

STUDIES AND ANALYSIS OF LEGISLATION DIRECTORATE

OUTCOMES OF COMPETITION ADVOCACY DECISIONS IN 2016-2017

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 **2016 - 2017**. 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 2018**.

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 **laws for specific sectors**.

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.

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;

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.

- **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 reason.

According to the monitoring cyclical program pursued by AGCM, all partially positive, negative and not evaluable outcomes for 2017 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 second kind of survey, for the biennium 2016-2017.

II. OVERALL AND ANALYTICAL DATA 2016 - 2017

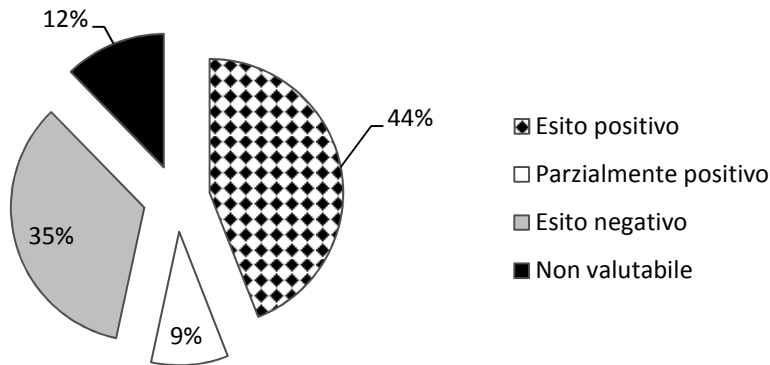
The survey has reviewed advocacy interventions in the period from the 1st of January 2016 to 31st December 2017, for a total of **236 decisions** (106 in 2016 and 130 in 2017) issued under articles 21, 22 e 21 *bis* of competition act n. 287/90, including decisions applying special laws for specific sectors.

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

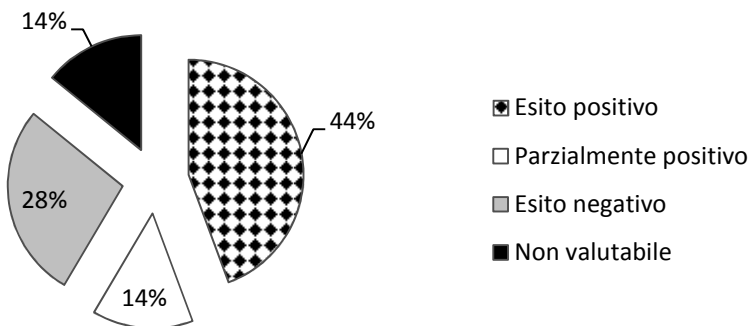
1. Overall summary of advocacy activity (2016-2017)

Among the **236 decisions**, the success rate has been **53%** (44% positive outcome, 9% partially positive), corresponding to 126 cases (104 positive outcomes and 22 partially positive), the negative outcomes have been 35% (81 cases) whilst the not evaluable rate is 12% (29 cases), as shown in the graphic below.

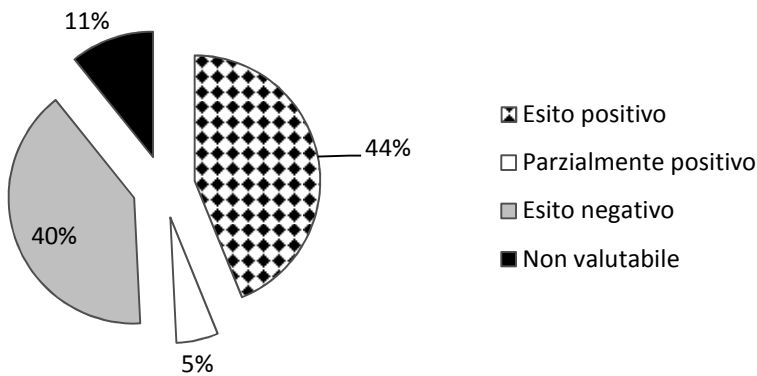
Success rate of competition advocacy (2016-2017)



Success rate of competition advocacy (2016)



Success rate of competition advocacy (2017)



Source: Data processing AGCM on data 2016 and 2017

All partially positive, negative and not evaluable outcomes of 2017 interventions will be reassessed in the next monitoring cycle.

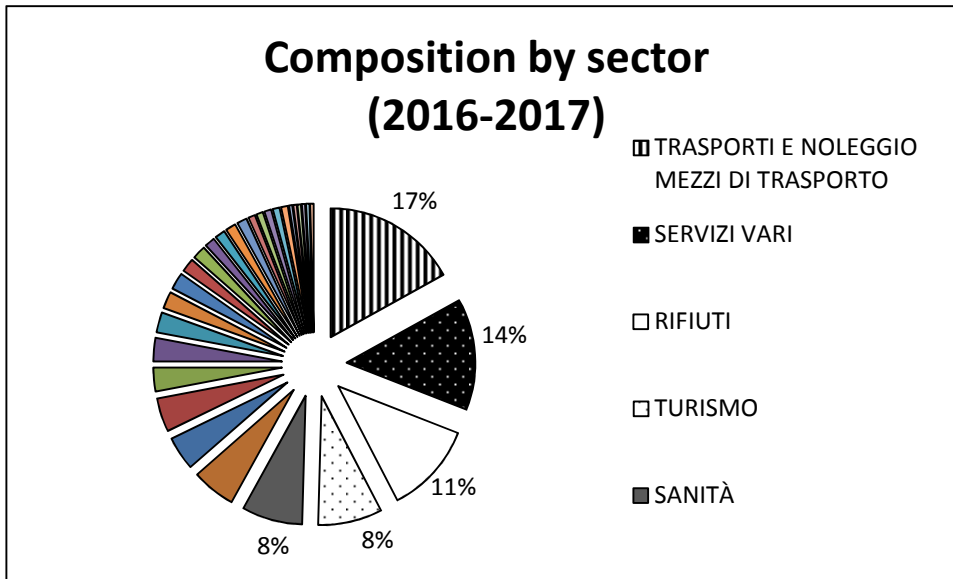
2. Composition of decisions by sector (2016 - 2017)

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** (17%), **general services** (14%), **waste** (11%), **tourism** (8%), and **health services** (6%), which all together count for **58%** of decisions.

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

SECTOR	2016	2017	2016-2017
TRANSPORTS AND RENTAL OF TRANSPORT MEANS	14	26	40
GENERAL SERVICES	20	13	33
TOURISM	4	15	19
WASTE	9	18	27
HEALTH SERVICES	7	11	18
INFORMATION TECHNOLOGY	7	6	13
ELECTRIC ENERGY AND GAS	3	7	10
TLC AND E-COMMERCE	5	5	10
PHARMACEUTICAL INDUSTRY	4	3	7
FINANCIAL SERVICES	2	5	7
RECREATIONAL AND CULTURAL ACTIVITIES	2	4	6
FOOD AND DRINK	4	1	5
MEDIA	4	1	5
POSTAL SERVICES	2	2	4
OIL INDUSTRY	3	1	4
MEANS OF TRANSPORT	3	-	3
PROFESSIONAL ACTIVITIES	2	1	3
ELECTRIC AND ELECTRONIC MATERIAL	2	1	3
RESTAURANTS	1	2	3
LARGE-SCALE RETAIL DISTRIBUTION	2	-	2
WATER	-	2	2
TV-RADIO TELEVISION	1	1	2
MINING INDUSTRY	1	1	2
TV RIGHTS	-	2	2
MANUFACTURING ACTIVITIES	1	-	1
INSURANCE AND PENSION SCHEMES	1	-	1
AGRICULTURE AND BREEDING	1	-	1
MECHANICS	1	-	1
REAL ESTATE	-	1	1
EDUCATION	-	1	1
TOTALE	106	130	236

Source: Data processing AGCM on data 2016 and 2017 - The list follows the increasing order in the biennium 2016-2017, which can diverge in the single year and mismatch the order in every column.



Source: Data processing AGCM on data 2016 and 2017

Thus, considering the total for the biennium, the trend already observed is confirmed: the sectors attracting most part of the advocacy activity are **transports and rental of transport means** (40), **general services** (33), followed by **waste** (27), **tourism** (19) and **health services** (18). On the whole, these sectors cover more of the half of the interventions. Other considerable although lower numbers are covered by information technology (13), electricity and gas (10), TLC and e-commerce (7), financial services (7).

3. Success rates for legal basis

As to the **distinction for legal basis** in the considered period **2016-2017**, out of a total of **236 interventions**:

Split of data for legal basis

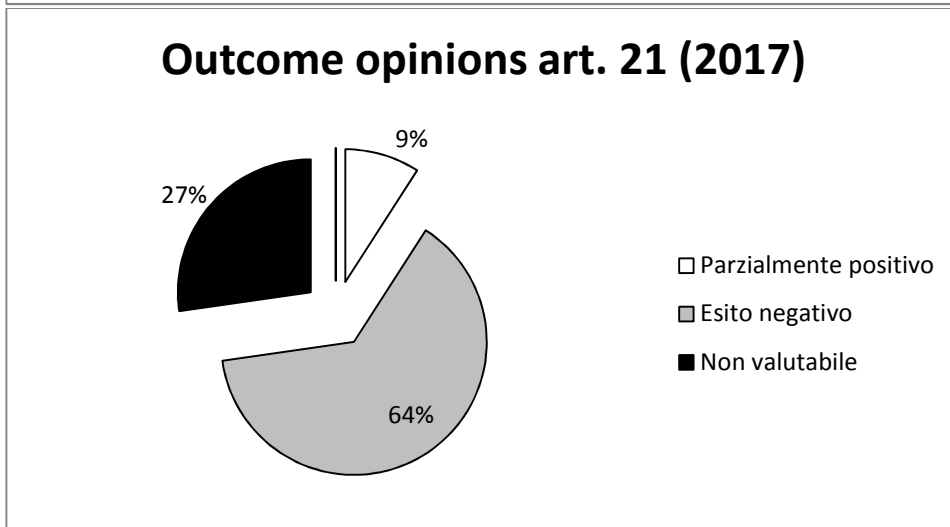
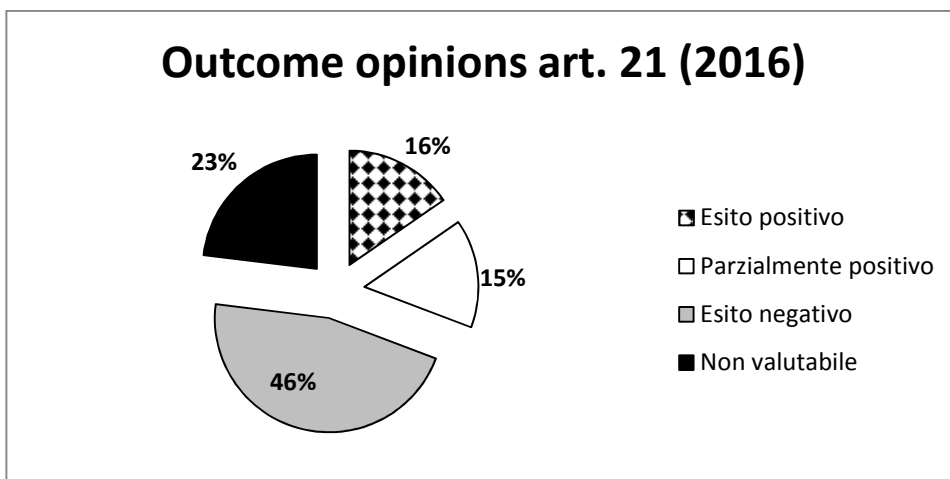
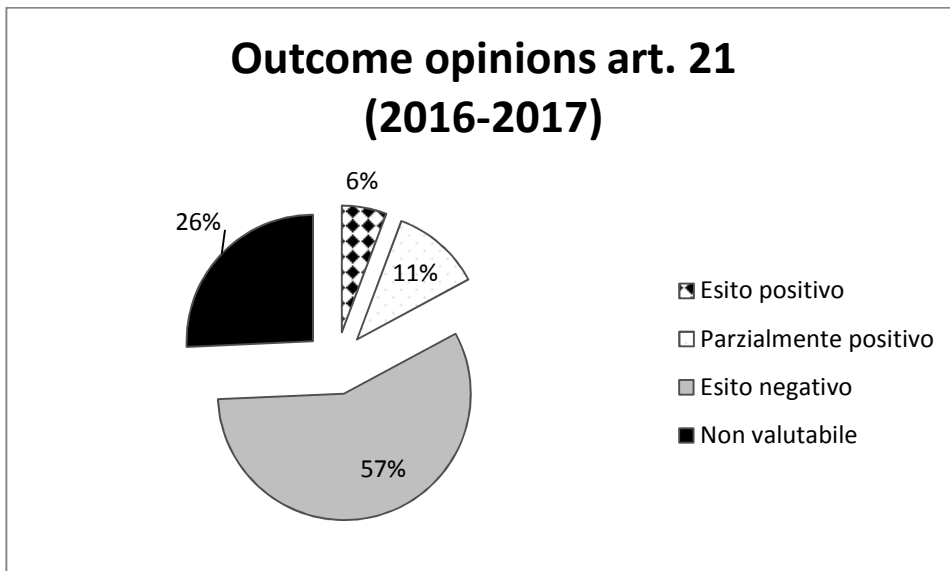
Legal basis	2016-2017	2016	2017
Art. 21	35	13	22
Art. 22 (total, without PCM)	112	61	51
<i>Art. 22 requested by central PA</i>	<i>54 (41 Consip)</i>	<i>28 (19 Consip)</i>	<i>26 (22 Consip)</i>
<i>Art. 22 requested by local PA</i>	<i>21</i>	<i>12</i>	<i>9</i>
<i>Art. 22 ex officio to central PA</i>	<i>23</i>	<i>14</i>	<i>9</i>
<i>Art. 22 ex officio to local PA</i>	<i>14</i>	<i>7</i>	<i>7</i>
Art. 22 PCM	30	17	13
Art. 21-bis	56	14	42
<i>Art. 21-bis* TUSP</i>	<i>18</i>	<i>1</i>	<i>17</i>
Sectorial laws	3	1	2
Total	236	106	130

Source: Data processing AGCM on data 2016 and 2017

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

3.1. Outcome of opinions under art. 21

Out of **35 opinions** adopted under **art. 21** (13 in 2016 and 22 in 2017), the global success rate is **17%** (6% positive outcome, 11% partially positive), compared to **57%** of negative outcomes. The graph below shows the split of the said results, for the considered biennium and per year.



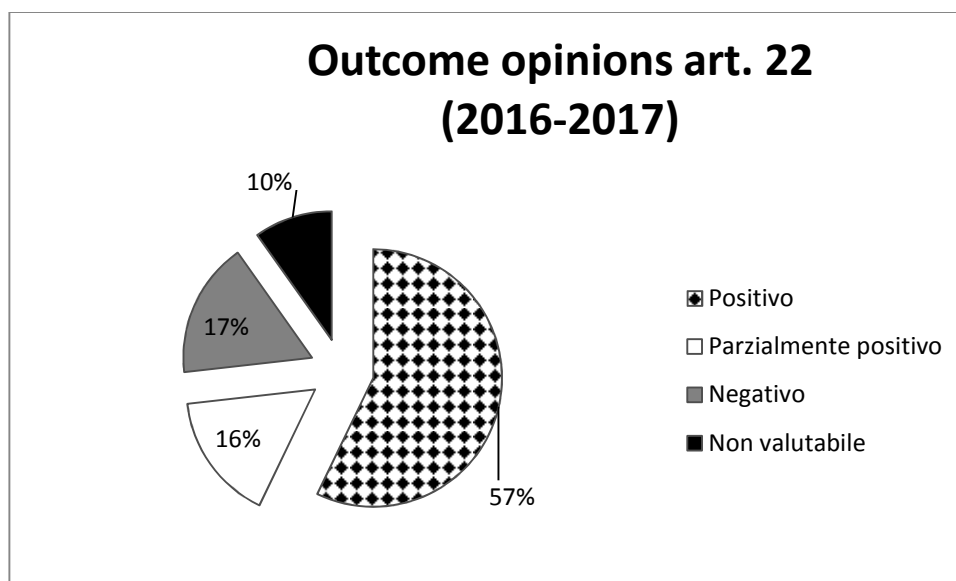
Source: Data processing AGCM on data 2016 and 2017

As to the recipients of said decisions, the instrument has been addressed for a bit more than half of the cases to national Legislator or central administrations (18), the other half to local entities (17). 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).

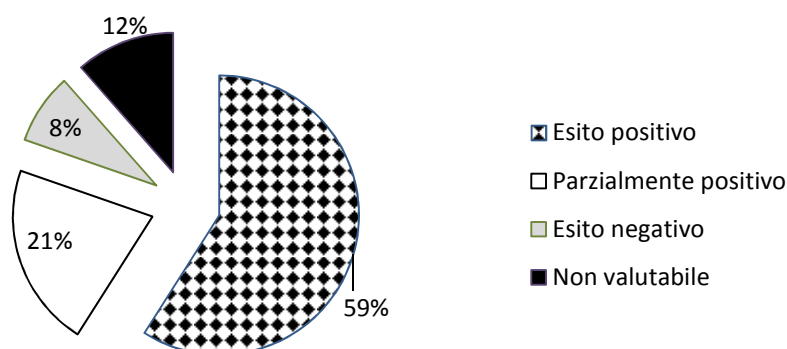
3.2. Outcome of opinions under art. 22 (total)

Out of a total of **112 opinions** adopted under **art. 22** (including 41 opinions to Ministry of Finance/Consip and excluding opinions to PCM) in the entire period considered (61 in 2016 and 51 in 2017), **75** were adopted upon requests of central or local administrations; **37** were decided on AGCM own initiative.

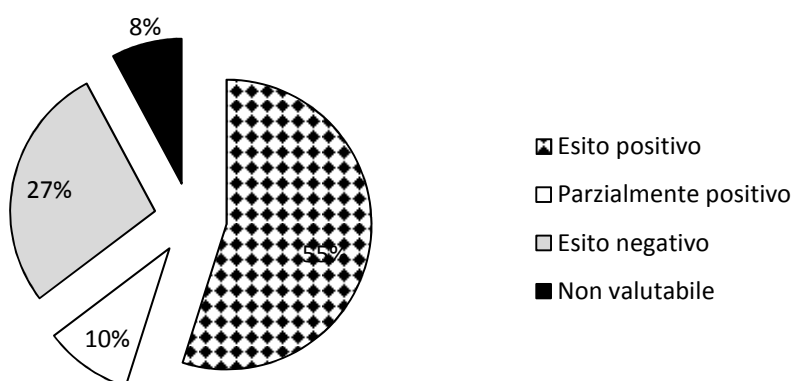
The overall success rate for opinions under art. 22 is satisfying, with a success rate of **73%** (57% positive outcome, 16% partially positive), compared to 17% of negative and 10% of not evaluable outcomes, as shown in the graphs below.



Outcome opinions art. 22 (2016)



Outcome opinions art. 22 (2017)



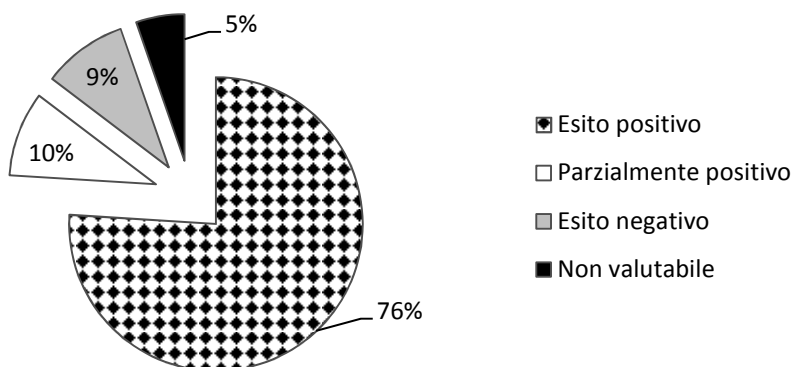
Source: Data processing AGCM on data 2016 and 2017

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 **75** opinions adopted upon requests under **art. 22** (including 41 opinions to MEF/Consip and excluding opinions to PCM), **54** are from **central administrations** and **21** from **local administrations**. The global success rate for opinions adopted upon request is **86%** (76% positive outcome, 10% partially positive), the negative outcome is 9% and the not evaluable is 5%, as shown by the graph below.

Outcome opinions art. 22 upon requests (from central and local PAs, 2016-2017)



Source: Data processing AGCM on data 2016 and 2017

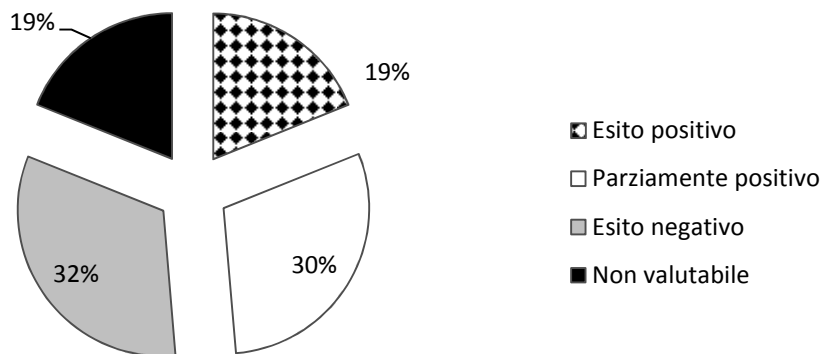
Depending on the requesting administration, the success rate is **95%** for central administrations (91% positive outcome, 4% partially positive), compared to 5% of negative outcome, and it is **62%** for local administrations (38% positive outcome, 24% partially positive), compared with 19% of negative outcome.

The result is in line with that emerged in the preceding survey for the period 2015-2016 (it was then 86% - 67% positive outcome, 19% partially positive) and, consistently with the previous analysis, reaffirms for AGCM the role as a “**consultant**” for competition matters towards other public administration.

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

As to the opinions adopted under art. 22 on AGCM’s own initiative, out of **37 ex officio opinions** (23 to central administrations, 14 to local administrations), **49%** of cases registers **positive outcome** (19% positive outcome, 30% partially positive), 32% negative, 19% not evaluable.

Outcome opinions art. 22 ex officio (to central and local PAs, 2016-2017)



Source: Data processing AGCM on data 2016 and 2017

Depending on the recipient administration, for **central administration the success rate is 56%** (17% positive outcome, 39% partially positive), compared to negative results for 22% equal to not evaluable, whilst for **local administrations it is 36%** (22% positive outcome, 14% partially positive), the negative outcomes being 50% and the not evaluable 14%.

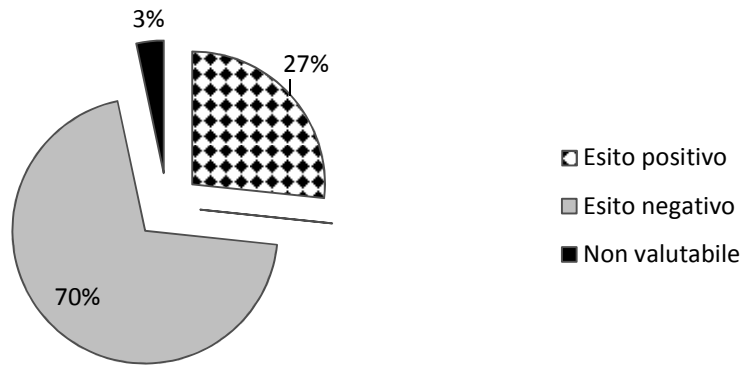
Comparing the previous period, the success rate for the biennium 2015-2016 was 61% (18% positive outcome, 43% partially positive), in the previous one 2014-2015 was 46% (9% positive outcome, 37% partially positive). The trend seems therefore to settle in the middle with fluctuations a bit up and down.

3.3. Outcome of opinions under art. 22 to PCM

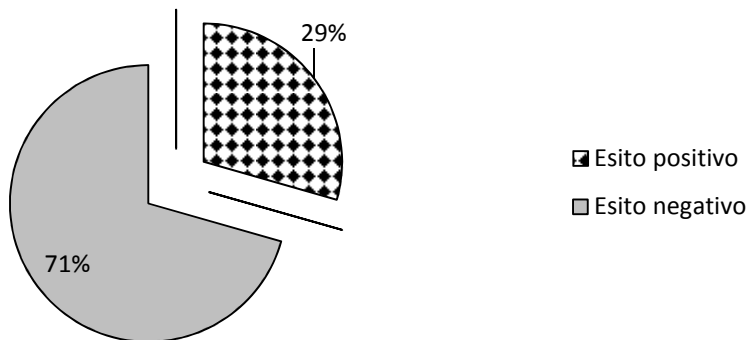
In the focused period **93 requests by PCM on regional laws** have been assessed, 46 in 2016, 47 in 2017.

Out of these requests, in **30 cases** AGCM adopted opinions (17 in 2016 and 13 in 2017), among which in 7 cases PCM brought appeal to Constitutional Court, corresponding to a rate of **23%**. Adding another positive outcome for the change of the law following a moral suasion by PCM subsequent to the opinion (in a perspective oriented to the result), the rate goes up to **27%**. In 21 cases the PCM has not challenged the law, departing from the opinion. The graphs below show these results.

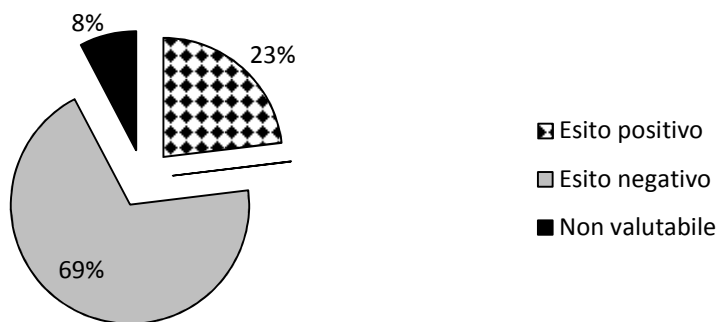
Outcome opinions art. 22 to PCM (2016-2017)



Outcome opinions art. 22 to PCM (2016)



Outcome opinions art. 22 to PCM (2017)



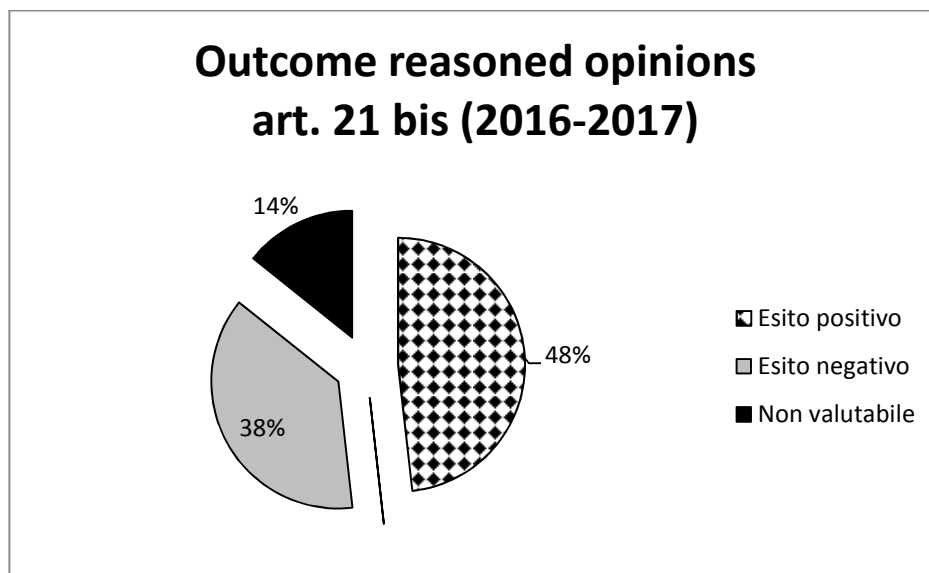
Source: Data processing AGCM on data 2016 and 2017

Assessing the efficacy of opinions in term of final decisions of the Constitutional Court for competition issues: a) in 2016 the Court granted appeals in 4 out of 5 cases², rejecting the remaining case³; b) in 2017, PCM challenged regional laws in two cases out of 13 opinions, whilst another case, as mentioned above, the regional law was amended via *moral suasion* conducted by PCM towards the Region subsequently to the opinion⁴. As to the two appeals which were brought, the Court granted one case (decision n. 109 of 2018), whilst another case is ongoing⁵.

Summing up, in the biennium 2016-2017 the total appeals brought by PCM to the Constitutional Court were 7, out of which 6 have been decided: in 5 cases the Court has declared unconstitutional the challenged regional laws (**acceptance rate of the appeals: 83%**), whilst another case has been taken up by the Regional legislator with amendments with no need of appeal (adding this case, the acceptance rate goes up to **86%**).

3.4. Outcomes of opinions under art. 21 bis

In the period considered, the interventions under art. 21-bis were **56** (14 in 2016, 42 in 2017, all to local administrations, except one), including 18 special opinions so called “TUSP” (under art. 5, par. 3, d.lgs. n. 175/2016 - 1 in 2016, 17 in 2017). The success rate registered is **48%** (27 cases), i.e. the acts were amended following the opinion adopted by the AGCM, compared to 38% of negative outcomes (21 cases) and 14% not evaluable (8 cases).



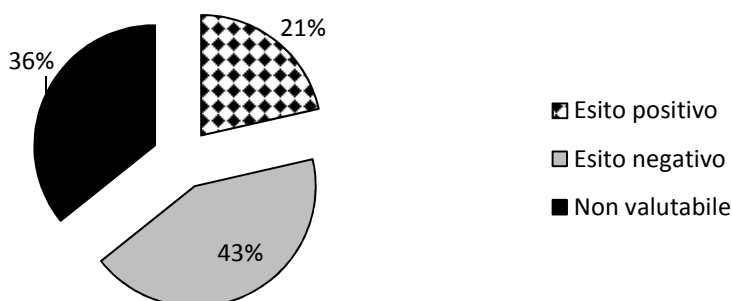
² Decisions n. 98/2017, 133/2017, 157/2017 e 174/2017.

³ Decision n. 152/2017.

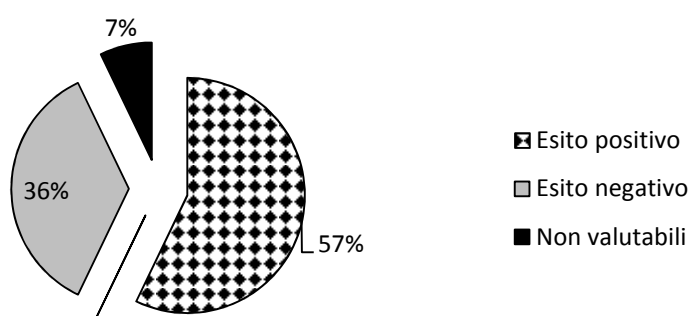
⁴ The law dealt with in opinion AS1353 - *Legge Regione Friuli Venezia Giulia n. 21/2016/Disciplina delle politiche regionali nel settore turistico e dell'attrattività del territorio*.

⁵ See AS1468 – *Regione Liguria - Legge n. 25/2017* regarding the qualification and protection of beach concessions companies and law n. 26/2017 on the regime of such concessions for touristic and recreational aims.

Outcome reasoned opinions art. 21 bis (2016)



Outcome reasoned opinions art. 21 bis (2017)



Source: Data processing AGCM on data 2016 and 2017

Comparing **2016 and 2017** the number of opinions has increased substantially (from 14 cases in 2016 to 42 in 2017); the **outcomes**, while the judicial litigation is mostly ongoing, improved considerably, from positive outcomes at **21%** in 2016, to **48%** in 2017, compared to respectively 38% and 44% of negative outcomes. Also comparing the previous biennium 2015-2016 there is an improvement (success rate was 44% then).

In most cases with negative outcomes, AGCM appealed the administrative acts before the administrative judge. Therefore, as regards 21-bis interventions, a definitive assessment will be possible only once the current cases pending in court will be defined.

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

Within this category one opinion has been adopted under art. 19, par. 1, d.lgs. 259/2003 containing electronic communication Code (positive outcome), two opinions under sport rights regulation under d.lgs. 9/2008 so called Decreto Melandri (SR28 and SR28B, positive

outcome). Other “standard” opinions were issued under the electronic communication Code (71 in 2016, 14 in 2017) and Decreto Melandri (2 in 2016,3 in 2017).

III. FINAL CONSIDERATIONS

The survey on outcomes of competition advocacy decisions in the biennium 2016-2017 shows a success rate of **53%** (44% positive outcome, 9% partially positive) out of a total of **236** interventions.

Concerning these results, it has to be considered that the end of the legislature could explain, at least partially, the success rate’s decrease in 2017 respect to 2016. Anyway, the partially positive, negative and not evaluable outcomes of 2017 will be re-assessed in the next monitoring cycle.

Analysing the split of data depending on legal basis, in particular referring to the decisions issued under art. 22, it appears evident a role awarded to the AGCM as a consultant of administrations in competition matters, at both central and local levels. In particular, the success rate is particularly satisfying for opinions sought by administrations (91%), both central (95%) and local (62%). Regarding the other legal instruments, the results might be affected reasonably by the content of many AGCM interventions, aimed at advocating for broad and deep reforms, under attention at international level too, which obviously require time to be enacted.

A kind of monitoring of advocacy activity is carried out, in different forms and ways, by many European competition authorities, given the value attached to it in term of promotion of economic policies based on marked liberalization. As far as AGCM is concerned, this activity implies a systematic monitoring exercise, which allows to verify the efficacy and effectiveness level, from one side, and the accountability of its own activity, on the other side, matching an advanced step of the impact assessment process carried out so far by the most sensitive national authorities.

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

Annex B – References of relevant opinions adopted in 2017 and relative outcomes