

STUDIES AND ANALYSIS OF LEGISLATION DIRECTORATE

OUTCOMES OF COMPETITION ADVOCACY DECISIONS IN 2015-2016

I. INTRODUCTION

This document outlines the results of competition advocacy decisions issued by Italian Competition Authority (“AGCM”), as provided for by the **competition act, Law n. 287/90**, in the biennium **2015 - 2016**. The survey has been carried out by the Studies and Analysis of Legislation Directorate within the AGCM’s periodical program to monitor advocacy activity. In particular, the analysis will focus first of all the overall summary data for the considered period and then detailed data divided by instrument, with further subsections when appropriate. Data are updated as of **May 2017**.

In the context of this analysis, the survey focuses on compliance with AGCM’s recommendations contained in advocacy interventions, i.e. legal adherence to them by recipients.

The decisions have been divided as follows:

1. opinions under **art. 21**,
2. opinions under **art. 22**,
3. opinions under **art. 21 bis**,
4. opinions issued under **special laws** (electronic communication code).

Opinions under **art. 22** have been further divided among:

- 1) **opinions issued upon requests of**
 - a. central public bodies,
 - b. local public bodies,
 - c. Presidency of Council of Ministers (“PCM”)¹;
- 2) **opinions issued on AGCM’s own initiative addressed to**
 - a. central public bodies,
 - b. local public bodies.

¹ Art. 4 of d.l. 24 January 2012, n. 1, converted into law with amendments by l. 24 March 2012, n. 27 introduced a fruitful cooperation mechanism between the Presidency of the Council of Ministers and AGCM, aimed at challenging restrictive regional laws before the Constitutional Court. Particularly, after receiving requests for opinions, AGCM timely informs the PCM about regional laws that unduly restrict competition. If the Presidency adheres to the assessment of the ICA, then it submits the laws to the Constitutional Court.

For the purpose of this analysis, the outcome of interventions have been classified as follows:

- **positive**: when the addressee has exactly met the requirements;
- **partially positive**: when the addressee has met the requirements only partially;
- **negative**: when there has been no compliance at all with what was recommended;
- **not evaluable**: when the assessment of the outcome has not been possible for any reason².

The monitor program provides for a cyclic survey. All partially positive, negative and not evaluable outcomes for 2016 will be re-assessed in the next fall cycle.

In particular, the monitoring program includes the assessment of follows-up of decisions twice per year:

- a) an assessment within any December as referred to the results of the entire preceding year and the first semester of the ongoing year, with provisional rates;
- b) an assessment within any May as referred to the entire preceding two years with more stable rates, although the data for the latest year will be reassessed again within the following survey, for the purpose of completion of data included in the Annual report.

The results below refer to this secondo kind of survey, for the biennium 2015-2016.

In the current study an additional element, absent in previous ones, has been taken into account as to similar monitoring activities on advocacy activities carried out by National Competition Authorities (“NCAs”) at the European Competition Network level (“ECN”).

II. OVERALL AND ANALYTICAL DATA 2015 - 2016

The survey has reviewed advocacy interventions in the period from 1 January 2015 to 31 December 2016, for a total of **208 decisions** (102 in 2015 and 106 in 2016) issued under articles 21, 22 e 21 *bis* of competition act n. 287/90, including decisions applying special laws (in the IT sector).

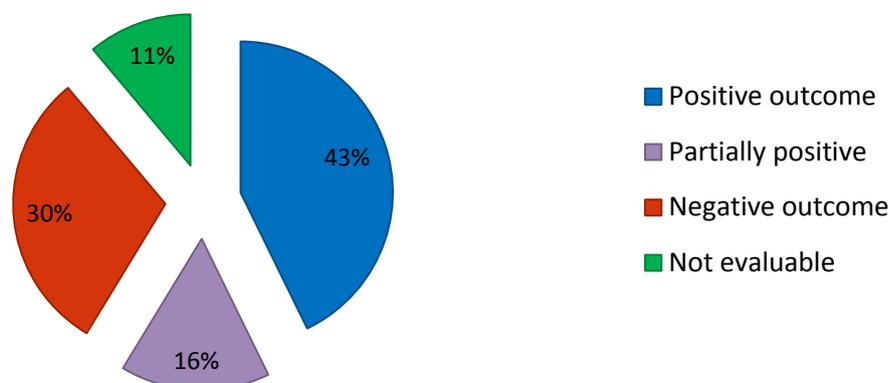
Two annexes attached to the present document list the references of decisions considered in the study and the relevant outcomes (annex 1 and annex 2).

1. Overall summary of advocacy activity (2015-2016)

Among the **208 decisions**, the success rate has been **59%** (43% positive outcome, 16% partially positive), corresponding to 122 cases (89 positive outcomes and 33 partially positive), the negative outcomes have been 30% (63 cases) whilst the not evaluable rate is 11% (23 cases), as shown in the graphic below.

² In particular, “positive outcome” refers to cases where the addressee of the decision has exactly met the requirements, “negative outcome” refers to cases where when there has been no compliance to what required, “partially positive outcome” identifies those cases when public administrations or legislative bodies have not solved all competition concerns but they have acted or are acting for meeting the target, and finally “not evaluable” refers to cases where the assessment of the outcome has not been possible for several reasons, such when providing advice in the context of procedure pending before other public bodies or the monitoring is too next to the notification of the decision.

Success rate of competition advocacy (2015-2016)



Source: Data processing AGCM on data 2015 and 2016

The overall result has improved compared to the previous rate emerged in the 2015 monitoring (2015 and first semester 2016: 55% - 36% positive outcome and 19% partially positive) and in the biennium 2014 - 2015 (55% - 43% positive outcomes and 12% partially positive), and the results are even more satisfying compared to the success rates of the older surveys (32% for 2007, 31% for 2008, 16% for 2009).

2. Composition of decisions by sector (2015 - 2016)

As regards the **sectors** concerned by the advocacy decisions, most of interventions have been focused on the sectors of **transports and rental of transport means** (18%), **general services** (17%), **electric energy and gas** (7%), **information technology** (6%) and **health services** (6%), which all together count for **54%** of decisions and can be considered the drivers of the advocacy.

The table and the graph below, showing numerical data and rates, respectively, highlight the sectors where the interventions are most frequent.

| SECTOR | 2015 | 2016 | 2015-2016 |
|--|------|------|-----------|
| Transports and rental of transport means | 24 | 14 | 38 |
| General services | 16 | 20 | 36 |
| Electric energy and gas | 12 | 3 | 15 |
| Information technology | 6 | 7 | 13 |
| Health services | 5 | 7 | 12 |
| Waste | - | 9 | 9 |
| TLC and e-commerce | 3 | 5 | 8 |
| Tourism | 3 | 4 | 7 |
| Financial services | 4 | 2 | 6 |
| Professional activities | 4 | 2 | 6 |
| Postal services | 4 | 2 | 6 |
| Pharmaceutical industry | 2 | 4 | 6 |

3. Success rates for legal basis

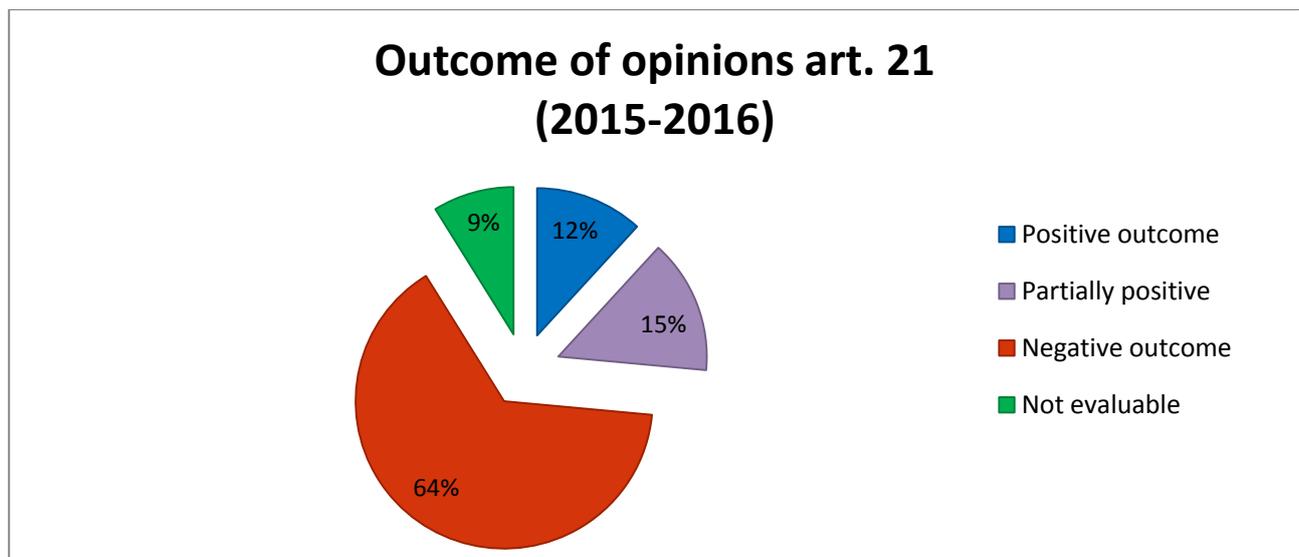
As to the **distinction for legal basis**, in the considered period, out of a total of **208 interventions**:

- **34** adopted under **art. 21**;
- **107** adopted under **art. 22** (not including the so called PCM);
- **31** adopted under **art. 22** upon request of **PCM**;
- **32** adopted under **art. 21-bis**;
- **1** adopted under **art. 21-bis** following the notification under art. 5, par. 3, d.lgs. n. 175/2016;
- **3** adopted under **special laws**.

In the following the graphs account for data referred to every single legal instrument.

3.1. Outcome of opinion under art. 21

Out of **34 opinions** adopted under **art. 21** (21 in 2015 and 13 in 2016), the global success rate is **27%** (equal to previous study), given from the sum of positive (12%) and partially positive outcomes (15%), compared to **64%** of negative outcomes. The graph below shows the split of the said results.



Source: Data processing AGCM on data 2015 and 2016

In the current survey a relatively low success rate for the instrument at stake is confirmed (in the preceding biennium 2014 - 2015 was 39% - 24% positive outcome, 15% partially positive), probably linked to the nature of affected acts, consisting generally in definitive legal acts.

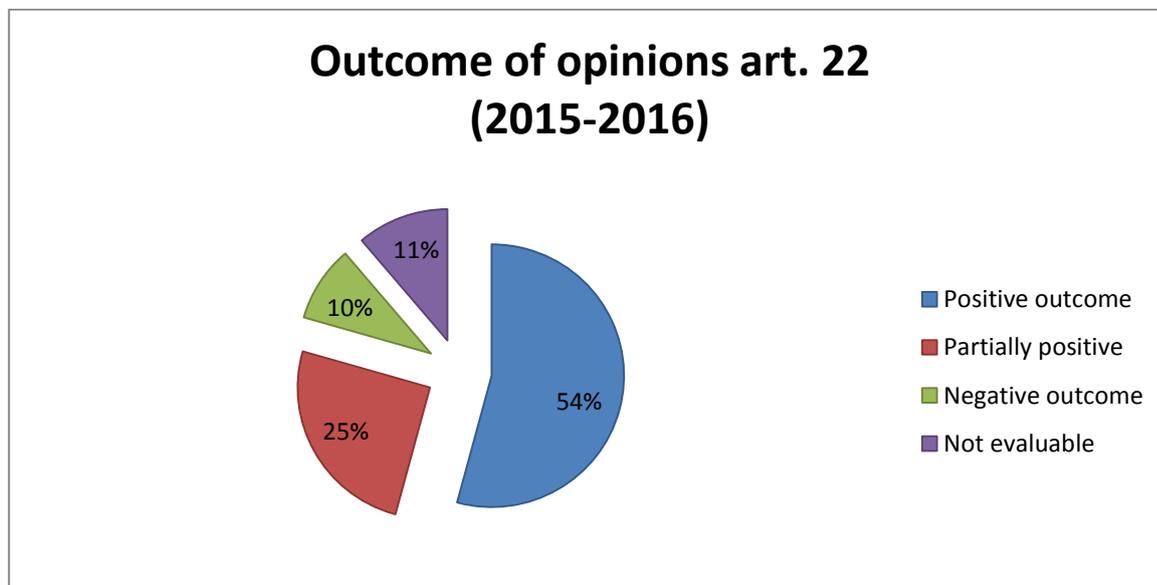
As to the recipients of said decisions, the instrument has been addressed for almost half of the cases to regions and local public bodies (18) towards national legislator or central administrations (16). The kind of affected acts varies and includes both administrative

(decisions by ministries, local public bodies and territorial entities) and legal (national and local laws).

3.2. *Outcome of opinions under art. 22 (total)*

Out of a total of **107 opinions** adopted under **art. 22** (including 35 opinions to Ministry of Finance/Consip and excluding opinions to PCM) in the entire period considered (46 in 2015 and 61 in 2016), **79** were adopted upon requests of central or local administrations; **28** were decided on own AGCM's initiative.

The overall success rate for opinions under art. 22 is highly satisfying, with a success rate of **79%** (**54%** positive outcome, **25%** partially positive), compared to rates of **10%** of negative outcome and **11%** of not evaluable, as shown in the graph below. Such result is in line with that emerged in preceding surveys and provides for AGCM a role as a “**consultant**” for competition matters towards other public administration.



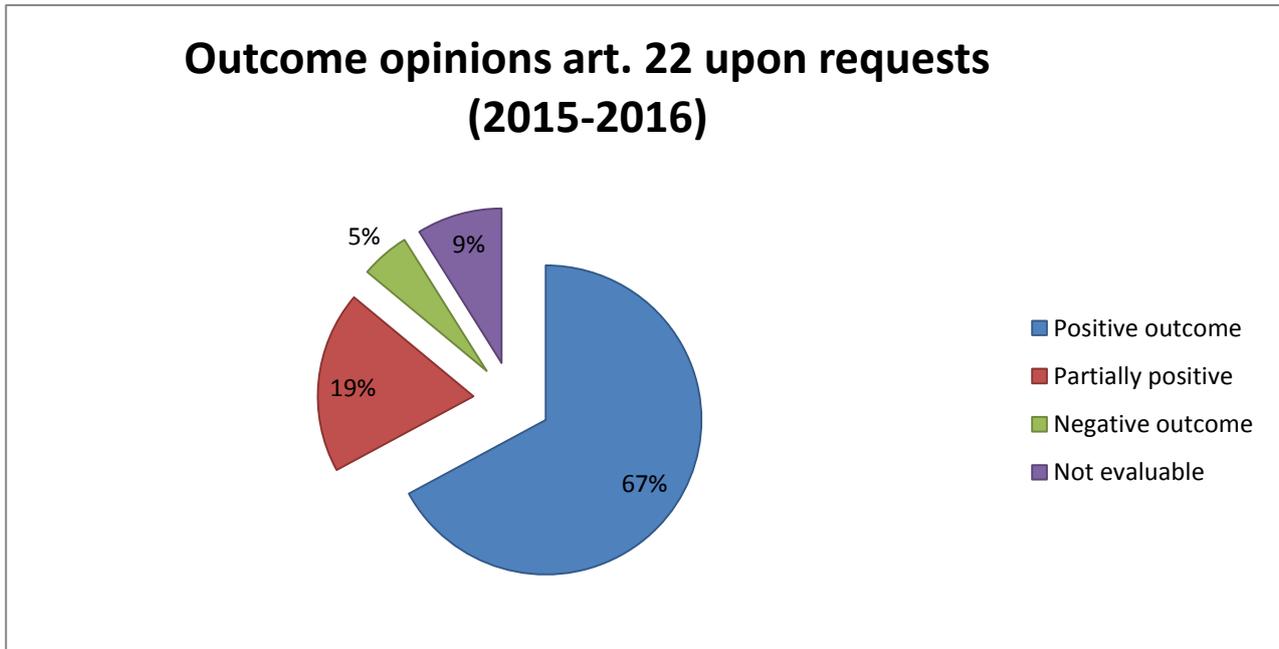
Source: Data processing AGCM on data 2015 and 2016

Within opinions adopted under art. 22, the ones adopted upon requests of public administrations (excluding the ones requested by PCM) have been distinguished from the ones adopted on AGCM's own initiative, with additional distinction between opinions addressed to central or local administration.

3.2.1. *Outcome of opinions issued under art. 22 upon request of public administrations*

Out of **79** opinions adopted upon requests under **art. 22** (including 35 opinions to MEF/Consip and excluding opinions to PCM), **55** are from **central administrations** and **24** from **local administrations**. The graph below show the success rates of opinions adopted under art. 22 upon request.

The global success rate for opinions adopted upon request is **86%** (67% positive outcome, 19% partially positive).



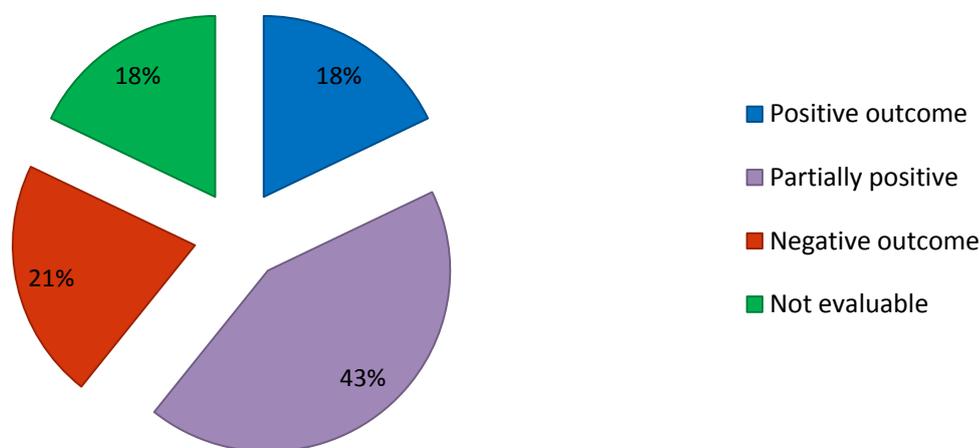
Source: Data processing AGCM on data 2015 and 2016

Depending on the requesting administration, the success rate is **91%** for central administrations (82% positive outcome, 9% partially positive), **75%** for local administrations (33% positive outcome, 42% partially positive).

3.2.2. Outcome of opinions adopted under art. 22 on AGCM's own initiative

As to the opinions adopted under art. 22 on AGCM's own initiative, out of **28 ex officio opinions**, **61%** of cases registers **positive outcome** (18% positive outcome, 43% partially positive).

Outcome opinions art. 22 ex officio (2015-2016)



Source: Data processing AGCM on data 2015 and 2016

Depending on the recipient administration, out of **28** adopted opinions, **18** were addressed to central administrations, while the remaining **10** opinions to local administrations. As to the outcomes, for central administration the success rate is **67%** (17% positive outcome, 50% partially positive), for local administrations it is **50%** (20% positive outcome, 30% partially positive).

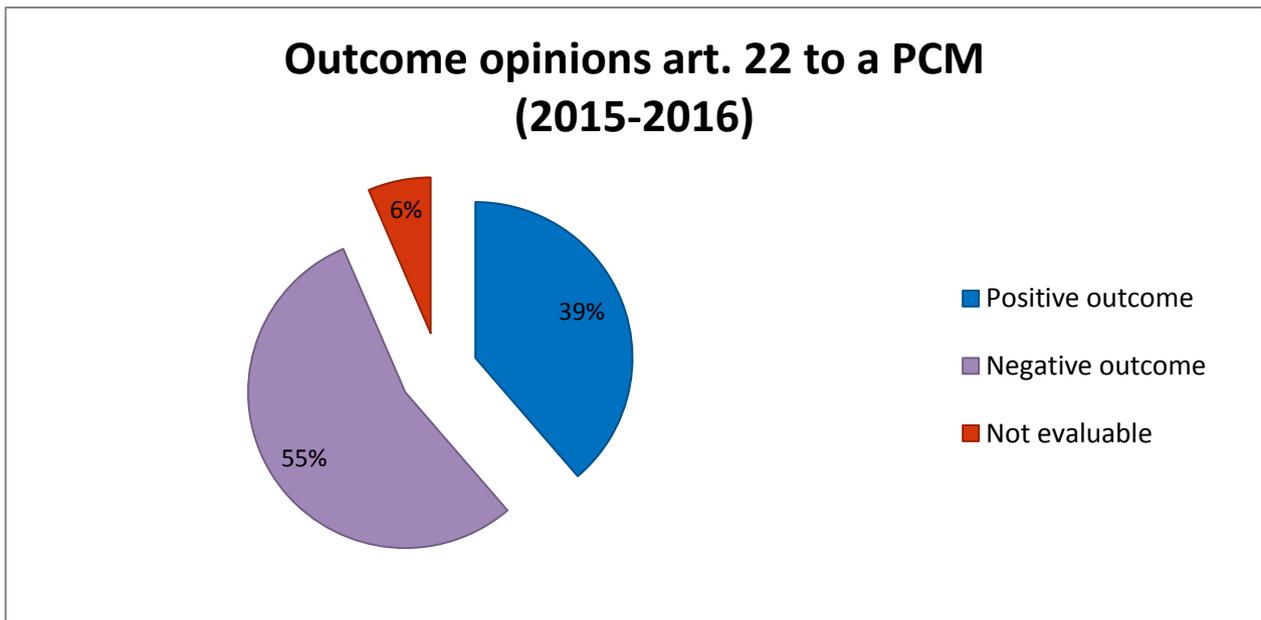
The success rate of 61% for opinions adopted on AGCM's own initiative, although lower than the one for opinions upon request, has further improved compared to preceding survey, strengthening the increasing trend already observed³. The increase seems to result from a more precise targeting of the activity, as well as a wider authoritativeness of AGCM's intervention, corresponding to a higher compliance by recipients, although the opinion had not been requested.

3.3. Outcome of opinions under art. 22 to PCM

In the focused period **141 requests by PCM on regional laws** have been assessed, 75 in 2015, 66 in 2016.

Out of these requests, in **31 cases AGCM** adopted opinions, 14 in 2015 and 17 in 2016, among which in 12 cases PCM brought appeal to Constitutional Court, corresponding to a rate of **39%**; in 17 cases PCM has not followed AGCM's opinion; other 2 cases are not evaluable. The graph below shows these results.

³ In particular, in the survey 2015 and first semester 2016 it was 59% (6% positive outcome, 53% partially positive), in the one referred to 2014-2015 it was 46% (9% positive outcome, 37% partially positive).



Source: Data processing AGCM on data 2015 and 2016

Comparing **2015 with 2016**, the trend has worsened, with a decreasing rate of success rate of opinions from 50% (7 cases out of 14 opinions adopted) to 29% (5 cases out of 17 opinions adopted).

Assessing the efficacy of opinions, for 2015, PCM followed 7 opinions and brought appeal before the Constitutional Court; the Court granted the appeal in 4 cases, in line with AGCM's opinions⁴, and rejected 1 case, 1 case has dismissed because appealed untimely (see decision n. 223 of 2016), 1 case is pending before the Court.

As to 2016, PCM brought appeal before the Constitutional Court in 5 cases; the Court granted 1 case (the obligation of working hours for retail activities in certain holidays of the year decided by the region Friuli-Venezia Giulia has been assessed anti-constitutional as against competition laws⁵), while the other 4 appeals are ongoing.

In summary, in the biennium 2015-2016 the Constitutional Court decided 7 appeals brought by PCM also on the basis of AGCM's opinions, granting the appeals in 6 cases (with a success rate of 83%).

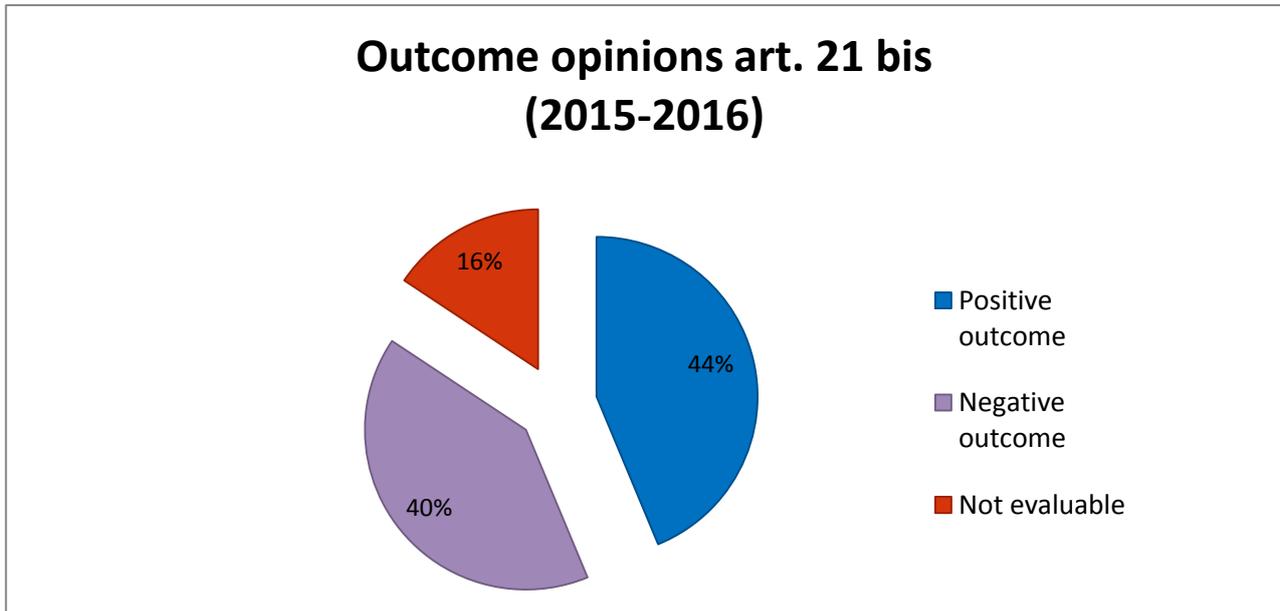
3.4. Outcomes of opinions under art. 21 bis

In the period considered, the interventions under art. 21-bis were **32** (19 in 2015, 13 in 2016, 6 to central administrations, 26 to local administrations), on which the success rate has been **44%**, i.e. the acts were amended following the opinion adopted by the AGCM

⁴ The decision by the Court not in line with AGCM's opinion is n.105/2016 in oil distribution matter; in line with AGCM's opinions are: decision n. 239/2016, related to restrictions in retail sectors in regional laws by Puglia; decision n. 265/2016, referred to not scheduled local public transport regulation enacted by regional laws of Piemonte; decision n. 39/2017, related to access in offshore search and exploitation of oil products; decision n. 40/2017, regarding restrictions in concessions of public lands and buildings provided for by regional laws by Puglia.

⁵ See decision n. 98/2017.

(corresponding to 14 positive outcome, 13 negative, 5 not evaluable), as shown in the graph below .



Source: Data processing AGCM on data 2015 and 2016

As to the negative outcomes, in total **13** cases, the majority of them refers to local administrations (11) rather than the central ones (2), according to the split of recipients and confirming the trend of the preceding survey. In the almost totality of negative outcomes, AGCM has brought appeal before the administrative courts: among these, the Regional Administrative Tribunal rejected AGCM's appeal in 4 cases, all appealed before the Council of State and ongoing, in 1 case the Regional Administrative Tribunal has granted the appeal, 4 cases are pending before the Regional Administrative Tribunal.

One further opinion adopted in the second semester 2016 under art. 21-bis has to be added to the ordinary 32 ones, **following the communication under art. 5, comma 3, del D.lgs. n. 175/2016⁶**, which assigned AGCM specific powers towards certain publicly owned companies. The result of such opinion has been negative and it is under appeal. For the sake of completeness, including the said opinion in the data on art. 21-bis, the overall success rate for this instrument is **43%** positive outcome, **42%** negative outcome, 15% not evaluable.

As regards 21-bis interventions, a definitive assessment will be possible only once the current cases pending in court will be defined.

⁶ D.lgs. 19 August 2016, n. 175 on certain publicly owned companies, implementing one the mandates provided for by l. 124/2015 "Madia", establishes the re-organisation of those companies. In particular, art. 5, par. 3, provides for a new power to AGCM, to which the founding or the acquiring act must be transmitted in order to the exercise of powers under art. 21bis of competition act n. 287/90.. The case relates to the communication from ACI of the acts referred to the acquisition, by its controlled Società Acinservice S.r.l. (95%), of the remaining shares owned by third party in the capital of the owned controlled company Ge.Ser. S.r.l..

3.5. Success rate of opinions under art. 22 jointly with electronic communication code

Within this category there are **3** decisions under art. 22 applied in combination with laws different from competition act n. 287/90, in particular art. 19, par. 1, d.lgs. 259/2003 containing Electronic communication code, out of which **1 positive** and **1 partially positive** in 2015, **1 partially positive** in 2016. Other 110 standard opinions were issued in this matter (39 in 2015, 71 in 2016) under art. 14 of the same Code.

Other 4 opinions were issued under d.lgs. 9/2008 regarding sport rights, 2 in 2015 and 2 in 2016.

III. FINAL CONSIDERATIONS

The survey on outcomes of competition advocacy decisions in the biennium 2015 - 2016 shows a success rate of **59%** (**43%** positive outcome, **16%** partially positive) out of a total of **208** interventions.

Analysing the split of data depending on legal instrument, in particular referring to the decisions issued under art. 22, it appears evident a role awarded to the AGCM as a preferential consultant of administrations in competition matters, at both central and local level. In particular, the success rate is satisfying not only for opinions sought by central administrations (91%) or local administrations (75%), but also when opinions are issued on AGCM's own initiative (61%), very likely for a spillover and reputational effect.

Finally, a kind of advocacy activity is carried out by several European ANCs. They reconnect to it a positive value for the purpose of the promotion of economic policies grounded on markets liberalisation; only a few of them, however, so far have carried out a systematic monitoring exercise, in view of assessing the efficacy and effectiveness level of their advocacy activity, and in line with accountability purposes, whilst others are planning to do it in next years. In this perspective, the monitoring program and exercise run by the AGCM represents one advanced step in the process of impact assessment of its own activity so far endorsed and carried out only by the most sensitive (in this respect) ANCs, such as the one in the UK.

Annex 1 – References of relevant opinions adopted in 2015 and relative outcomes

Annex 2 – References of relevant opinions adopted in 2016 and relative outcomes