitive agreements cases (ascertaining an infringement in 62 cases). The ICA also proved to be the most active competition authority in the field of both public and private procurement: it has examined 15 bid-rigging cases over the last decade. See ICA Decision Nos. 26815 of 18 October 2017, case I/796 – Servizi di supporto e assistenza tecnica alla PA nei programmi cofinanziati dall’UE; 26316 of 21 December 2016, case I/792 – Gare ossigenoterapia ventiloterapia; 25966 of 19 April 2016, case I/790 – Vendita diritti televisivi serie A; 25802 of 22 December 2015, case I/785 – Gara Consip scuole; 25739 of 18 November 2015, case I/782 – Gare per la bonifica di materiali inquinanti presso gli arsenali di Taranto, La Spezia ed Augusta; 25488 of 27 May 2015, case I/759 – Forniture Trentitalia; 25489 of 27 May 2015, case I/771 – Servizi di post-produzione di programmi televisivi RAI; 25435 of 22 April 2015, case I/775 – Procedure di affidamento dei servizi di ristoro su rete stradale; 25257 of 3 February 2015, case I/765 – Gare gestioni fanghi Lombardia e Piemonte; 1066 of 7 March 2017, case I/744 – Gare per TPL; 25155 of 22 October 2014, case I/769 – Sanità privata nella regione Abruzzo; 23931 of 28 September 2012, case I/723 - Intesa nel mercato delle barriere stradali; 22838 of 28 September 2011, case I/731 – Gare assistitive ASL e aziende ospedaliere campane; 22648 of 4 August 2011, case I/729 – Gara d’appalto apparecchiature risonanza magnetica; and 17135 of 3 August 2007, case I/666 – Gare per la fornitura di dispositivi per stomia.

29 See ICA Decision Nos. 26815 of 18 October 2017, case I/796 – Servizi di supporto e assistenza tecnica alla PA nei programmi cofinanziati dall’UE; 25802 of 22 December 2015, case I/785 – Gara Consip scuole; 25488 of 27 May 2015, case I/759 – Forniture Trentitalia; 25435 of 22 April 2015, case I/775 – Procedure di affidamento dei servizi di ristoro su rete stradale; 1066 of 7 March 2017, case I/744 – Gare per TPL; 22838 of 28 September 2011, case I/731 – Gare assistitive ASL e aziende ospedaliere campane; 22648 of 4 August 2011, case I/729 – Gara d’appalto apparecchiature risonanza magnetica; and 17135 of 3 August 2007, case I/666 – Gare per la fornitura di dispositivi per stomia.

30 See ICA Decision Nos. 26815 of 18 October 2017, case I/796 – Servizi di supporto e assistenza tecnica alla PA nei programmi cofinanziati dall’UE; 25488 of 27 May 2015, case I/759 – Forniture Trentitalia; and 17135 of 3 August 2007, case I/666 – Gare per la fornitura di dispositivi per stomia.
courts the opportunity to expand their reasoning on the standard of proof required in bid-rigging infringements and to point out some interesting criteria.

3.1 The standard of proof in bid-rigging infringements

It is well known that to prove the existence of a concerted practice the ICA relies on: (i) endogenous elements (i.e., indirect evidence) such as the market structure, the parallelism of commercial strategies and all other factual elements which can only be explained by collusion; and (ii) exogenous elements (i.e., direct evidence), that is all direct contact and information exchanges among competitors.

When exogenous elements are not available, the ICA must provide reliable, accurate and consistent evidence that the parallel behaviours have no explanation other than an illegal cooperation between undertakings. In other words, the ICA’s reconstruction must be the only plausible interpretation of events. By contrast, undertakings can disprove the ICA’s allegations simply by demonstrating that the facts underlying the ICA’s assumptions have a different and convincing explanation.

Conversely, when exogenous elements are available, the ICA can limit itself to simply providing them, whereas the undertakings have the burden of proving that the elements are not convincing and that their conduct was economically rational.

In light of these criteria, Italian administrative case-law has pointed out some interesting principles concerning: (i) the existence of exogenous elements; and (ii) the assessment of the economic conduct of undertakings involved in omissive bid-rigging infringements.

With regard to the qualification of exogenous elements, the administrative courts have clarified that merely meeting cannot be considered “qualified contact”, especially if the meeting was held in a public place or in an institutional context (e.g., at a trade association’s offices). The ICA must demonstrate that during the meeting the undertakings clearly expressed an intention to agree on their future conduct in order to collude and distort competition.

31 See Italian Administrative Tribunal of Lazio Decision No. 14281 of 18 December 2015 – Gare RCA per trasporto pubblico locale and Decision No. 3982 of 1 August 2016 – My Chef e Chef express; and Council of State Decision No. 4123 of 4 September 2015.

32 See Italian Administrative Tribunal of Lazio Decision No. 13303 of 14 October 2016, Gara Consip per i servizi di pulizia nelle scuole.

33 See Italian Administrative Tribunal of Lazio Decision No. 6503 of 6 June 2016. The Tribunal held that the evidence collected by the ICA was insufficient, as collusion cannot be assumed to have occurred simply based on meetings that were held in a parish hall (i.e., a public place) if: (a) the meeting minutes contain only general recommendations, and (b) the party that accepted the recommendations cannot be identified.

34 See Italian Administrative Tribunal of Lazio Decision No. 14281 of 18 December 2015 – Gare RCA per trasporto pubblico locale, confirmed by Council of State Decision No. 1066 of 7 March 2017. The Council of State held that the meetings of an association’s working group – established within the Italian Insurance Association (ANIA) – cannot be considered qualified contact without other documental evidence of the agreement.

35 See Italian Administrative Tribunal of Lazio Decision No. 3982 of 1 August 2016 – My Chef e Chef express.
With regard to omissive conduct in bid-rigging infringements, it should be borne in mind that parallel behaviours do not all have the same relevance: a situation in which all the undertakings invited to submit a tender bid with identical prices (“level tendering”) cannot be compared to a situation in which all undertakings refrain from submitting a bid or do not offer discounts on the base tender price. Indeed, if all undertakings refrain from submitting a bid and/or offering discounts, it cannot be excluded that these parallel behaviours are due to the inherent lack of profitability of the tender. Consequently – in cases involving concerted practices entailing omissive conduct – the ICA needs to apply a more rigorous standard of proof, which entails an in-depth economic analysis of: (i) the economic criteria set by the tender, and (ii) the economic context in which the tender was launched36.

In other words, given that lawful alternatives to explain the facts are more likely to be plausible for cases involving omissive conduct37, the ICA needs to support its allegation with particularly solid arguments (i.e., detailed economic surveys and targeted information requests to assess the expected profitability of tenders)38.

3.2 The main features of the Italian system

The Italian approach to bid-rigging cases is characterised by three main aspects. The first two can be regarded as consistent with the European strategy, whereas the last one is specific to Italy.

The first aspect concerns the cooperation between the ICA and public prosecutor’s office. Although a standard information exchange procedure has yet to be developed, the Italian legislative system is particularly suitable for fostering this interaction in private and public tenders. Indeed, bid rigging in Italy is already a criminal offence (Arts. 352 and 354 of the Italian Criminal Code) and two recent administrative court decisions confirmed that the ICA can use all the documentation collected in criminal proceedings – assuming that the documentation was collected in compliance with procedural rules – in reaching its decisions39.

The second aspect is that the effectiveness of the ICA’s final decisions recently increased in public and private tenders. Indeed, according to the IAA’s recent guidelines issued to implement Art. 80(5) of the Italian Public Procurement

36 See Italian Administrative Tribunal of Lazio Decision No. 14281 of 18 December 2015 – Gare RCA per trasporto pubblico locale, confirmed by Council of State Decision No. 1066 of 7 March 2017. The Council of State stated that the ICA must assess the profitability of the tender taking into account not only the single tender but the entire sector, as it is common practice for large undertakings to assess the profitability of the sector in their business plan and then identify the tenders of (economic) interest in which to participate.

37 For instance, the undertakings could have decided not to submit a bid because they have invested in different tenders or considered the tender conditions to be too challenging, given the contingent conditions of the market.

38 The ICA followed this approach in its Decision No. 25802 of 22 December 2015, Case 1785 – Gara Consip servizi di pulizia nelle scuole.

Code, the ICA’s “executive” decisions can lead contracting authorities to exclude from a tender the undertakings to which the decision was addressed.

The last aspect relates more specifically to the ICA’s method of calculating fines in bid-rigging infringements, which is set out in Art. 18 of the ICA’s guidelines for calculating fines adopted in 2014 (“Fine Guidelines”).

The general rule is that, in calculating the fine, the ICA identifies the “basic amount”, which represents a percentage – of between 0% and 30% depending on the seriousness of the infringement – of the undertaking’s sales of goods or services to which the infringement relates (“Basic Amount”). The rationale of this provision is to guarantee the proportionality of the fine to the economic benefit expected from the illegal practice, to ensure effective deterrence.

However, if the infringement relates to bid rigging, the ICA calculates the Basic Amount on: (i) the value of the lots awarded to the undertakings; or (ii) the value of the tender base price if the tender is not awarded (“Unawarded Tender”). The ICA’s decision-making practice has shown that this special criterion could have potentially distortive effects in terms of proportionality in calculating the fine.

In Unawarded Tenders – in which the value taken into account in quantifying the fine corresponds to the overall value of all the lots involved in the tender (i.e., the tender base price) – no correlation exists between the amount of the fine quantified using this calculation method and the potential profit that arises from the collusion. Additionally, this outcome seems particularly unfair in terms of proportionality, as tender base prices are typically high and, therefore, the fine is likely to reach the legal limit of 10% of the undertaking’s aggregate turnover.

Consequently, in Unawarded Tenders the criteria set out in the Fine Guidelines need to be amended to allow for a more proportionate approach: for example, in one case the ICA divided up the tender base price based on the historical market shares held by the undertakings that participated in the bid-rigging infringements under examination.

Another criticism could emerge in relation to framework agreement tenders (gare in accordo quadro), which are special tender procedures that are particularly widespread in the healthcare sector.
sector. In this form of tender, the parties awarded the tender are entitled to be included in a special list of suppliers at the price they submitted in their tender bid (“Supplier List”). However, there is no guarantee that the operators included in the Supplier List will be awarded the entire value of the lots, as this value is allocated depending on the contracting authority’s demands. Consequently, if a bid-rigging infringement occurs within a framework agreement tender that has been awarded, the ICA must calculate the Basic Amount by dividing up the value of the lots awarded between the number of undertakings included in the Supplier List, so as to guarantee a proportionate approach.

4. CONCLUSIONS

The above analysis shows that – regardless of the different instruments used – the Commission and the main European Competition Authorities now have a clear interest in fighting bid-rigging infringements.

At national level, all competition authorities have published soft-law instruments (i.e., guidelines or brochures) to raise contracting authorities’ awareness of bid-rigging infringements, and they have also strengthened communication channels with criminal prosecutors’ offices.

In this respect, it would certainly be desirable for European competition authorities to implement a profitable exchange of expertise within the European Competition Network to take advantage of the similarities and differences between the various national systems and (potentially) develop a common approach. A joint effort would help to guarantee compliance with the principles of proportionality, equal treatment and legal certainty when applying competition law in critical sectors such as private and public procurement.

With specific regard to Italy, the level of development in the last few years in competition law applied to tenders is certainly impressive: administrative courts have proven to be sufficiently aware of the dangers involved in the presumptions regarding concerted practices and have accordingly required a higher standard of proof in cases that entail omissive conduct or when no direct evidence of an agreement exists. Likewise, the ICA has shown it is not indifferent to this issue and – it is hoped – has started to ensure solid evidence is collected and in-depth economic analysis conducted before presuming – based solely on parallel behaviours – that a collusion exists.

Nonetheless, the European experience provides few starting points to enhance the overall effectiveness of Italian competition enforcement. Running training courses for judges and other civil servants, as other European competition authorities do, would certainly be one positive and beneficial way of improving bid-rigging enforcement in Italy.

Finally, the most pressing need for improvement appears to be the regime governing fines for bid-rigging infringements. The section of the ICA’s Fine Guidelines concerning bid-rigging infringements needs to be revisited to mitigate the risk of disproportion when imposing fines.

45 See ICA Decision No. 26316 of 21 December 2016, case I/792 – Gare assegnoterpia ventiloterapia.
in cases of Unawarded Tenders and framework agreement tenders, in which a return to the traditional criteria set out in the Fine Guidelines seems to be the most suitable option, i.e., considering the sales value to be related to the infringement. Such a change would help avoid unnecessary proportionality distortions and violations of the equal treatment principle.
5. REFERENCES


Competition Authorities Decisions

Autorité de la Concurrence, Decision No. 04-D-50 of 3 November 2004

Autorité de la Concurrence, Decision No. 05-D-17 of 27 April 2005

Autorité de la Concurrence, Decision No. 05-D-24 of 31 May 2005

Autorité de la Concurrence, Decision No. 07-D-15 of 9 May 2007

Autorité de la Concurrence, Decision No. 09-D-03 of 21 January 2009

Autorité de la Concurrence, Decision No. 09-D-18 of 2 June 2009

Autorité de la Concurrence, Decision No. 09-D-20 of 11 June 2009

Autorité de la Concurrence, Decision No. 11-D-02 of 26 January 2011

Autorité de la Concurrence, Decision No. 13-D-09 of 17 April 2013

Bundeskartellamt, Decision of 4 December 2010, case B11-26/05

Bundeskartellamt, Decision of 10 February 2011, case B12-11/09

DOI: 10.12870/iar-12855
Bundeskartellamt, Decision of 20 September 2012, case B10-101/11
Bundeskartellamt, Decision of 23 July 2013, case B12-16/12 and B12-19/12
Bundeskartellamt, Decision of 28 August 2014, case B-3-123/11
Comisión Nacional de los Mercados y la Competencia, Decision of 4 December 2014, case S/0453/12
Comisión Nacional de los Mercados y la Competencia, Decision of 8 January 2015, case S/0429/12
Comisión Nacional de los Mercados y la Competencia, Decision of 3 December 2015, case S/0481/13
Comisión Nacional de los Mercados y la Competencia, Decision of 6 September 2016, case S/DC/0544/14
Comisión Nacional de los Mercados y la Competencia, Decision of 6 September 2016, case S/DC/0544/14
Comisión Nacional de los Mercados y la Competencia, Decision of 9 March 2017, case S/DC70512/14
Competition and Markets Authority, Decision of 19 December 2016, case CE/9691-12
Competition and Markets Authority, Decision of 27 March 2017, case CE/9882-16
European Commission, Decision of 24 January 2007, case COMP/F/38.899 – Gas insulated switchgear
European Commission, Decision of 10 July 2013, case AT.39748 – Automotive Wire
European Commission, Decision of 2 April 2014, case AT.39610 – Power Cables
European Commission, Decision of 25 June 2014, case AT.39965 – Mushrooms
European Commission, Decision of 11 December 2014, case AT.39780 – Envelopes
European Commission, Decision of 21 October 2015, case AT.39639 – Optical Disk Drives
European Commission, Decision of 12 December 2016, case AT.39904 – Rechargeable Batteries
Italian Competition Authority, Decision No. 26815 of 18 October 2017, case I/796 – Servizi di supporto e assistenza tecnica alla P.A nei programmi cofinanziati dall’UE
Italian Competition Authority, Decision No. 26316 of 21 December 2016, case I/792 – Gare ossigenoterapia ventiloterapia
Italian Competition Authority, Decision No. 25966 of 19 April 2016, case I/790 – Vendita diritti televisivi serie A
Italian Competition Authority, Decision No. 25802 of 22 December 2015, case I/785 – Gara Consip scuole
Italian Competition Authority, Decision No. 25739 of 18 November 2015, case I/782 – Gare per la bonifica di materiali inquinanti presso gli arsenali di Taranto, La Spezia ed Augusta

DOI: 10.12870/iar-12855
Italian Competition Authority, Decision No. 25488 of 27 May 2015, case I/759 – *Forniture Trenitalia*

Italian Competition Authority, Decision No. 25489 of 27 May 2015, case I/771 – *Servizi di post-produzione di programmi televisivi RAI*

Italian Competition Authority, Decision No. 25435 of 22 April 2015, case I/775 – *Procedure di affidamento dei servizi di ristoro su rete stradale*

Italian Competition Authority, Decision No. 25257 of 3 February 2015, case I/765 – *Gare gestioni fanghi Lombardia e Piemonte*

Italian Competition Authority, Decision No. 1066 of 7 March 2017, case I/744 – *Gare per TPL*

Italian Competition Authority, Decision No. 25155 of 22 October 2014, case I/769 – *Sanità privata nella regione Abruzzo*

Italian Competition Authority, Decision No. 23931 of 28 September 2012, case I/723 - *Intesa nel mercato delle barriere stradali*

Italian Competition Authority, Decision No. 22838 of 28 September 2011, case I/731 – *Gare assicurative ASL e aziende ospedaliere campane;*

Italian Competition Authority, Decision No. 22648 of 4 August 2011, case I/729 – *Gara d’appalto apparecchiature risonanza magnetica*

Italian Competition Authority, Decision No. 17135 of 3 August 2007, case I/666 – *Gare per la fornitura di dispositivi per stomia*

Office of Fair Trading, Decision No. CA98/1/2004 of 16 March 2004

Office of Fair Trading, Decision No. CA98/1/2005 of 15 March 2005

Office of Fair Trading, Decision No. CA98/04/2005 of 11 July 2005

Office of Fair Trading, Decision No. CA98/01/2006 of 23 February 2006

Office of Fair Trading, Decision No. CA98/02/2009 of 21 September 2009

Office of Fair Trading, Decision No. CA98/03/2013 of 6 December 2013

**Italian Judicial Decisions**

Italian Administrative Tribunal of Lazio Decision No. 14281 of 18 December 2015

Italian Administrative Tribunal of Lazio Decision No. 3075 of 27 January 2016

Italian Administrative Tribunal of Lazio Decision No. 6503 of 6 June 2016

Italian Administrative Tribunal of Lazio Decision No. 3982 of 1 August 2016

Italian Administrative Tribunal of Lazio Decision No. 13303 of 14 October 2016

Council of State Decision No. 3291 of 2 July 2015

Council of State Decision No. 4123 of 4 September 2015

Council of State Decision No. 1066 of 7 March 2017