

THE USE OF ECONOMIC EVIDENCE IN BID RIGGING CASES

Antonio Buttà

Italian Competition Authority

Public Procurement & Competition Policy

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Bid rigging cartels

- **Bid rigging**

- Bidders agree to eliminate competition (within auction/across auctions)
- Allocation of tenders/lots among potential bidders
- Avoid competitive procedure
- → Higher prices (but normally no reduction in quantity)



- **From screening to enforcement**

- Screening → Antitrust proceedings → Proof of bid rigging cartel?

Evidence to prove a cartel

- **Direct evidence**


- Identifies a meeting or communication between the cartel participants and describes the illegal substance of their agreement
- It makes it possible to establish that designated companies concluded an agreement that restricts competition

- **Circumstantial evidence**

- Evidence that is consistent with illegal cartel activity but does not specifically describe the terms of the agreement or identifies the parties to it
- Evidence which is appropriate to corroborate the proof of the existence of a cartel by way of deduction, common sense, economic analysis or logical inference from other facts which are demonstrated

Circumstantial evidence

	Circumstantial evidence	Examples
Communication	Evidence that firms met or otherwise communicated, indirect evidence of communication about the subject	Meetings, internal documents that show knowledge of a competitor's pricing strategy, notes that mention allocation of tenders
Economic	Conduct by firms in a market and of the industry as a whole that is consistent (only) with the expected conduct of a cartel	Parallel pricing, abnormally high profits, stable market shares and a history of cartel violations
	Facilitating practices: practices that can make it easier for firms to reach or sustain an agreement	Information exchanges, price signalling, price protection, most favoured nation policies and unnecessarily restrictive product standards
	Structural evidence: market characteristics that are conducive to the existence and stability of a cartel	High concentration, high barriers to entry, homogeneous products, symmetry of firms, stable demand and price transparency



*The methodology for evaluating circumstantial evidence
is like an impressionist painting:
many dots or brush strokes which together form an image*

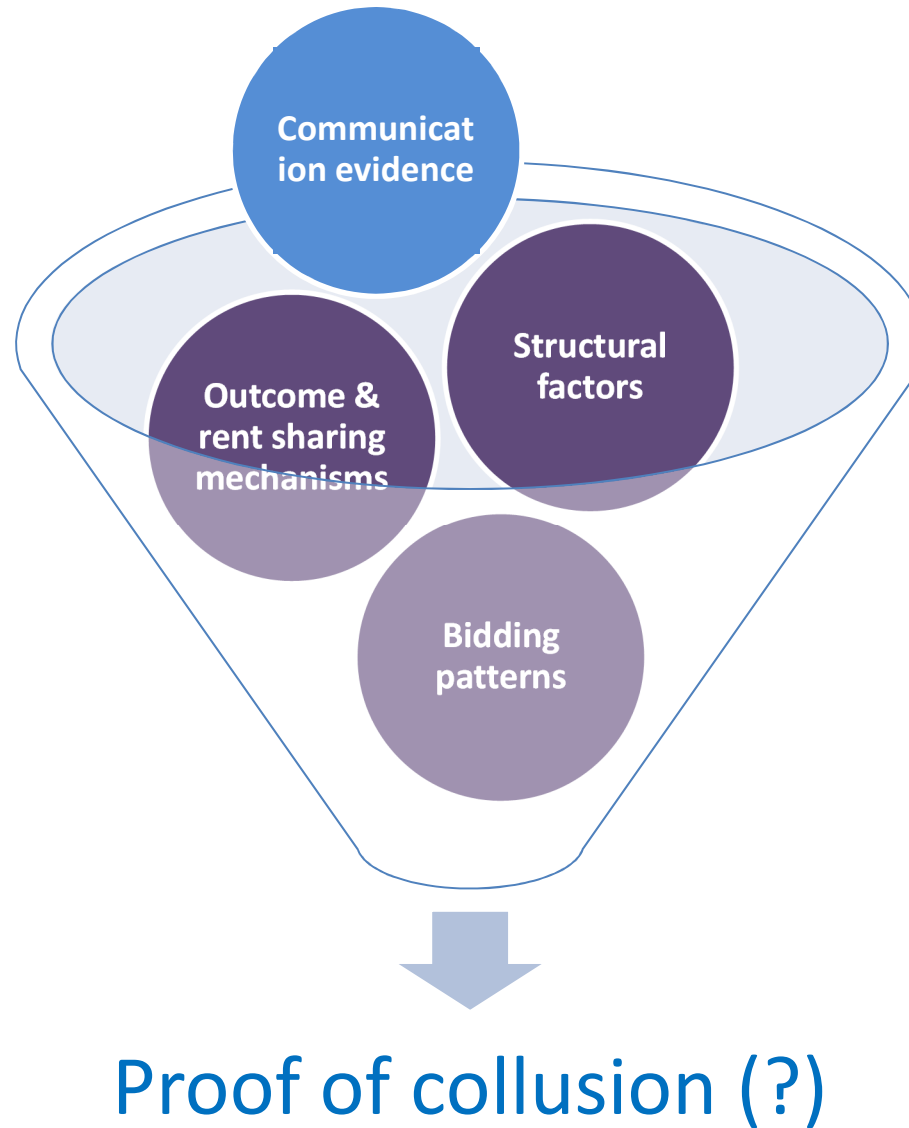
*(OECD Policy Roundtables,
Prosecuting Cartels without Direct Evidence)*



Standard of proof

- The existence of an anticompetitive practice or agreement can be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules
- The assessment of an infringement can be based on circumstantial evidence if an overall pattern of guilt emerges and in absence of any other reasonable hypothesis that could be predicated on that evidence
- The weight of evidence is based more on its overall consistency than on the value of each individual item of evidence

Economic evidence in bid rigging cases



Structural factors

- **The market/industry**
 - Market structure
 - Barriers to entry
 - New entrants/mavericks
 - Capacity constraints
 - Firms' heterogeneity
 - Geographical coverage (transport costs)
 - Incumbency advantages
- **Auction design**
 - Ability and incentives to collude (e.g. lots, participation requirements)
 - Intensity of (unilateral) competition (e.g., reserve price, auction design conducive to tacit collusion)

Bidding patterns

	Potential index of collusion	Potential alternative explanations	Relevant evidence
No bids	Agreement to avoid tender procedure, maintain <i>status quo</i> , or improve tender conditions (No “duty to bid” by individual companies)	Tender design (reserve price, bidding costs) Opportunity cost	Benchmarking: across-auction anomalies Firms’ heterogeneity Economic models
Selective bids	Allocation of lots/tenders resulting in market sharing	Lack of resources/capacity constraints Firms’ heterogeneity (incumbency advantages) Bidding costs Opportunity cost	Economic models Bidding costs Heterogeneity (lots, tenders, firms)
Cover bids	Add legitimacy to a market sharing collusive agreement Can strategically affect the outcome	Firms’ heterogeneity Cost differences Incumbency advantages	Economic models Within-auction (or across-auction) anomalies

Outcome and rent sharing mechanisms

- **Outcome**

- Distribution of lots/tenders among market players
- Historical market positions
- Geographical market-segmentation or time-based allocation of tenders
- Contract value

- **Profit/rent sharing mechanisms**

- Consortia/joint bidding
- Common ownership
- Sub-contracting
- Side payments

Joint bidding

- **Pro-competitive use:** it increases the number of competitors, allowing the (joint) participation of undertakings. Joint bidding may lead to substantial economic benefits (by combining activities, skills or assets, saving costs and sharing investments) and increase competition.
- **Anti-competitive use:** joint bidding can be used to avoid competition. Antitrust infringements may be committed through the distorted use of rights which are formally legitimate, but exercised in a reprehensible manner for a purpose different from that meant by the laws conferring such rights.
- **-> case by case analysis**
 - Joint bidding between companies which would be able to individually participate in the tender is not anti-competitive as such
 - Assess if aims at excluding competition between operators
 - Assess economic rationale of the agreement

The ICA's recent enforcement record

- **Proceedings closed by the ICA for restrictive agreements in public tenders (2015-2016)**
 - 1765 – GARE GESTIONE FANGHI IN LOMBARDIA E PIEMONTE
 - 1744 – GARE RCA PER TRASPORTO PUBBLICO LOCALE
 - 1775 – PROCEDURE DI AFFIDAMENTO DEI SERVIZI RISTORO SU RETE AUTOSTRADALE ASPI
 - 1759 – FORNITURE TRENITALIA
 - 1771 – SERVIZI DI POST-PRODUZIONE DI PROGRAMMI TELEVISIVI RAI
 - 1792 - GARE OSSIGENOTERAPIA E VENTILOTERAPIA
 - 1782 - GARE PER SERVIZI DI BONIFICA E SMALTIMENTO DI MATERIALI INQUINANTI E/O PERICOLOSI PRESSO GLI ARSENALI DI TARANTO, LA SPEZIA ED AUGUSTA
 - 1785 - GARA CONSIP SERVIZI DI PULIZIA NELLE SCUOLE

Case I782: disposal of asbestos

- **Case I782 – disposal of asbestos in military arsenals**

- Decision against 12 undertakings for a cartel distorting competition in public tenders for the disposal of hazardous materials (asbestos) in 3 military arsenals.
- Market-sharing and the preservation of the companies' incumbency positions
- Higher prices

Economic evidence

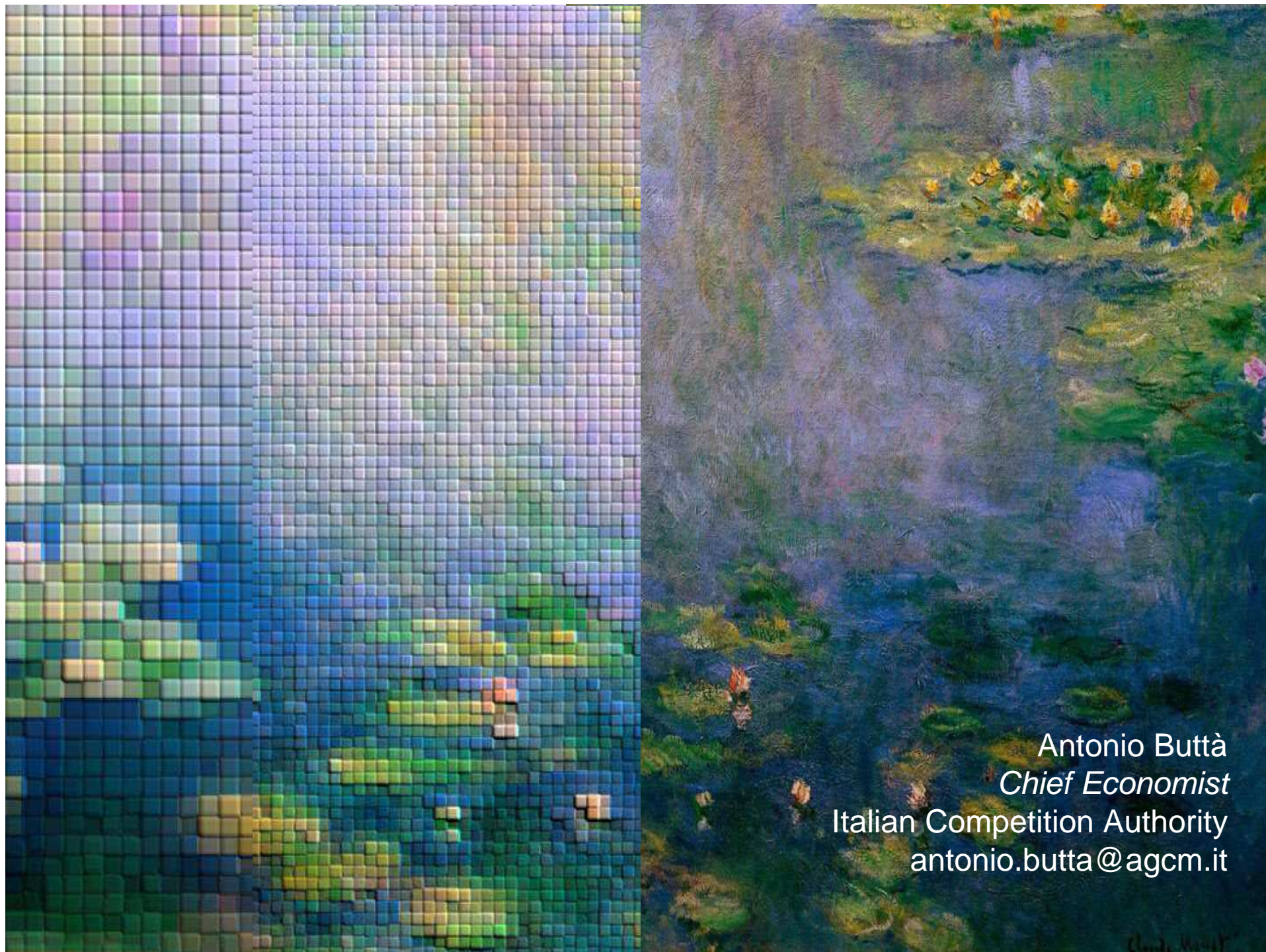
- Joint bidding by companies that were previously competing
- Only one bid in each lot
- Low rebates (about 1%)
- Ex-post allocation of activities inconsistent with structure of consortia

Alternative explanations put forward by the parties

- Joint bidding by companies with complementary assets
- Lack of resources/capacity constraints to bid in all lots
- Low rebates due to higher costs, payment delays + need to recoup past losses

- **Decision upheld by TAR and the Council of State**

- The «narrative congruency» of the hypothesis of collusion is the only one that appears to fit the facts



Antonio Buttà
Chief Economist
Italian Competition Authority
antonio.butta@agcm.it