

# Division of Public Contracts Into Lots and Bid Rigging: Can Economic Theory Provide an Answer?

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*Splitting large public contracts into lots fosters competition in the long and short run, and enhances the participation of small and medium enterprises (SMEs) in public procurement proceedings. However, the division of contracts into lots can also facilitate anticompetitive practices, such as bid rigging. In order to deal with this, economic theory has established two basic rules. The first one is that the number of lots should be smaller than the expected number of participants. The second one is that the contracting authorities should define at least one lot more than the number of incumbents and reserve it to new entrants. This paper discusses these rules and investigates to what extent they can indeed cope successfully with bid rigging. As it will be proved, they are not panacea for all cases of bid rigging and it is not always practically possible to apply them. Therefore, they need further elaboration and amendments. Suggestions will be made about how we could make them more effective. Some of these recommendations are based on ideas taken from the legal regime of USA.*

## I. Introduction

It has been a long-standing belief that dividing large public contracts into lots “extends the supplier and provider base to small and medium size enterprises (“SMEs”)”, while competition is enhanced in the long and short run.<sup>1</sup> However, apart from fostering competition, the division of contracts into lots can also facilitate anti-competitive activities such as bid rigging. Bid rigging is an explicit agreement that bidding firms usually make with the aim of not tendering at all or with the aim of tendering but in such a way that they may not be competitive with one of

the other bidders.<sup>2</sup> As a result, the outcome of any sale or purchasing process in which bids are submitted can be adversely affected.<sup>3</sup>

In order to prevent collusive practices when the public contract is split into lots, the economic theory has underlined that two vital rules should always apply. The first one is that the number of lots should be smaller than the expected number of participants. The second one is that the contracting authorities should define at least one lot more than the number of incumbents and reserve it to new entrants. In this paper, the author is scrutinising the aim as well as the content of these two intuitive rules of the eco-

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1 Recital 78 of the Directive 2014/24/EU; M Trybus, ‘The Promotion of Small and Medium Sized Enterprises in Public Procurement: A Strategic Objective of the New Public Sector Directive?’ in: FLichère, R Caranta and S Treumer (eds), *Modernising Public Procurement: The New Directive* (Djøf Publishing 2014), 268; L Carpineto, G Piga and M Zanza, ‘The Variety of Procurement Practice: Evidence From Public Procurement’ in: NDimitri, G Piga and G Spagnolo (eds), *Handbook of Procurement* (Cam-

bridge University Press 2006), 21-22; A Sánchez-Graells, ‘Prevention and Deterrence of Bid Rigging: A Look from the New EU Directive on Public Procurement’ in GRacca and CYukins (eds), *Integrity and Efficiency in Sustainable Public Contracts* (Brussels: Bruylant 2014), 12; WKirkwood, ‘The Evolution of Small Business Preferences in the United States and Selected Lessons Learned for the European Union’ (2016) 4 EPPPL, 312.

2 A Zarkada-Fraser, ‘A Classification of Factors Influencing Participating in Collusive Tendering Agreements’ (2000) 23 *Journal of Business Ethics*, 270.

3 Directorate General for Competition, ‘Glossary of Terms Used in EU Competition Policy - Antitrust and Control of Concentrations, Brussels 2002, available at <[http://ec.europa.eu/translation/spanish/documents/glossary\\_competition\\_archived\\_en.pdf](http://ec.europa.eu/translation/spanish/documents/glossary_competition_archived_en.pdf)> (last accessed on 10 January 2018).

conomic theory and she tries to answer the research question to what extent they can successfully cope with bid rigging. The analysis will focus on the weaknesses that are still to be overcome when applying these two prescriptions, without referring to specific markets or industries but by using some exemplary case scenarios that can be met in various markets and industries, as explained below. As it will be proved, the aforementioned rules of the economic theory are not panacea for all cases, but they need further elaboration and amendments, especially in view of the fact that the weaknesses arising from them remain unaddressed by the new Public Sector Directive 2014/24/EU (hereinafter “2014/24/EU Directive”). Hence, before concluding, some recommendations will also be made in order to render them more effective.

In view of the above, this paper is structured as follows. After this introduction, section II provides some background information that lays out the legal framework for division of public contracts into lots in Europe, in order to avoid jumping directly into the core issues, without setting the general context. In the same section, it is explained why we should care about collusive practices, such as bid rigging, in the area of public procurement and specifically when public contracts are divided into lots. Section III explains the content of the first rule of the economic theory and monitors all the points that are rather weak and incompatible with the effective confrontation of bid rigging. Section IV examines the second rule of the economic theory and highlights its various practical hindrances as well as the fact that several EU Member States may not ensure preferential treatment for SMEs, which is a prerequisite for the successful application of the rule. In Section V some recommendations are made in order to make the current rules of the economic theory more effective. Some of these recommendations are based on ideas taken from the legal regime of the USA. In Section VI the Article draws the main conclusions resulted from the whole analysis.

## II. Background Information and Significance of the Paper

Procurement planning is the first phase of the public procurement process, in which decisions are made about which goods or services are to be bought and

when. At this stage, contracting authorities can also consider whether they will divide a contract into lots or not. Article 46, paragraph 1 of Directive 2014/24/EU contemplates that contracting authorities have the discretion to decide whether they will award a contract in the form of separate lots or not and they are free to determine the size and subject-matter of such lots. Similarly, the European legislator gives Member States an option to render mandatory the splitting of public contracts.<sup>4</sup> If this option is not made by a specific Member State, like the UK which did not implement such an obligation or the Netherlands and Belgium that have adopted rather “loose regulations” regarding this issue,<sup>5</sup> contracting authorities are obliged to give reasons why they decided not to split the contract into lots (“Divide or explain formula”).<sup>6</sup> This means that in case of a non-mandatory provision in a Member State, still the division of contracts into lots is the default approach, as any opposite decision taken by a contracting authority shall be justified by having to provide the “main reasons” in the procurement documents or in the individual report which is required under Article 84 of Directive 2014/24/EU.<sup>7</sup>

As already highlighted in the introduction, the division of contracts into lots can favour anti-competitive activities such as bid rigging. Bid rigging can take place when a public contract is divided into lots because the simultaneous awarding of lots by the same contracting authority may give the opportunity to economic operators that usually submit bids for all lots to “share the pie”, as they can ensure in this way the possession of at least one lot for each of them.<sup>8</sup> But, even if the format in the award of multiple lots is not simultaneous but sequential, collusion

4 Article 46, paragraph 4 of Directive 2014/24/EU.

5 M Zimmermann, ‘Economic Efficiency and the Division of Large Procurement Contracts into Lots: An Analysis’ (2017) 4 EPPPL, 423.

6 M Trybus and M Andrecka, ‘Favouring Small and Medium Sized Enterprises with Directive 2014/24/EU?’ (2017) 3 EPPPL, 229; I Herrera Anchustegui, ‘Division into Lots and Demand Aggregation—Extremes Looking for the Correct Balance?’ in: GS Ølykke and Albert Sánchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar 2016), 126.

7 SIGMA and OECD, “Brief 36—Division of Contracts into Lots”, available at <<http://www.sigmaxweb.org/publications/Public-Procurement-Policy-Brief-36-200117.pdf>> (last accessed on 25 January 2018), 4.

8 G Simona, ‘Public Investments and the Application of Articles 101 and 102 TFEU’ in A Almäşan and P Whelan (eds), *The Consistent Application of EU Competition Law: Substantive and Procedural Challenges* (Springer 2017), 99.

between economic operators can still be enhanced, because they have the ability to “identify defections from the collusive agreement and to react quickly within the same sequential award”.<sup>9</sup> Additionally, the frequent interactions of economic operators when they bid for multiple lots, as well as the pre-announcement of a series of tenders for awarding the lots of a public contract can increase the likelihood of collusive practices like bid rigging.<sup>10</sup>

The reason why we should care about collusive practices, such as bid rigging, is that they undermine the very purpose of dividing contracts into lots. To be more specific, bid rigging can decrease the allocative efficiency, meaning “the allocation of the entire procurement to the economic operator(s) that are willing and able to provide the goods or service for the highest value/price quotient”.<sup>11</sup> If for some reason, like bid rigging, the economic operators that were awarded with the lots of a public contract do not offer the highest possible value/price quotient but they submit an artificially raised price in order to maximise their profits, the public sector fails to achieve the best value for money. The consequences of this outcome are even more dramatic when a pub-

lic contract is split into lots, because in that case not only the value for money is not achieved, but also increased transaction costs accrue, i.e. costs related to and accompanied with the division of contract into lots, as the contracting authority has to administer more than one award procedure and separate evaluations have to be made for each of the lots procured.<sup>12</sup> As a result, the increased transaction costs in combination with the payment of great amounts of money to undeserving suppliers cause loss to the government’s budget and this loss is ultimately borne by the taxpayers.

### III. The Number of Lots Should Be Smaller than the Expected Number of Participants: What Is Wrong With This?

The first prescription is that the number of lots should be smaller than the expected number of participants.<sup>13</sup> The auction literature as well as the economic theory suggests this in order to prevent firms from sharing the lots as if they were spoils divided up among them at a low price.<sup>14</sup> In other words, the purpose of the first criterion is to make it harder for colluding tenderers to coordinate and share the pie between them, since the discrepancy between the participants and the number of lots means there will be bid riggers unable to get a slice out of the cake. However, this rule has some limits, as it does not take into account the composition of firms in the market as well as the fact that they may operate in multiple markets.<sup>15</sup> Another factor that is not particularly considered under this rule is the “numerical and dimensional distribution of lots”, in other words the lots’ exact configuration.<sup>16</sup> When the size of the lots is heterogeneous and there is asymmetry in the value of lots, the scope of market sharing agreements may be reduced<sup>17</sup> for two reasons. The first one is that the barriers to entry may be somewhat lowered when splitting the contract in one very high-value lot and one very low-value lot, as in this way the market opens up to SMEs, which are also able to bid.<sup>18</sup> The second one is that the higher the asymmetry of lots, the bigger the differences in the contribution of ring members to the collusive gains. Since “the payoffs from participation in the ring are commensurate with the contribution of each individual to the profitability of the ring”,<sup>19</sup> this means that the coopera-

9 SIGMA and OECD, ‘Brief 2- Economic Issues in Public Procurement’, January 2011, available at <[www.sigmaxweb.org/publications/Economic\\_Issues\\_Public\\_Procurement\\_2011.pdf](http://www.sigmaxweb.org/publications/Economic_Issues_Public_Procurement_2011.pdf)> (last accessed on 17 October 2017).

10 OECD, ‘Policy Roundtables- Competition in Bidding Markets 2006’, available at <<http://www.oecd.org/competition/carets/38773965.pdf>> (last accessed on 17 October 2017), 35.

11 Zimmermann (n5), 425. 12 Ibid, 427.

13 PKlemperer, ‘What Really Matters in Auction Design’ (2002) 16(1) *Journal of Economic Perspectives*, 169-189; PKlemperer, ‘How (Not) to Run Auctions: the European 3G Telecom Auctions’ (2002) 46(4-5) *European Economic Review*, 829-845; PKlemperer, *Auctions: Theory and Practice* (Princeton University Press 2004); V Grimm, RPacini, G Spagnolo and MZanza, ‘Division in Lots and Competition in Procurement’ in: NDimitri, GPiga and G Spagnolo (eds), *Handbook of Procurement* (Cambridge University Press 2006), 183-185.

14 PKlemperer, ‘What Really Matters in Auction Design’ (2002) 16(1) *Journal of Economic Perspectives*, 177-178.

15 Grimm/Pacini/Spagnolo/Zanza (n 13), 168-169.

16 Ibid.

17 OECD, ‘Hearing on Auctions and Tenders: Further Issues- Working Party No. 2 on Competition and Regulation’, available at <[https://one.oecd.org/document/DAF/COMP/WP2\(2015\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2(2015)1/en/pdf)> (last accessed on 5 February 2018).

18 OECD, *Second Public Procurement Review of the Mexican Institute of Social Security (IMSS): Reshaping Strategies for Better Healthcare* (Paris: OECD Publishing 2018), 151.

19 RC Marshall and LM Marx, *The Economics of Collusion- Cartels and Bidding Rings* (MIT 2012), 63.

tive payoffs of each ring member will be different as well. This can be a great problem for the sustainability of a bidding ring, especially when its ring members are symmetric. In case of a ring member that gets a small and low-value lot, its pay-off will be decreased as well and so this may serve as an incentive for it to deviate from the collusive agreement and undercut it in order to obtain extra profits.<sup>20</sup> Despite the above reasons, the present rule of the economic theory does not contribute at all to the calculation of the optimal lot sizes and value, while these decisions are in the hands of the contracting authorities which have wide autonomy, according to 2014/24/EU Directive, to determine the size as well as the subject-matter of the lots.<sup>21</sup> Hence, we could say that the rule plays second fiddle when it comes to the contracting authorities' freedom to decide autonomously, without being subject to administrative or judicial supervision.

Moreover, the rule cannot apply effectively to other forms that bid rigging can take, such as the cover bidding, bid rotation and subcontracting arrangements. Let us consider firstly the form of cover bidding. Suppose, for instance, that a ministry is equipping a new office with furniture. The contract is split into lots so that separate competitions may take place for the desks and the associated items, chairs, storage units, meeting room furniture and so on.<sup>22</sup> In case of cover bidding, one or more of the tenderers will submit offers at an intentionally high price or at least higher than the bid of the designated winner or having special terms which were not contemplated in the contract notice. As a result, the relevant contracting authority will probably reject these offers and it will award all or several of the contract lots to the designated winner. This is something that can very possibly happen in view of Directive 2014/24/EU which in Recital 79 allows for package bidding, meaning that a bidder is able to offer a single price for a set of items. Package bidding is permissible if after the determination of the tenders that best fulfill the award criteria laid down for each individual lot, the contracting authorities conduct a comparative assessment of these tenders with the tenders submitted by a particular tenderer for a specific combination of lots and it turns out that the latter fulfill the relevant award criteria better than the tenders for the individual lots concerned seen in isolation.<sup>23</sup> Article 46, paragraph 2 of Directive 2014/24/EU is in the same line with Recital 79 and it contemplates that where

the application of the award criteria results in one tenderer being awarded more lots than the maximum number of lots per tenderer, which is stated in the contract notice or in the invitation to confirm interest, contracting authorities shall indicate in the procurement documents the objective and non-discriminatory criteria or rules they intend to apply.

Let us now deal with the form of bid rotation. Suppose that a hospital wants to re-tender a facilities management contract that covers many non-medical services, such as cleaning, security, building maintenance, catering etc. Though a total facilities management single contract is feasible, contracting authorities may opt for separate competitions for each element.<sup>24</sup> This may be the case if, for instance, a contracting authority is not satisfied with the joint venture that had previously won the total facilities management contract or if it wants to open competition to SMEs as well. Under these circumstances, the contracting authority may decide that the duration of each single service contract, like the contract for cleaning services, will be only two years because of its simple nature.<sup>25</sup> Since the single service contracts, contrary to the complex bundled contracts, are generally planned to be re-tendered pretty soon, it is very possible for the bidders to agree on the submission of the lowest bid on a rotating basis. Such an anti-competitive practice of course cannot be prevented by just fixing the ratio between the number of potential bidders and the number of lots, which tries to deliver more competition for the lots without providing for any way that the timing and extent of the contract division could become unpredictable.

Regarding the third form that bid rigging can take, namely the subcontracting arrangements when they are made as a payback ("*quid pro quo*"), imagine that

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20 GL Albano and G Spagnolo, 'Asymmetry and Collusion in Sequential Procurement: A "Large Lot Last" Policy' (2010) 10(1) The B.E. Journal of Theoretical Economics, Article 43, 10.

21 Recital (78) of Directive 2014/24/EU.

22 The scenario is taken from the Public Spend Forum. Please see P Smith, 'Five Alternative Approaches to Lots Lotting for Contracts', available at <<http://www.publicspendforum.net/blogs/peter-smith/2017/03/15/contracts-lots-lotting-public-procurement-uk-europe/>> (last accessed 17 October 2017).

23 Recital (79) of the Directive 2014/24/EU.

24 Ibid.

25 For the usual duration of facilities management contracts, please see H Davis, 'Deciding the Duration of a Facilities Management Contract', available at <<http://www.fgould.com/uk-europe/articles/deciding-duration-facilities-management-contract/>> (last accessed 17 October 2017).

a public contract is based on the most economically advantageous offer (“MEAT”) and it is split into two lots. For the first lot, tenderer A submits an offer of €200,000, tenderer B submits an offer of €180,000, while tenderer C submits an offer of €190,000. For the second lot tenderer B submits an offer of €160,000, while tenderer C submits an offer for €130,000. Though from a pure economic perspective, the first lot should have been awarded to tenderer B and the second lot to tenderer C, the contracting authority held that the offer of tenderer C for the first lot was much better than the offer of tenderer B on the basis of the best price-quality ratio. Therefore, tenderer C undertakes to perform all the two lots in virtue of Recital 79 and Article 46, paragraph 2 of Directive 2014/24/EU. After the award of the contract, tenderer C subcontracts part of the contract’s services to an undertaking that under normal conditions would bid for the first lot of the contract, acting in this way as tenderer D, but it eventually did not bid because it agreed with tenderer C that the latter would subcontract a share of the contract to it. This issue cannot be fixed by just dividing the contract into an optimal number of lots (i.e. two lots while the participants are three), as still bid rigging can take place in the form of subcontracting arrangements.

Apart from the above, a rule like this one that relates the number of bidders with the number of lots cannot have application in case of public contracts that must be awarded as soon as possible. In order to be able to predict the *expected* number of participants, there should be plenty of time for a contracting authority to go to market, investigate it and plan the procurement procedure. Indicatively, a health au-

thority in the UK which was looking for solutions to provide low carbon ward lighting had to put the unmet need into a procurement call two years before the lighting was actually needed.<sup>26</sup> When the needs that a public contract must cover are urgent, contracting authorities do not have at their disposal the time to predict and calculate the number of undertakings that would be expected to take part in the procurement process. Things can become even more complicated when it comes to procurements of innovative solutions. It may be particularly difficult for a contracting authority to map the competitive landscape by gauging whether the suggested contract or a similar one has been delivered on the market before. For this reason, in such cases the calculation of the expected number of participants presupposes preliminary market consultations. Yet, as already noted above, it usually takes between three and six months for a consultation process to take place.<sup>27</sup> What is more, until recently “most EU institutions had no policy for preliminary market consultations prior to starting the formal procurement procedure”.<sup>28</sup> “A legal basis clarifying the regime for a preliminary market consultation has only been introduced by the modifications of the Financial Regulation and Rules of Applications and entered into force on 1<sup>st</sup> January 2016”.<sup>29</sup> Hence, it is not always practically possible to gauge or to gauge timely and successfully the expected number of participants in a public procurement process in order to adjust beforehand the number of lots in which the contract will be divided.

Last but not least, there are procurements where “the technical aspects of supply require a very large number of lots”,<sup>30</sup> like in case of medicines. In these markets, it is not always feasible to define the number of lots in accordance with the expected number of participants, as priority is to procure a great variety of innovative medicines that will be readily available in the hospital pharmacy, regardless of the participating suppliers’ number.

#### **IV. At Least One Lot More Than the Number of Incumbents, Reserved to New Entrants: What Is Wrong With This?**

The second prescription that the auction literature and the economic theory recognises is that the contracting authorities should define at least one lot

26 L Georghiou, J Edler, E Uyarra and J Yeow, ‘Policy Instruments for Public Procurement of Innovation: Choice, Design and Assessment’ (2014) 86 *Technological Forecasting and Social Change*, 6.

27 *Directorate General for Competition* (n 3).

28 European Court of Auditors, ‘The EU Institutions Can do More to Facilitate Access to Their Public Procurement- Special Report No 17’, available at <[http://www.eca.europa.eu/Lists/ECADocuments/SR16\\_17/SR\\_PROCUREMENT\\_EN.pdf](http://www.eca.europa.eu/Lists/ECADocuments/SR16_17/SR_PROCUREMENT_EN.pdf)> (last accessed on 27 January 2018), 8; See also N Komšić, ‘Big Data for Procurement- The Importance of Correctly Acquiring and Using Information in Public Procurement’ in G Piga and T Tátrai (eds), *Law and Economics of Public Procurement Reforms* (Routledge 2017).

29 European Court of Auditors, ‘Special Report- The EU Institutions Can Do More to Facilitate Access to Their Public Procurement’, 61, available at <[http://www.eca.europa.eu/Lists/ECADocuments/SR16\\_17/SR\\_PROCUREMENT\\_EN.pdf](http://www.eca.europa.eu/Lists/ECADocuments/SR16_17/SR_PROCUREMENT_EN.pdf)> (last accessed on 18 October 2017).

30 *Grimm/Pacini/Spagnolo/Zanza* (n 13), 183.

more than the number of incumbent firms and reserve it to new entrants.<sup>31</sup> The special treatment of new entrants acts like a carrot that encourages the participation of several weak bidders in the public procurement process, as they now face a reasonable probability of success by having the chance to accomplish certain parts of the project. At the same time, this can improve the aggressiveness of stronger bidders, since the submission of bids by new bidders that enter the process in order to improve the procurement outcome, can drive down the prices on all lots, even if the new bidders will not be successful at the end of the day. Such a thing fosters competition in the market not only in the short but also in the long term, as the experience that new bidders gain in this way will render them considerable competitors in future tenders.

Despite its good intentions, the effect and application of this rule may be rather limited in practice. The main reason for this is the broad margin of discretion given to contracting authorities by Directive 2014/24/EU, which means that it is up to them whether and to what extent they will apply the rule. The significance of this parameter becomes obvious if it is considered in combination with the overall tension of the EU Member States not to give preferential treatment to SMEs. Data from EuroPAM (“European Public Accountability Mechanisms”) in the area of public procurement supports this observation. EuroPAM is an “observatory of European transparency legislation, similar to national procurement portals” and one of the areas it covers is public procurement.<sup>32</sup> EuroPAM is also one of the watchdog tools that DIGIWHIST (“Digital Whistleblower”) project has in order to identify systemic vulnerabilities in the respective legislations and their implementation. Before proceeding to the assessment of EuroPAM data, it is important to highlight the fact that in an empirical study of PricewaterhouseCoopers (PwC) commissioned by the European Commission in 2014, it was proved that “breaking tenders down into lots is one of the most important tools to help SMEs access public contracts”, while one of the scatter diagrams in the same study suggested that “there was some marginal correlation between the median value of single awards (lots) and the proportion of these contracts won by SMEs in the EU”.<sup>33</sup> This conclusion is also supported by Piga and Zanza<sup>34</sup> who conclude that SME participation in public procurement processes is mainly achieved by splitting tenders into lots that

can be bid for separately, as well as by Sandholm.<sup>35</sup> However, in another empirical study that regarded only the sector of defence, it was found that splitting a public contract into lots does not automatically increase the chances of successful SME participation, because some aspects of the tender, like SMEs’ competence in matters of procedure for participation in public tenders, require improvements.<sup>36</sup>

Regarding the data of EuroPAM, the author accessed and studied the database which is relevant to the public procurement legal and regulatory norms of each EU Member State in 2015.<sup>37</sup> One of the issues investigated in that particular collection of public procurement rules was whether there is a preferential treatment for SMEs in every EU Member State in 2015 (Qual-27 in the Microsoft Excel document). The rules that give preferential treatment for SMEs usually refer directly to this purpose. After studying the answers that were given regarding this issue based on the legislation of each Member State, it is concluded that only seven out of twenty eight EU Member States did actually have in 2015 a preferential treatment for SMEs. To make things worse, from these seven European countries, most of them had not taken any specific measures to ensure this pref-

31 Ibid, 169-170; PKlemperer, ‘What Really Matters in Auction Design’ (2002) 16(1) *Journal of Economic Perspectives*, 169-189; K Binmore and PKlemperer, ‘The Biggest Auction Ever: The Sale of the British 3G Telecom Licences’ (2002) 478(112) *The Economic Journal*, C74-C96; PMilgrom, *Putting Auction Theory to Work* (Cambridge University Press 2004).

32 To see more about the project follow the link <<http://digiwhist.eu/about-digiwhist/>> (last accessed on 19 October 2017).

33 GWessel Thomassen, P Orderud, I Strand, MP Vincez, P de Bas, M van der Wagt and A Yagafarova, ‘SMEs’ Access to Public Procurement Markets and Aggregation of Demand in the EU - February 2014’, 52-53, available at <<https://publications.europa.eu/en/publication-detail/-/publication/c0681d67-e56e-11e5-8a50-01aa75ed71a1>> (last accessed on 6 February 2018).

34 GPiga and MZanza, ‘An Exploratory Analysis of Public Procurement Practices in Europe’ in KVThaial (eds), *Challenges in Public Procurement: An International Perspective* (Florida: Boca Raton 2005), 185, 187-188.

35 TSandholm, ‘Expressive Commerce and Its Application to Sourcing: How We Conducted \$35 Billion of Generalized Combinatorial Auctions’ (2007) 28(3) *AI Magazine*, 49.

36 MEBigand AHGlas, ‘Considering Small and Medium-Sized Suppliers in Public Procurement - The Case of the German Defence Sector’ in: D Mattfeld, TSpengler, JBrinkmann and M Grunewald (eds), *Logistics Management - Contributions of the Section Logistics of the German Academic Association for Business Research, 2015, Braunschweig, Germany* (Switzerland: Springer International Publishing 2016), 30.

37 The dataset is available at <<http://europam.eu/?module=data-downloads>> (last accessed on 19 October 2017). The respective data for the years 2016 and 2017 is not yet ready and available.

erential treatment, but they were content with general provisions. Austria, Germany and Hungary are illustrative examples, while Belgium made provision for “economies of social insertion” only for tenders below the EU thresholds. France had the most detailed rules about reserved contracts for SMEs and Italy being in compliance with the Union rules, contemplated that where possible and cost-effective, contracts should be split into functional lots. In view of the overall unwillingness of EU Member States to treat SMEs preferentially, it makes one wonder whether and to what extent contracting authorities will indeed reserve lot(s) of public contracts for SMEs, while they have the discretion in the virtue of the new Directive not to do so.

Furthermore, the above rule can face various practical hindrances. First of all, the special treatment of SMEs may raise issues of fairness and may run afoul of State aid rules and the principle of equal treatment.<sup>38</sup> Secondly, to reserve one or more lots to a new entrant in the market, reducing in this way the number of lots available for incumbents does not necessarily enhance competition but quite the opposite, it may weaken competition for all lots.<sup>39</sup> Strong bidders may disappear from the market altogether if they cannot get a share of sizeable procurement contracts.<sup>40</sup> Thirdly, defining just one lot more than the number of incumbents and reserving it to new entrants does not guarantee that eventually the market will not be shared by incumbents. Quite the opposite, the possibility of awarding more than one lots to the same tenderer, according to Directive 2014/24/EU (Recital (79) and Article 46, paragraph 2)

together with the right that a bidder has to withdraw its tender anytime it decides so, may give an incentive either for collusion between incumbents and new entrants or for blackmail of the latter by the former. The fewer and weaker the new players in a market, the easier it is for incumbent firms to blackmail them or make them an offer of side-payment for the latter to withdraw their tender and so have the remaining lots shared by the incumbents. Similarly, in the Netherlands the weak entrant was not able to participate in the procurement process until the end because it was threatened by an incumbent.<sup>41</sup> Although the new entrant complained to the government, the government took no action, “perhaps because excluding the incumbent firm would have ended the auction immediately and it might have been hard to impose a meaningful fine”.<sup>42</sup> Things were worse in case of Italy where even a strong bidder (and not just a weak one) withdrew its tender at the last minute, supposedly because there had been collusion by which the firm at issue took part in the auction only to avoid invoking the rule reducing the number of licenses.<sup>43</sup> Apart from Europe, it is also the United States of America that suffered from the undesirable use of bid withdrawals as a strategic device. Indicatively, in spectrum auctions conducted by the Federal Communications Commission (“FCC”), it was revealed that rather most of the bid withdrawals were used for undesirable bid signaling and in order to “acquire near the end of the auction more preferred licenses that seem to free up after the decline of another bidder”.<sup>44</sup>

## V. Recommendations

For all the reasons mentioned above, the intuitive rules of economic theory that we have just analysed are not panacea for all cases. In order to render them more effective, particular attention should be paid to the transparency rules that govern procurement procedures when a public contract is split into lots. The less information is concealed about the bidder identities, the better the aforementioned rules can apply in practice, as it will be less likely for cover bidding, bid rotation and sub-contracting arrangements to take place. As already explained, these are the main forms of bid rigging schemes that do not fall within the scope of the first rule of the economic theory, as the optimal number of lots does not affect their implementation.

38 OECD, ‘Policy Roundtables- Competition in Bidding Markets’ (2006), available at <[www.oecd.org/competition/cars-tels/38773965.pdf](http://www.oecd.org/competition/cars-tels/38773965.pdf)> (last accessed on 19 October 2017), 35.

39 GL Albanoo, Ni Dimitri, I Perrigne and G Piga, ‘Fostering Participation’ in N Dimitri, G Piga and G Spagnolo (eds), *Handbook of Procurement* (Cambridge University Press 2006), 287.

40 Ibid.

41 See more about the Netherlands Auction (July 2000) in the article by P Klemperer, ‘How (not) to run auctions: the European 3G Telecom Auctions’ (2002) 46(4-5) *European Economic Review*, 833-834.

42 Ibid.

43 See more about the Italian Auction (October 2000) in the article by P Klemperer ‘How (not) to run auctions: the European 3G Telecom Auctions’ (2002) 46(4-5) *European Economic Review*, 834-835.

44 P Cramton, ‘Simultaneous Ascending Auctions’ in P Cramton, Y Shoham and R Steinberg (eds), *Combinatorial Auctions* (MIT Press 2006), 112-113.

Bid withdrawals is another issue that should be expressly arranged if we want both to discourage insincere bidding in public contracts divided into lots and to secure the optimal asymmetry between lots and economic operators until the end of the procurement process. A possible measure could be to enable bidders to withdraw their bids in at most two rounds of an auction, as FCC in USA already does.<sup>45</sup> This measure, however, presupposes a great number of rounds and this does not always apply in all cases of procurement procedures contemplated under Directive 2014/24/EU, as it does in case of electronic auctions (Article 35 of the Directive). Another possible solution, inspired again by the legal regime of USA, could be to impose penalties when withdrawing a high bid.<sup>46</sup> The penalty could be the difference between the withdrawn bid and the final sale price so that the damage suffered by the public purchaser may be remedied in this way.<sup>47</sup> Yet, as we know, there are several European systems of tort or delict which do not recognise the deterrence and penal function of civil liability, as the US law does<sup>48</sup> and most civil law systems have hostile approaches towards punitive awards because they raise public policy concerns.<sup>49</sup> The reason that punitive damages are deemed to be contrary to public policy in Europe is that they deviate from the civil law's compensatory logic, which is to restore the initial status (*in integrum restitution*) without entailing the enrichment of the injured party.<sup>50</sup> Moreover, they imply "a quasi criminal sanction"<sup>51</sup> while the procedure in which they are awarded is civil or administrative, as suggested in our own case. In view of the above, the Court of Justice of the EU (CJEU) has tried to take a brave step in the direction of formally authorising the award of punitive damages by saying that in the domain of intellectual property, the Member States are not prohibited from introducing punitive damages as a measure where an intellectual property right has been infringed.<sup>52</sup> Hence, it could be said that there is no reason why the same measure should not apply in case of bid withdrawals as well.

In the further alternative, the author would suggest the complete forbiddance of bid withdrawals if they are not sufficiently justified by the relevant economic operators and if they are not accompanied with adequate evidence. Taking some examples from the US legislation, sufficient justification that would enable the bid withdrawal could be a clerical or mechanical error that was made in good faith (*bonafide*)

and was not the result of gross negligence, but it is so fundamental in character that it may make the whole bid materially different from what the bidder initially intended it to be.<sup>53</sup> Another example of excusable mistake that would enable a bid withdrawal could be the occurrence of some unforeseen circumstances after submitting the bid. In any case, it is recommended that the mistake should be clearly evident and specified in detail in a written notice with strict deadlines from the submission of the request for bid withdrawal. Where the mistake is obvious on its face, like in case of typographical, arithmetical, transposition errors or errors in extending unit price, the relevant contracting authorities should opt for its correction rather than proceeding to the withdrawal of the whole bid.<sup>54</sup>

A last issue that, in the author's opinion, should be clarified by the European legislator is the pricing strategy that a bidder can adopt when bundling of lots is permissible; otherwise it may serve as an additional incentive for incumbents to act illegally and outpace SMEs in the procurement process, as happened in the examples above that were taken from the Netherlands and Italy. In subparagraph 1 of Article 46, paragraph 2, the Directive 2014/24/EU has left unaddressed the question whether the price that a bidder can offer for all the lots (or a combination of some) can be lower than the one he or she offers for

45 Ibid.

46 Ibid, 105.

47 Ibid. See also DP Porter, 'The Effect of Bid Withdrawal in a Multi- Object Auction' (1999) 4(1) *Review of Economic Design*, 73-97.

48 G Wagner, 'Punitive Damages in European Private Law' in J Basedow, KJ Hopt, R Zimmermann and A Stier (eds), *Max Planck Encyclopedia of European Private Law* (Oxford University Press 2012).

49 C N Nagy, 'Recognition and Enforcement of US Judgments Involving Punitive Damages In Continental Europe' (2012) 30(1) *Netherlands Internationaal Privaatrecht (NIPR)*, 5.

50 Ibid.

51 Ibid.

52 *Wagner* (n 48).

53 Massachusetts General Laws, Chapter 149, Section 44B(3) and (4), available at <<https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter149/Section44B>> (last accessed on 29 January 2018); See also Stephen Phillips and National Roofing Legal Resource Center ("NRLRC"), 'Bidding: Bid Mistakes, Bid Responsiveness, Bid Bonds and Bid Protests', available at <[http://www.nrlrc.net/pdfs/0914\\_9\\_bidding.pdf](http://www.nrlrc.net/pdfs/0914_9_bidding.pdf)> (last accessed on 29 January 2018).

54 Code of Maryland Regulations, Title 21.05.02.12, 'Mistakes in Bids', available at <<http://mdrules.elaws.us/comar/21.05.02.12>> (last accessed on 29 January 2018) See also Phillips and NRLRC (n 53).

the individual lots. If this is the case, multiple bidding is favoured while value for money can be achieved by the public purchaser. Yet, at the same time concerns may arise regarding the intensity of competition and the participation of SMEs in the relevant market, as such a thing not only tends to expand opportunities for incumbents but it also incentivises them to use any illegal method, like offer of side-payment or blackmail, in order to displace weak market players and keep the award of lots for themselves at the end of the procurement process. For this reason and also in view of the initial objective that the division of contracts into lots has, which is to facilitate the involvement of SMEs in the public procurement market, the author would say that this interpretation should be explicitly rejected, even if the value for money is compromised in this way.

## VI. Conclusion

In this paper, an attempt was made to critically review the two basic rules of the economic theory that should apply every time in order to prevent collusive practices when the public contract is split into lots. We examined to what extent they can successfully cope with bid rigging and whether they need further elaboration and amendments. As we saw, the intuitive rules of economic theory are not applicable in all cases and there is need to make them more robust and effective by minimising the amount of information disclosed about the bidder identities when a public contract is split into lots as well as by regulating in a strict way the issue of bid withdrawals. The analysis shows that a possible measure could be to completely forbid bid withdrawals if they are not sufficiently justified by the relevant firms that request it and if their request is not accompanied with adequate

evidence. It was also highlighted that the European legislator should not leave unaddressed the issue regarding the pricing strategy that a bidder can adopt when bundling of lots is permissible. If it is officially interpreted that the price which a bidder can offer for all the lots (or a combination of some) can be lower than the one he or she offers for the individual lots, the public purchaser will be benefitted in the short term by achieving value for money. Nevertheless, in the long term this means encouragement of big incumbent firms in the market to bid and exhaust all possibilities of winning multiple lots in the relevant procurement process to the detriment of SMEs. One of the means that may be used in order to achieve their goal is the circumvention of the division of public contracts into lots, as already explained through several illustrative examples.

As long as the aforementioned concerns and questions are not entirely overcome, the conditions that favour bid rigging are likely to arise at the stage of the pre-contractual procurement planning, where the contracting authorities make the decision about the division of public contracts into lots or not. As a result, it is very possible for bid rigging to take place at the next stage, i.e. the contracting phase. This is so because a procurement planning stage susceptible to bid rigging can constitute the ground for new or sustainable bid rigging practices at the competitive bidding stage. Therefore, the policy makers should not sit back and become complacent in the application of the two rules that the economic theory suggests every time a public contract is split into lots. On the contrary, they should be alert to the risks that may arise each time by issuing and adopting guidelines that would inform procurement officers about the above scenarios, achieving in this way the necessary degree of harmonisation when dealing with division of public contracts into lots.