

# CIRCUMSTANTIAL EVIDENCE IN BID RIGGING CASES: LOOKING FOR (ITALIAN) PLUS FACTORS

**Michele Carpagnano**

**LEAR CONFERENCE  
PUBLIC PROCUREMENT & COMPETITION POLICY**

**Rome, 4 July 2017**

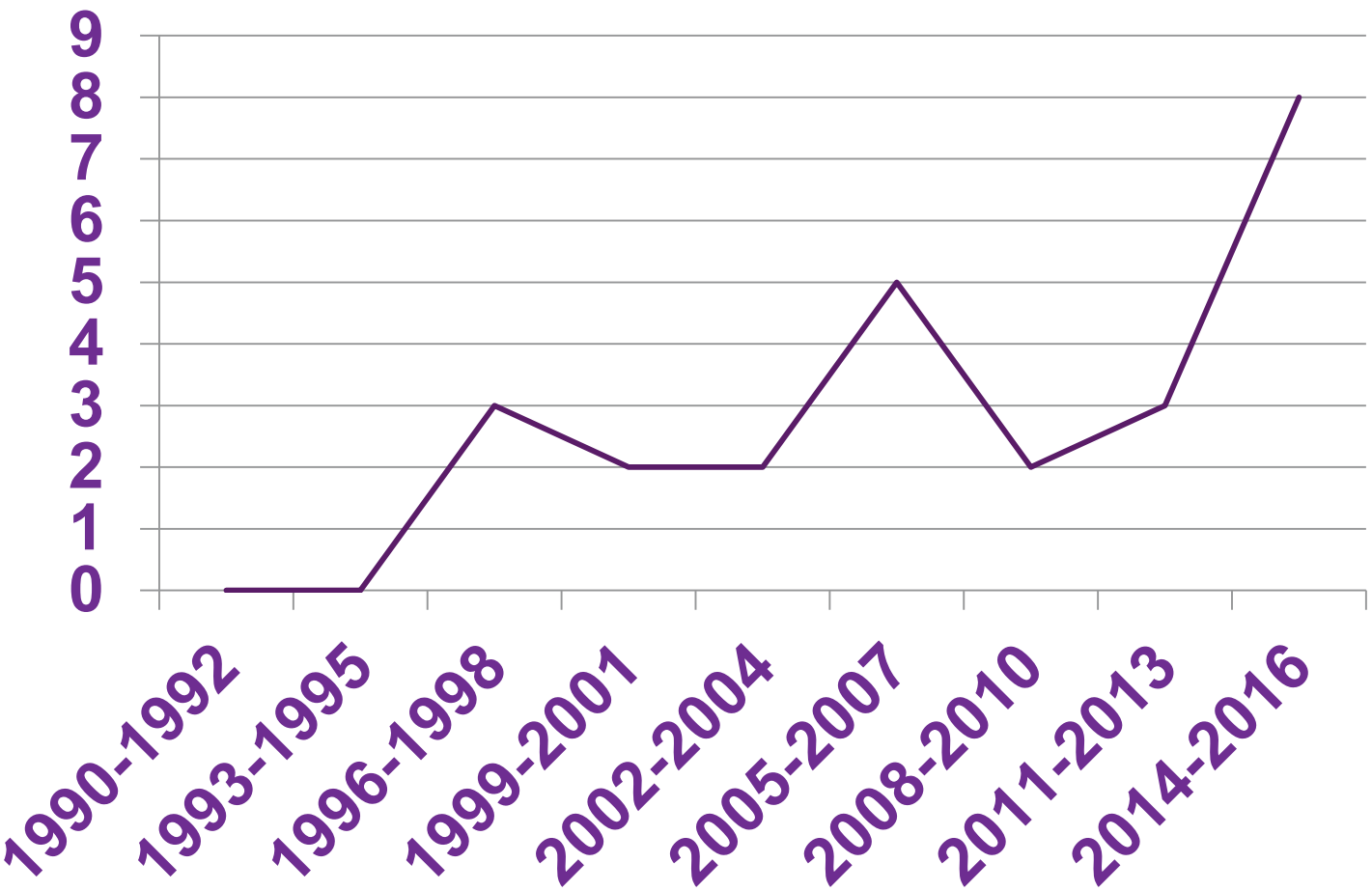
# OUTLINE

- 1. WHY CIRCUMSTANTIAL EVIDENCE IS CRITICAL IN DETECTING BID-RIGGING?**
- 2. AGGREGATED DATA ON BID-RIGGING CASES IN ITALY**
- 3. EVIDENCE IN BID-RIGGING CASES IN ITALY**
- 4. WHAT ARE PLUS & SUPER PLUS FACTORS IN THE ITALIAN EXPERIENCE?**
- 5. CONCLUSIONS: LOOKING FOR PLUS FACTORS BEYOND ICA's VADEMECUM**

# 1. WHY CIRCUMSTANTIAL EVIDENCE IS CRITICAL IN DETECTING BID-RIGGING?

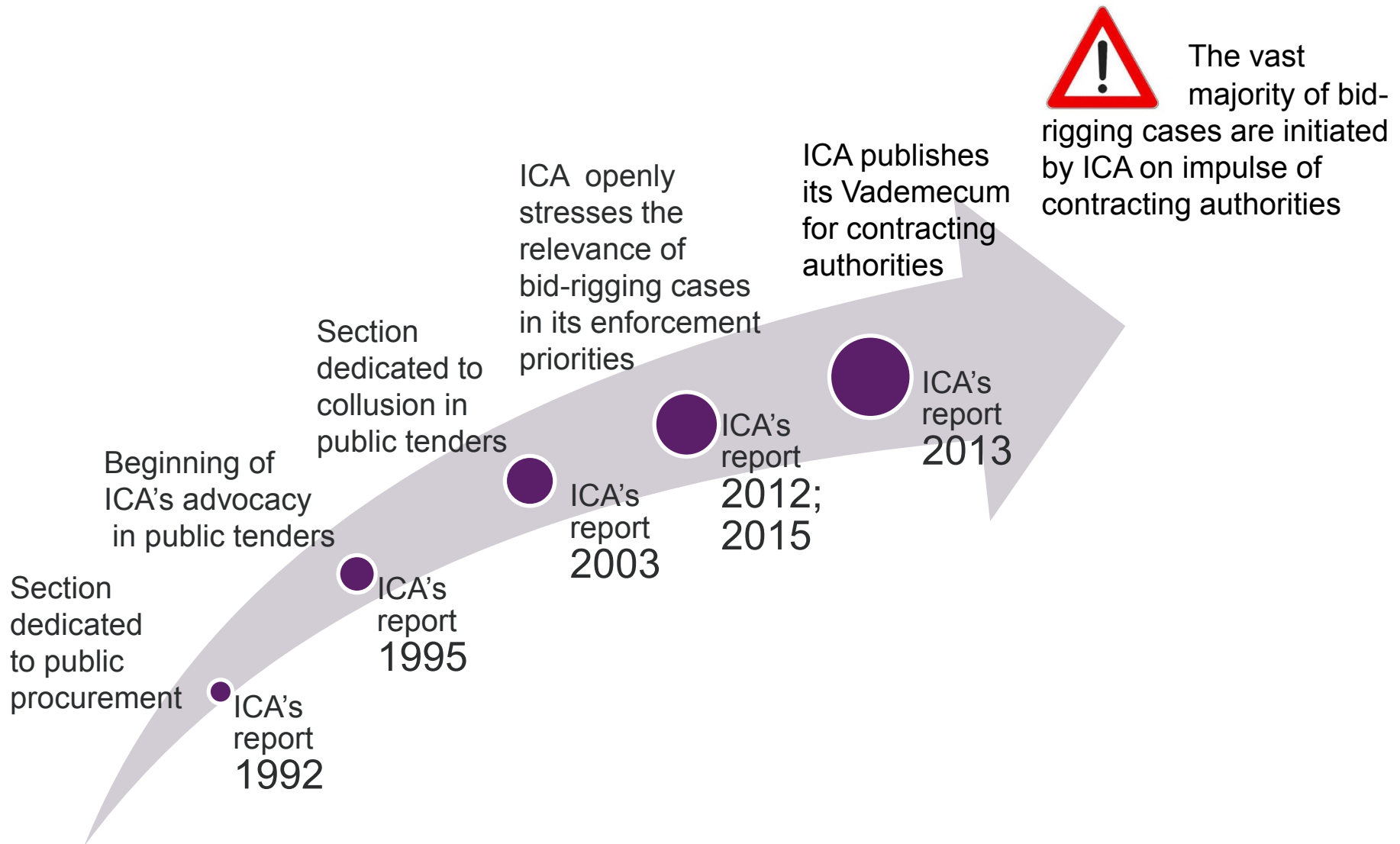
- Tenders are specifically designed to improve the degree of competition in the market both in the private and in the public sector
- Nevertheless tenders often see the participation of a **limited** number of players that lead to oligopolistic scenarios
- In such scenarios the interdependence between the players may be conducive to **repeated games**, thereby facilitating collusion compared to posted-price markets
- This is why it is often hard to distinguish **collusion** from **legitimate rational behaviours**
- This is why the **specific circumstances of the cases** must be scrutinized in order to detect indicators of collusion

# 2. ICA's DECISIONS ON BID-RIGGING CASES (1990-2016)



Source: ICA's Annual Reports

## 2. GROWING INTEREST IN BID-RIGGING CASES IN ITALY



# 2. TYPE OF DECISIONS AND INVESTIGATED MARKETS

25

ICA's  
DECISIONS

9

CONFIRMED  
ON APPEAL

3

ANNULLED  
ON APPEAL

3

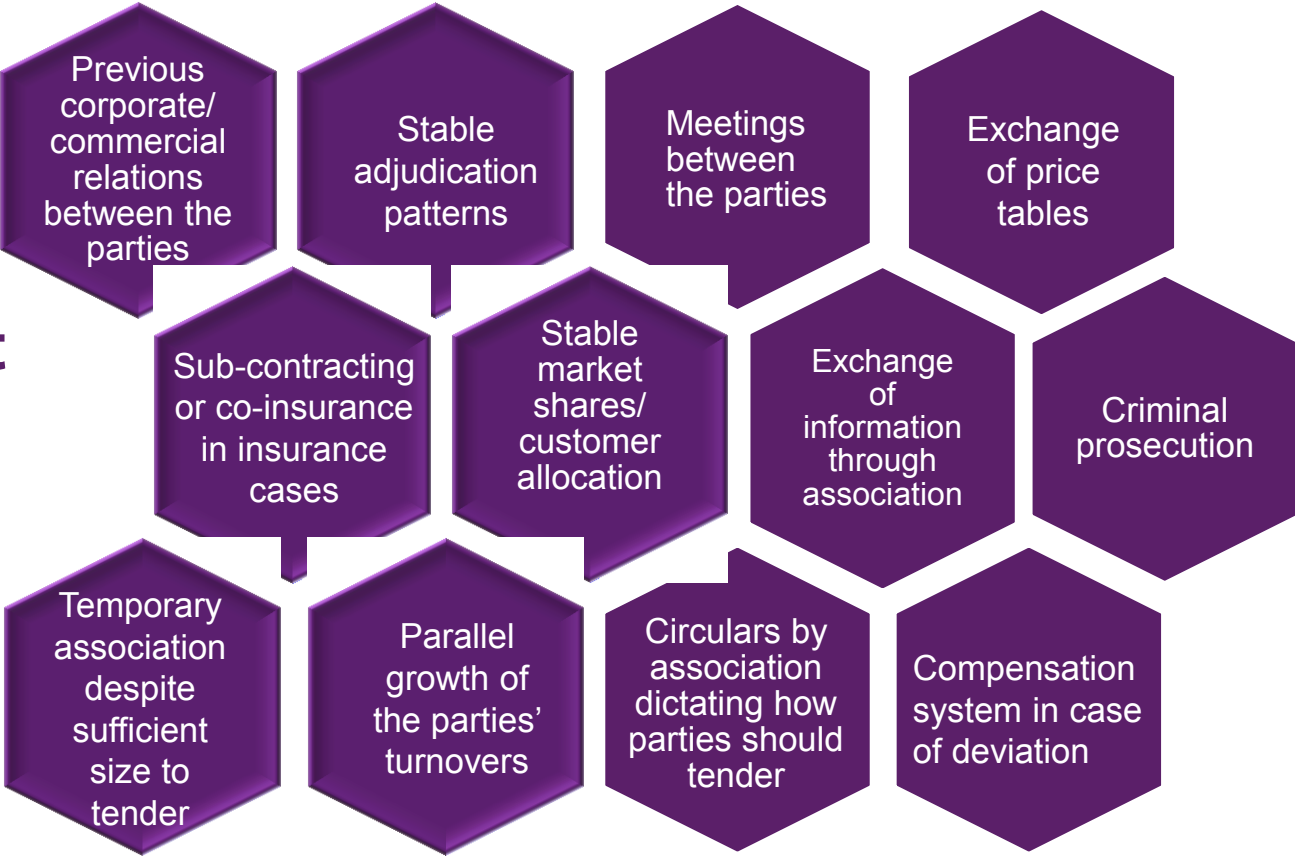
ON PRIVATE  
TENDERS



- Medical
  - Transport
  - Energy
  - Insurance
  - Local services
  - Other services (including supply of products, refreshments, banking...)
- (including sludge management, roadside barriers, reclamation services)

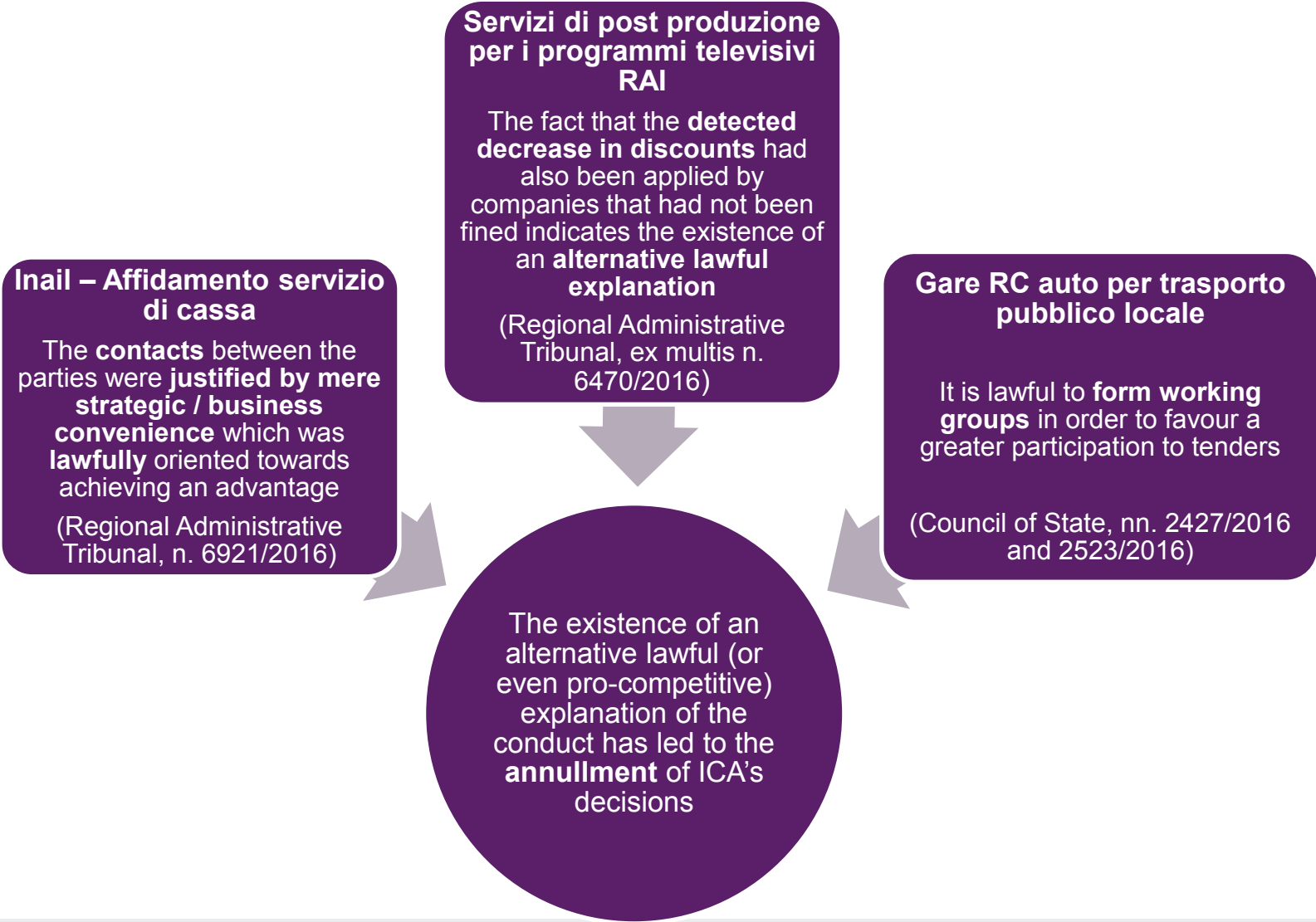
# 3. EVIDENCE IN BID-RIGGING CASES IN ITALY

**Agreement  
vs.  
concerted  
practice**



**No hierarchy between the various indicators based on their economic significance: the detection of bid-rigging depends on the overall consistency of all available evidence**

# 3. DESPITE THE NUMBER OF CONFIRMED DECISIONS, ADMINISTRATIVE COURTS STRICTLY RELY ON FACTS





# 4. WHAT ARE PLUS & SUPER PLUS FACTORS IN THE ITALIAN EXPERIENCE?



Most of these factors have been crystalized by ICA's 2013 Vademecum

## 5. CONCLUSIONS: LOOKING FOR (ITALIAN) PLUS FACTORS: BEYOND ICA'S 2013 VADEMECUM

- The data show an increasing growth in the number of bid-rigging cases in Italy
- Such growth stimulates the awareness of contracting authorities and witnesses ICA's rising experience in detecting bid-rigging
- Italian case-law shows that ICA hardly relies solely on circumstantial evidence to prove bid-rigging
- This is because in the absence of any clear indicators that an agreement has taken place the burden to prove that bid-rigging is the only reasonable explanation to the conduct of the parties falls on ICA
- The scrutiny of administrative courts over ICA's decisions supports that circumstantial evidence is the dividing line between legitimate rationale behaviours and collusion
- ICA's 2013 Vademecum provides a useful tool to detect bid-rigging based on circumstantial evidence, but plus factors still need to be clarified

**Michele Carpagnano**

Partner

Head of Competition & Antitrust

T +39 06 809 120 00

E [michele.carpagnano@dentons.com](mailto:michele.carpagnano@dentons.com)



---

Dentons is the world's largest law firm, delivering quality and value to clients around the globe. Dentons is a leader on the Acritas Global Elite Brand Index, a BTI Client Service 30 Award winner and recognized by prominent business and legal publications for its innovations in client service, including founding Nextlaw Labs and the Nextlaw Global Referral Network. Dentons' polycentric approach and world-class talent challenge the status quo to advance client interests in the communities in which we live and work. [www.dentons.com](http://www.dentons.com)