

STUDIES AND ANALYSIS OF LEGISLATION DIRECTORATE

OUTCOMES OF COMPETITION ADVOCACY DECISIONS IN 2017-2018

I. INTRODUCTION

This document outlines the results of competition advocacy decisions issued by Italian Competition Authority (Authority or AGCM), as provided for by the Competition Act n. 287/90, in the biennium 2017 - 2018. 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 2019.

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 opinions have been divided as follows:

1. under art. 21,
2. under art. 22,
3. under art. 21 bis,
4. issued under laws for specific sectors.

Opinions under art. 22 have been further divided among:

- 1) issued upon request of
 - a. central public bodies,
 - b. local public bodies,
 - c. Presidency of Council of Ministers ("PCM")¹;
- 2) 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;
- negative: when there has been no compliance at all with what was recommended;

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.

- 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 2018 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:

- 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;
- 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 2017-2018.

II. OVERALL AND ANALYTICAL DATA 2017 - 2018

The survey has reviewed advocacy interventions in the period from the 1st of January 2017 to 31st December 2018, for a total of 216 decisions (130 in 2017 and 86 in 2018) 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 for 2017 and 2018 and the relevant outcomes (annex A and annex B).

1. Composition of decisions by sector (2017 - 2018)

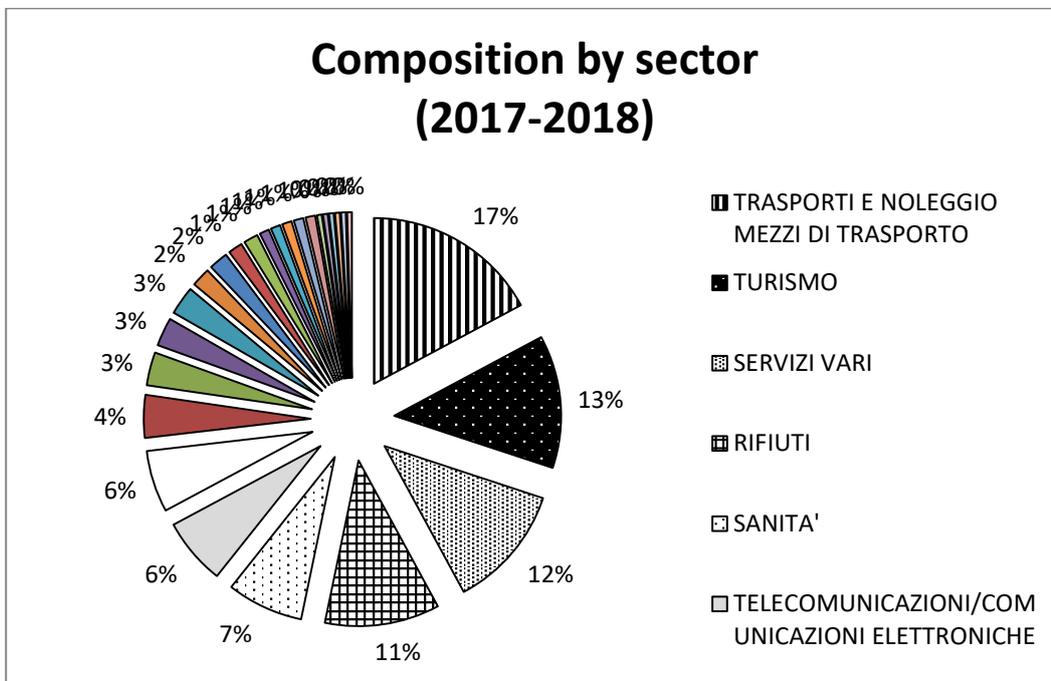
As regards the sectors concerned by the advocacy decisions, most of interventions have been focused on the sectors of transports and rental of transport means (17% - 37 cases), tourism (13% - 28 cases), general services (14% - 26 cases), waste (11% - 16 cases), and health services (7% - 16 cases), which all together count for more than half of the decisions, followed with lower figures by TLC and E-commerce (14), electric energy and gas (13), information technology (9). The table and the graph below show, respectively, numerical data and relative rates.

Table 1 – Distribution of opinions by sector

SECTOR	2017	2018	2017-2018
TRANSPORTS AND RENTAL OF TRANSPORT MEANS	26	11	37
TOURISM	15	13	28
GENERAL SERVICES	13	13	26
WASTE	18	6	24
HEALTH SERVICES	11	5	16
TLC AND E-COMMERCE	5	9	14
ELECTRIC ENERGY AND GAS	7	6	13
INFORMATION TECHNOLOGY	6	3	9
FINANCIAL SERVICES	5	2	7
RECREATIONAL AND CULTURAL ACTIVITIES	4	2	6
PHARMACEUTICAL INDUSTRY	3	3	6

POSTAL SERVICES	2	2	4
WATER	2	2	4
OIL INDUSTRY	1	2	3
PROFESSIONAL ACTIVITIES	1	2	3
MEDIA	1	1	2
RESTAURANTS	2	-	2
TV RIGHTS	2	-	2
INSURANCE AND PENSION SCHEMES	-	2	2
FOOD AND DRINK	1	1	2
ELECTRIC AND ELECTRONIC MATERIAL	1	-	1
TV-RADIO TELEVISION	1	-	1
MINING INDUSTRY	1	-	1
MECHANICS	-	1	1
REAL ESTATE	1	-	1
EDUCATION	1	-	1
TOTAL	130	86	216

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 2017 and 2018

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, tourism, general services, waste, and health services. On the whole, these sectors cover more of the half of the interventions.

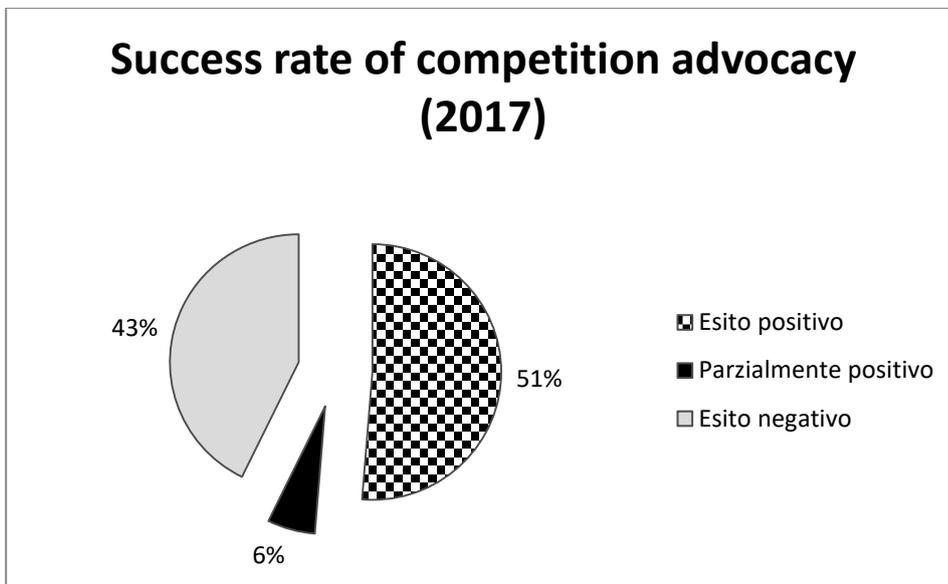
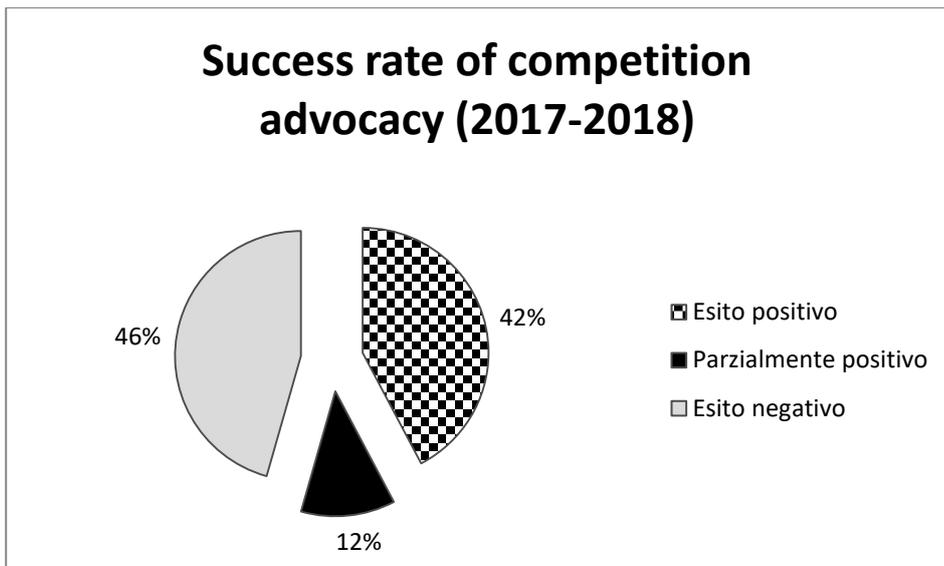
2. Overall summary of advocacy activity (2017-2018)

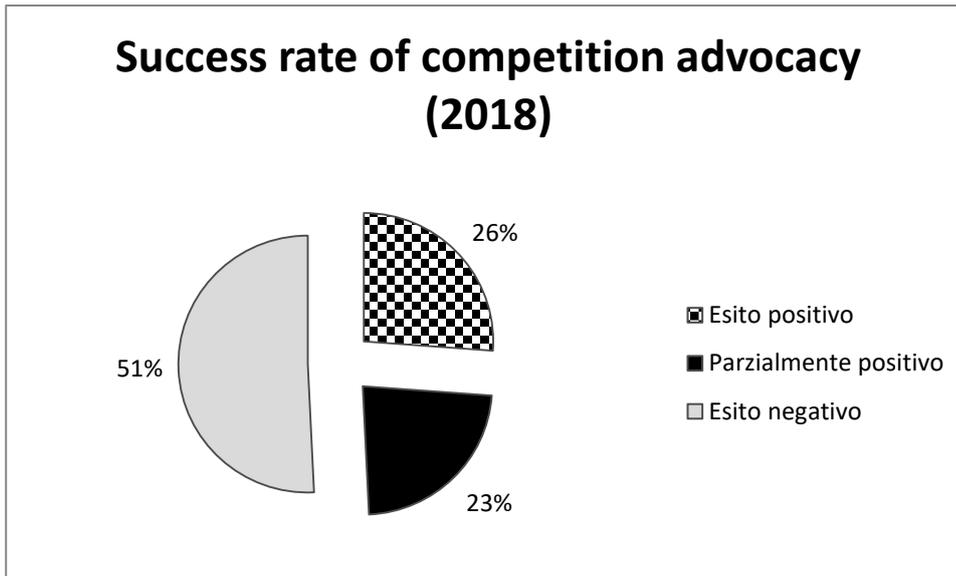
The processing of the data in this monitoring has concerned cases for which the results could be assessed, thus excluding 'non-evaluable' cases. With this innovation compared to previous monitoring, it was intended to strengthen the reliability of the processing, compared with the number of such cases recorded in the current survey (34 cases, the highest so far recorded, 13

in 2017 and 21 in the 2018), also considering the variety of cases, as well as the fact that the same cases will be subject to reevaluation.

Therefore, 34 cases that could not be evaluated were removed from the total of 216 cases and the processing of the results referred to 182 interventions, 117 in 2017 and 65 in 2018.

Among the **216 decisions**, the success rate has been **54%** (42% positive outcome, 12% partially positive), corresponding to 99 cases (77 positive outcomes and 22 partially positive), the negative outcomes have been 46% (83 cases).





Source: Data processing AGCM on data 2017 and 2018

In the comparison between 2017 and 2018, the positive figure there is a decline from 57% in 2017 (51% positive, 6% partially positive) to 49% in 2018 (26% positive, 23% partially positive). Compared to the previous two years monitored 2016-2017, apart from the difference in the database (net of the 34 non-evaluable cases in this survey, while in the other 29 were included), the overall compliance rate remains broadly stable (the rate of success was 53% - 44% positive, 9% partially positive). Moreover, partially positive and negative outcomes will be updated in the next monitoring.

3. Success rates for legal basis

In the two-year period 2017-2018, the 182 interventions considered within the analysis, excluding non-evaluable cases as mentioned above, are thus distinct:

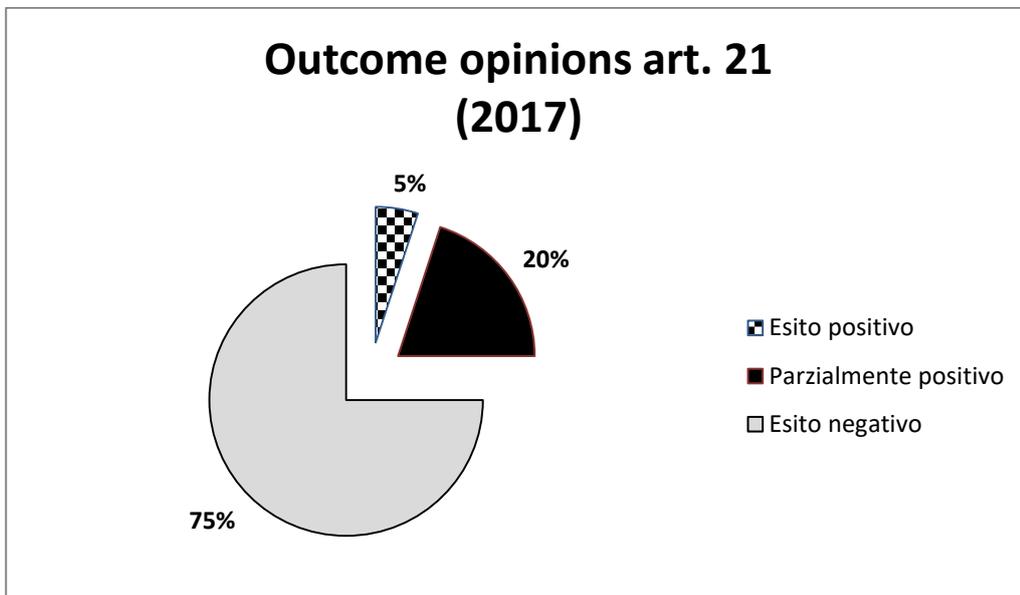
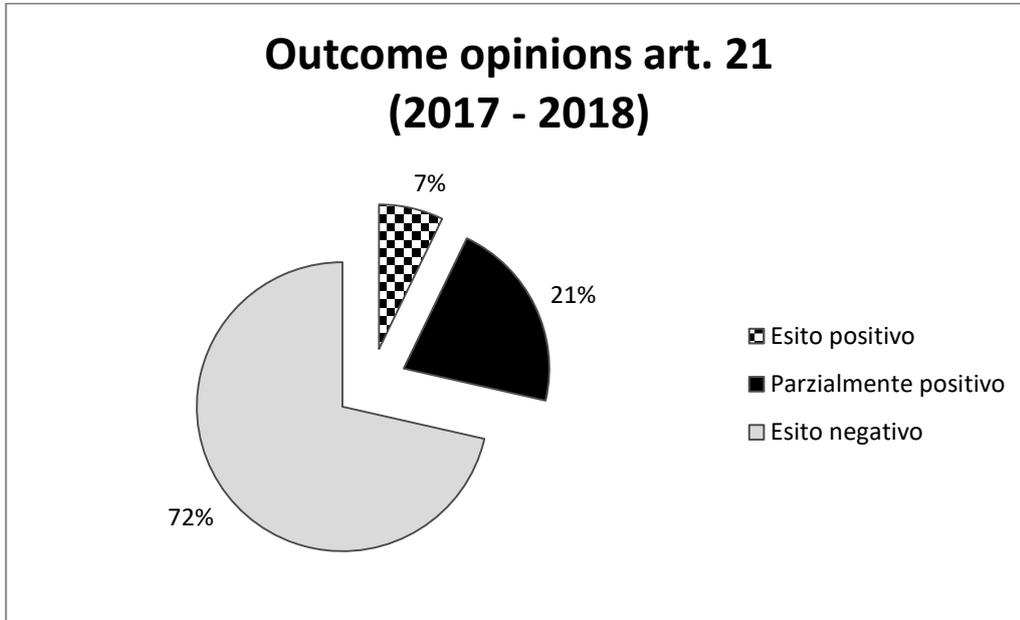
- (i) 28 under art. 21,
- (ii) 81 under art. 22 (including 30 opinions to Mef/Consip, excluding opinions to PCM);
- (iii) 20 under art. 22 at the request of the PCM;
- (iv) 51 under art. 21-bis, included 17 relevant TUSPP²;
- (v) 2 according to other regulations.

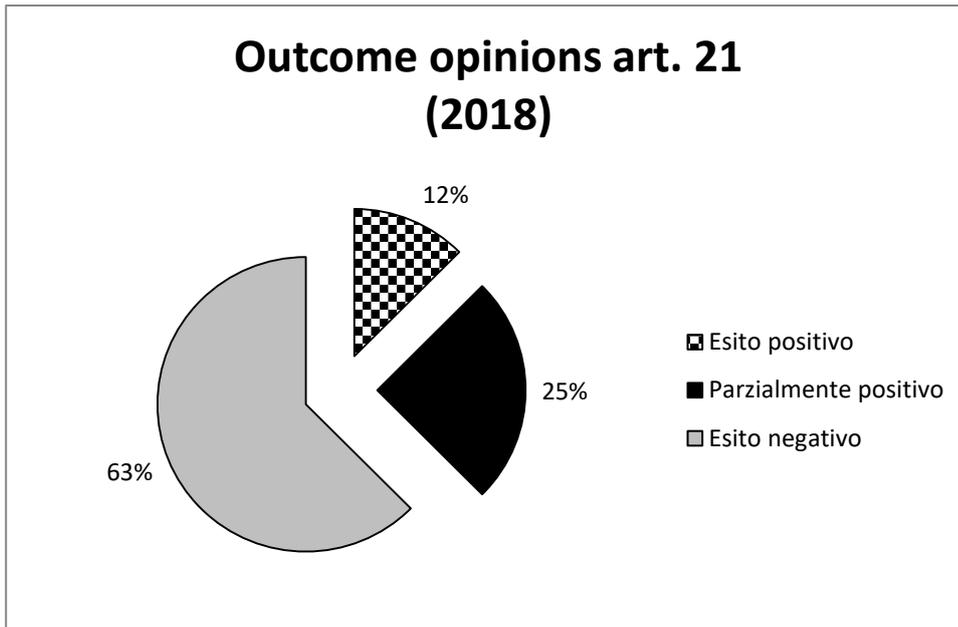
Below are the graphs that account for the data for each of the instruments considered.

3.1. Outcome of opinions under art. 21

² Under art. 5, par. 3, of Legislative Decree 19 August 2016, n. 175 *Unified law on public-owned companies* the deliberative act of setting up the company or acquiring direct or indirect participation must be referred to the AGCM for the purposes of the exercise of the powers provided for by art. 21bis of Competition Act n. 287/90.

Out of 28 opinions adopted under art. 21 (20 in 2017 and 8 in 2018), the global success rate is 28% (7% positive outcome, 21% partially positive), compared to 72% of negative outcomes. The graphs below show the split of the said results, for the considered biennium and per year.





Source: Data processing AGCM on data 2016 and 2017

From 2017 to 2018, the success rate increased from 25% (5% positive, 20% partially positive) to 37% (25% partially positive, 12% positive). Compared to the previous monitoring for the period 2016-2017, the success rate can be considered improved, in fact it was 17% (6% positive results, 11% partially positive). Nevertheless, also looking at the figure per year and considering that the one related to 2018 has a very low calculation base (8 cases, of which 1 positive, 2 partially positive and 5 negative), remains confirmed the low rate of compliance for such a tool, presumably also because of the nature of the acts engraved, consisting, generally, in final regulatory or administrative acts.

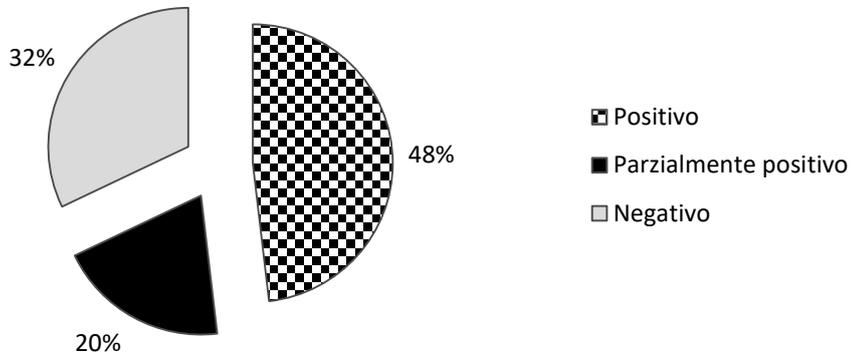
As regards the recipients of these interventions, it is noted that the instrument was used for about half of the cases towards the national legislature or central administrations (14 cases) compared to local authorities (12 cases), in addition to 2 mixed. On the other hand, with regard to the type of reported acts, a very wide variety of acts emerges (central and local regulations, ministerial decrees, local authority deliberations).

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

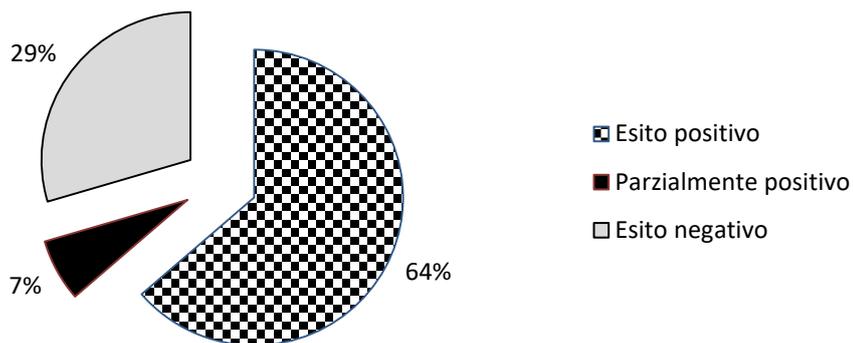
Of the 81 opinions made under art. 22 (including 30 opinions to MEF/Consip, net of opinions to PCM) throughout the period (44 in 2017 and 37 in 2018), 55 were adopted at request (central or local administrations), 26 on the initiative of the Authority.

Overall, the results of these opinions show a satisfactory result, with a positive figure of 68% (48% positive, 20% partially positive), compared with 32% of negative outcomes as shown in the chart below.

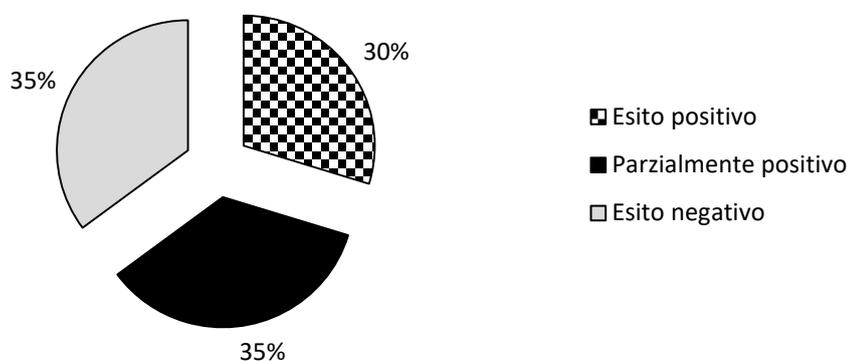
Outcome opinions art. 22 (2017-2018)



Outcome opinions ex art. 22 (2017)



Outcome opinions art. 22 (2018)



Source: Data processing AGCM on data 2017 and 2018

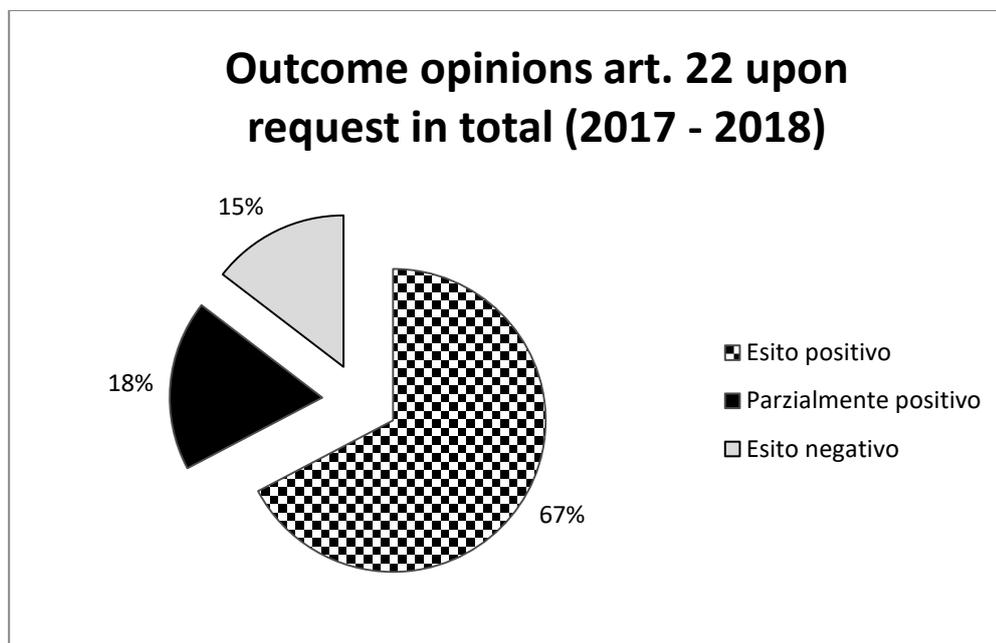
In comparison between 2017 and 2018, the rate decreased from 71% (64% positive, 7% partially positive), to 65% (30% positive, 35% partially positive). On the other hand, the two-year figure is consistent with the previous analyses (in 2016-2017 the success rate was 73% - 57% positive and 16% success (partially positive)).

In the category of opinions adopted under art. 22, the opinions adopted at the request of a public administration (net of those requested by PCM) were distinguished from those made on the initiative of the Authority, with a further division between opinions aimed at central and local governments.

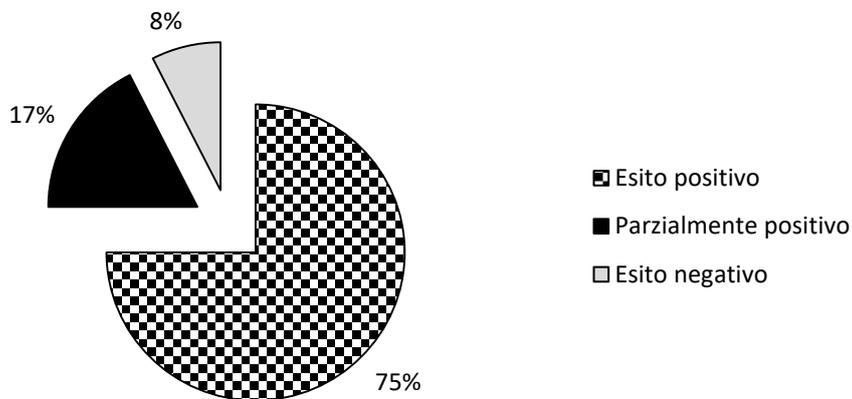
3.2.1. Outcome of opinions issued under art. 22 upon request of public administrations

Out of 55 opinions adopted upon requests in 2017-2018 under art. 22 (including 30 opinions to MEF/Consp and excluding opinions to PCM), 40 are from central administrations and 15 from local administrations.

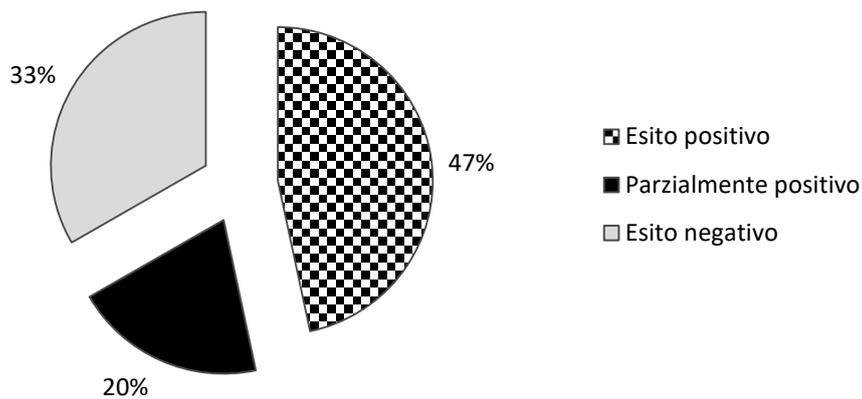
The global success rate for these 55 opinions adopted upon request is 85% (67% positive outcome, 18% partially positive), whilst the negative outcome is 9% as shown by the graph below.



Outcome opinions art. 22 upon request of central administration (2017 - 2018)



Outcome opinions art. 22 upon request of local administration (2017 - 2018)



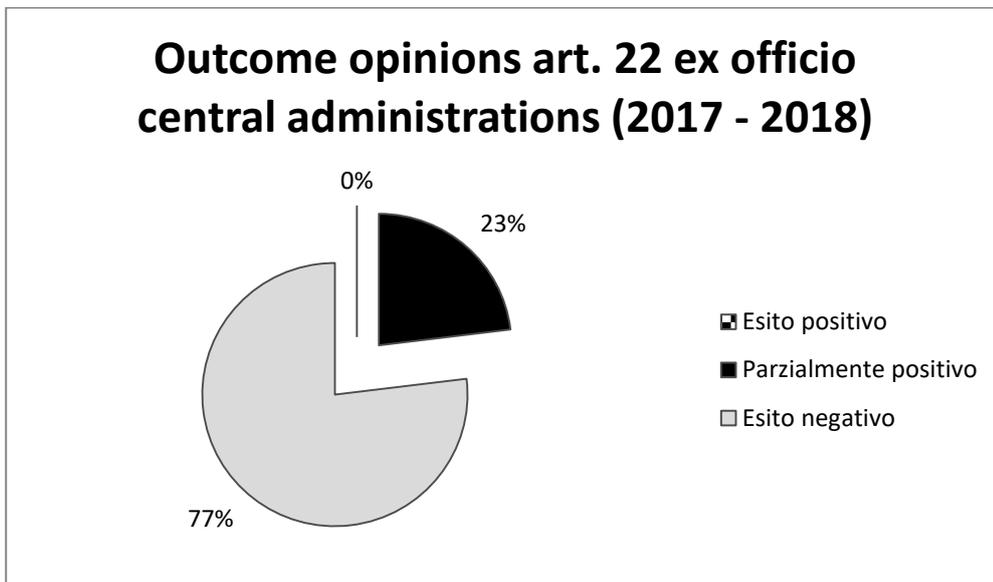
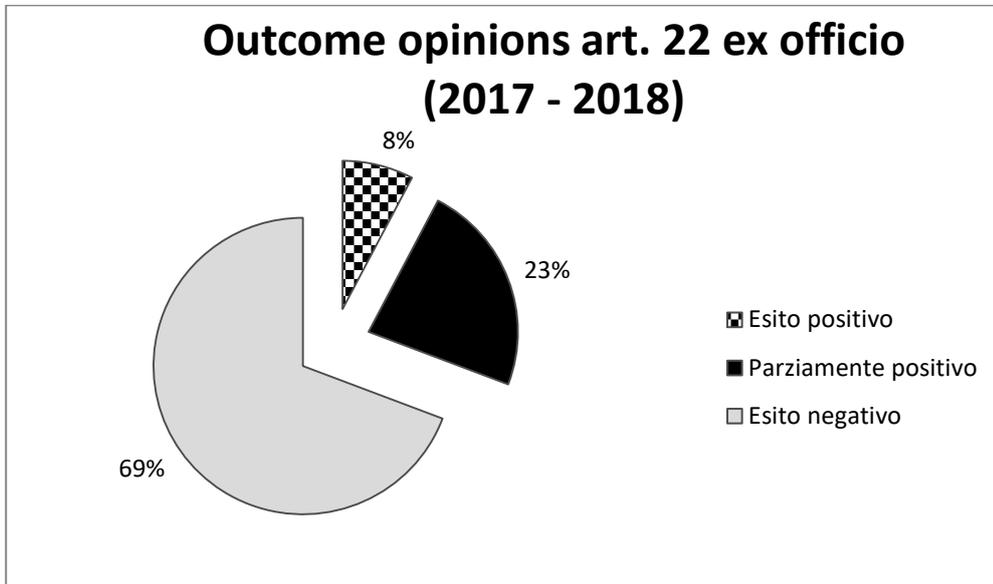
Source: Data processing AGCM on data 2017 and 2018

The figure is stable compared to the previous two years 2016-2017, in which there was also a success rate of 86% (76% positive result, 10% partially positive). This result, consistent with what has emerged in previous analyses, therefore confirms the role of "consultant" for the competition that the Authority has assumed in relation to other public administrations.

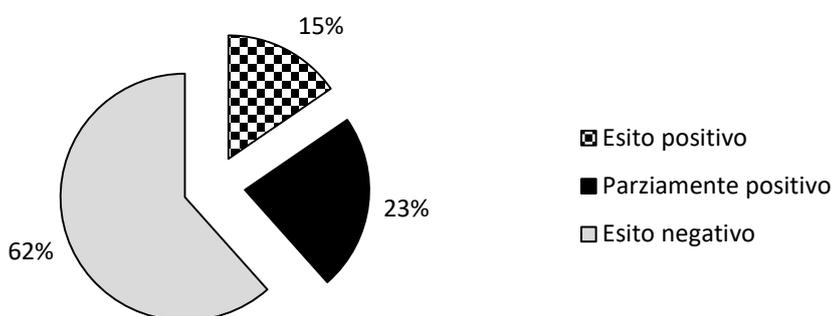
Looking at central and local governments, for the former the success rate is 92% (75% positive, 18% partially positive), compared with 8% with a negative result, for the latter it is 67% (46% positive, 20% partially positive), compared with 33% with negative outcome.

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

As to the opinions adopted under art. 22 on Authority's own initiative, out of 26 ex officio opinions (13 to central administrations, 13 to local administrations), 31% of cases only registers positive outcome (8% positive outcome, 23% partially positive), whilst 69% are negative.



Outcome opinions art. 22 ex officio local administrations (2017 - 2018)



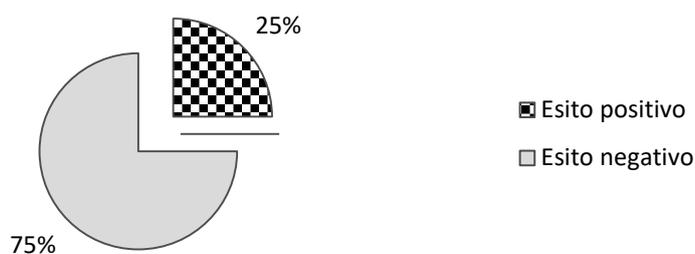
Source: Data processing AGCM on data 2017 and 2018

Considering the data distinctly by type of administration, the success rate of opinions to central government is 23% (23% partially positive), compared with 77% negative outcomes, but the success rate of opinions aimed at local governments is higher, at 38% (15% positive, 23%), compared to 62% of negative cases.

3.3. Outcome of opinions under art. 22 to PCM

In the focused period 80 requests by PCM on regional laws have been assessed (46 in 2016, 47 in 2017), out of which, in 20 cases the Authority adopted opinions (12 in 2017 and 8 in 2018). PCM brought appeal to Constitutional Court in 3 cases (2 in 2017, 1 in 2018); 2 additional positive outcomes can be considered for the change of laws following moral suasion measures by PCM subsequent to opinions (in a perspective oriented to the result). Therefore, the positive cases were 5 (3 in 2017, 2 in 2018) for a success rate amounting to 25%. In 15 cases the PCM has not challenged the laws, departing from the opinion.

Outcome opinions art. 22 to PCM (2017 - 2018)



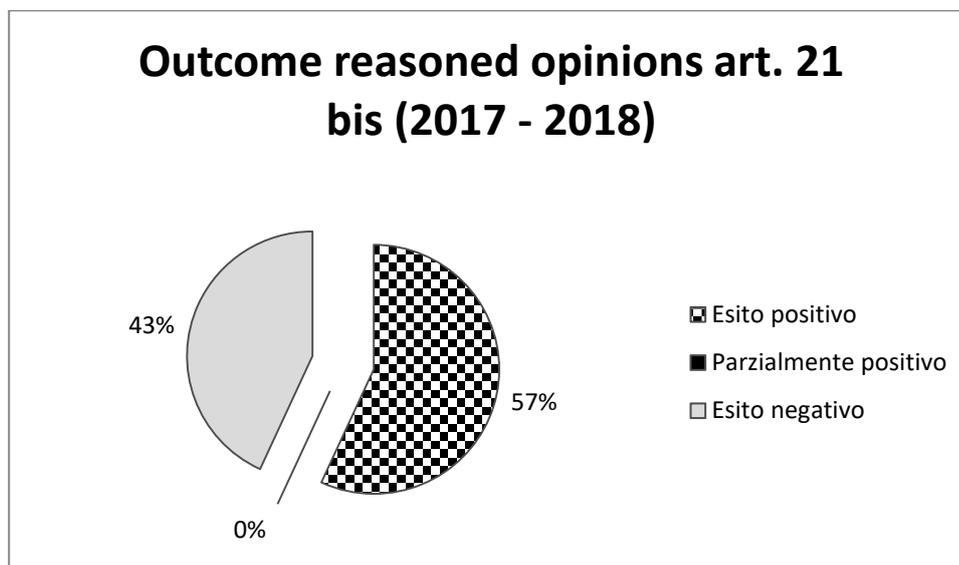
Source: Data processing AGCM on data 2017 and 2018

Comparing 2017 and 2018, the percentage breakdown repeats identically in the two-year period (25% in both years). Compared to the results of the monitoring conducted on the previous two years 2016-2017, it is reported that the figure remains broadly stable (a year ago the rate stood at 27%, while in the previous monitoring it was 39%).

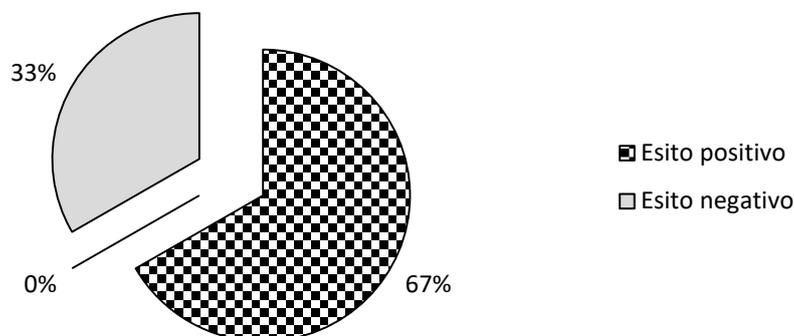
With regard to the outcome of the appeals brought by the PCM in relation to the profiles reported by the Authority, in 2017 the Constitutional Court accepted both proceedings (Judgment 109 of 2018 and Judgment 1 of 2019), in 2018, in the only case of appeal, the Court rejected the appeal (judgment 65 of 2019). In summary, out of the 3 appeal cases, the Court accepted two cases and rejected one.

3.4. Outcomes of opinions under art. 21 bis

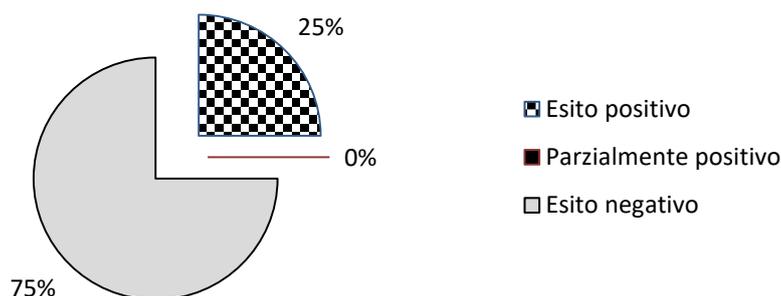
In the period considered, the interventions under art. 21-bis were 51 (39 in 2017, 12 in 2018, all to local administrations, except one), including 17 special opinions so called “TUSPP” (under art. 5, par. 3, legislative decree n. 175/2016, all in 2017). The success rate registered is 57% (29 positive cases, i.e. the acts were amended following the opinion adopted by the Authority, and other 3 case have seen the litigation in court closed in favor of the Authority: AS1382 Cineca, AS1484 Comune di Rovereto, AS1368 Regione Puglia), compared to 43% of negative outcomes (22 cases).



Outcome reasoned opinions art. 21 bis art. 21 bis (2017)



Outcome reasoned opinions art. 21 bis (2018)



Source: Data processing AGCM on data 2017 and 2018

Comparing 2017 and 2018, the number of interventions decreased (from 39 opinions in 2017 to 12 in 2018); the results have declined, from 67% positive outcome in 2017, to 25% positive outcome in 2018, compared with 33% and 75% respectively of negative cases.

In most cases that failed, the Authority appealed the act to the administrative court. As a result of this litigation, the outcome of the case could go from negative to positive. 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, two opinions have been adopted under sport rights regulation d.lgs. 9/2008 so called Decreto Melandri (SR28 and SR28B, positive outcome). Other two cases

were issued according to art. 19, par. 1, of d.lgs. 259/2003 (electronic communication Code, non-evaluable). Other “standard” opinions were issued under the same electronic communication Code (78) and Decreto Melandri (4 in addition to the mentioned).

III. FINAL CONSIDERATIONS

The monitoring activity covered all advocacy interventions adopted from January 1, 2017 to December 31, 2018, for a total of 216 decisions (130 in 2017 and 86 in 2018) according to articles 21, 22 and 21 *bis* of Law No.287/90, or to regulatory laws.

As in previous monitoring, interventions are concentrated mainly in the transport (37 cases), tourism (28 cases), general services (26 cases), waste (24 cases) and health (16 cases), which alone reach more than half of the interventions.

The most common competitive criticality profiles in the two-year period were restrictions on tenders (112 cases), including non-competitive assigning (42 cases), and the limitations of the business (111 cases), the most common of which strain to *“administrative laws or measures that alter the conditions of competition”* (95 cases).

In the general comparison between 2017 and 2018, it is noted that, with a decrease in the number of interventions in 2018 compared to 2017, there were more deliberations on broad issues and/or in particularly relevant or critical areas, with a focus on complex issues or qualified and substantive profiles (for example, in the case of concessions, digital platforms, scheduled and non- scheduled public transport services, port and airport infrastructure, TLC frequency tenders, energy sector regulation, historical criterion used for regional health spending).

As regards the results of the monitoring, for the reasons expressed above, the processing of the data, unlike in the past, concerned only the cases for which the results could be assessed, excluding the 34 "non-evaluable". Therefore, the processing of the results took into reference 182 interventions (i.e. 216 minus 34), 117 in 2017 and 65 in 2018.

On this basis, the monitoring results showed a compliance rate, given the totality used, of 54% (42% positive, 12% partially positive). In previous surveys, the aggregate figure was 53% (2016-2017) and 59% (2015-2016).

In comparison between 2017 and 2018, the compliance rate is slightly decreasing, from 57% (51% positive, 6% partially positive) in 2017 to 49% (26% positive outcome, 23% partially positive) in 2018. However, the results partially positive, negative and non-evaluable interventions 2018 will be updated in the next monitoring.

The analysis of the data split, in particular, it remains confirmed the role of competition consultant for the public administrations played by the Authority, with a success rate of opinions issued under art. 22 equal to 68%. In particular, the success rate can be considered

particularly satisfactory when the intervention was requested by the public administrations (success rate 85%), both central (92%) and local (67%).

The monitoring of the *advocacy* activity carried out by the Authority, now characterized by a structural and systematic character, allows to check the level of effectiveness and effectiveness and the accountability of your work. From this point of view, the Authority is in line with the best practices found among the national authorities of the European Competition Network.

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

Annex B – References of relevant opinions adopted in 2018 and relative outcomes