



## **OUTCOMES OF COMPETITION ADVOCACY DECISIONS IN 2018-2019**

**Rome, 16<sup>th</sup> November 2020**

***STUDIES AND ANALYSIS OF LEGISLATION DIRECTORATE***

## OUTCOMES OF COMPETITION ADVOCACY DECISIONS IN 2018-2019

### I. INTRODUCTION

This publication reports the results of the periodic monitoring of the outcomes of reporting and advisory interventions (advocacy), adopted by the Authority pursuant to Law no. 287/90 and other sectoral regulations and concerns data relating to the two-year period 2018 – 2019.

We analyse, in particular, first the summary data, and then the detailed data broken down by instrument, with further specifications, when relevant. The data are updated on 14 October 2020.

The data for the last of the two years considered, in this case 2019, will be reviewed in the next periodic survey, which will be carried out during 2021: in particular, all partially positive outcomes, negative outcomes and those not evaluable will be subject to reassessment.

The investigation focuses on the compliance rate understood as the recipients' compliance with the indications contained in the Authority's interventions.

The opinions have been divided as follows:

- a) under Article 21,
- b) under Article 22,
- c) opinions pursuant to Article 22 issued pursuant to Article 4 of the Grow Italy Decree<sup>1</sup> (hereinafter 22PCM);
- d) reasoned opinions pursuant to Article 21-bis (including opinions pursuant to Article 21-bis sent to administrations following communications pursuant to Article 5, paragraph 3, of Legislative Decree 175/2016 (herein referred to as "21-bis TUSPP")<sup>2</sup>;
- e) opinions pursuant to other sectoral regulations.

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;

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<sup>1</sup> Decree Law no. 1 of 24 January 2012 – *Urgent provisions for competition, infrastructure development and competitiveness*, converted, with amendments, by art. 1, paragraph 1, Law no. 27 of 24 March 2012.

<sup>2</sup> Legislative Decree no. 175 of 19 August 2016 “*Consolidated Law on Public Holdings*” provides for the reorganisation of the public holdings sector, implementing one of the central points of Law no. 124/2015, the so-called “*Madia Reform*”. In particular, Article 5, paragraph 3, provides for a new assignment by the Authority, to which must be transmitted “*the deliberative act of incorporation of the company or acquisition of the direct or indirect shareholding*” for the purpose of exercising the powers referred to in Article 21-bis of Law 287/90.

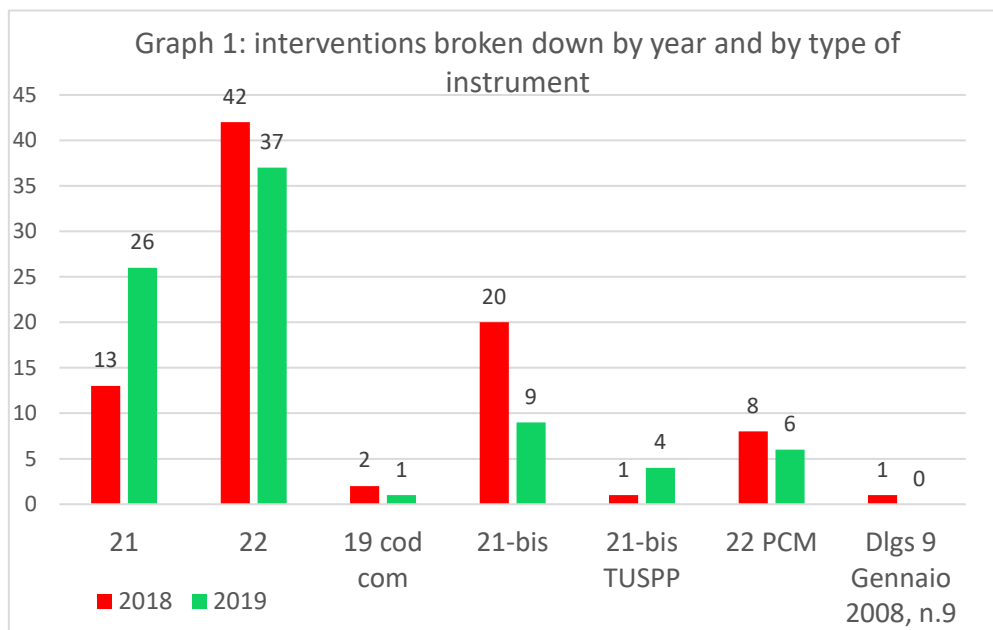
- negative: when there has been no compliance at all with what was recommended;
- not evaluable: when the assessment of the outcome has not been possible for any reason.

## II. SUMMARY AND ANALYTICAL DATA 2018-2019

The monitoring activity covered all advocacy interventions carried out from 1 January 2018 to 31 December 2019, for a total of 170 resolutions (87 in 2018 and 83 in 2019) adopted pursuant to Articles 21, 22 and 21-bis of Law no. 287/90, as well as pursuant to other sectoral regulations. Two lists relating to all the interventions considered for 2019 and 2018 (**Annexes A and B**), with a summary indication of the results, are attached to this document.

### 1. Some general data relating to interventions (2018-2019)

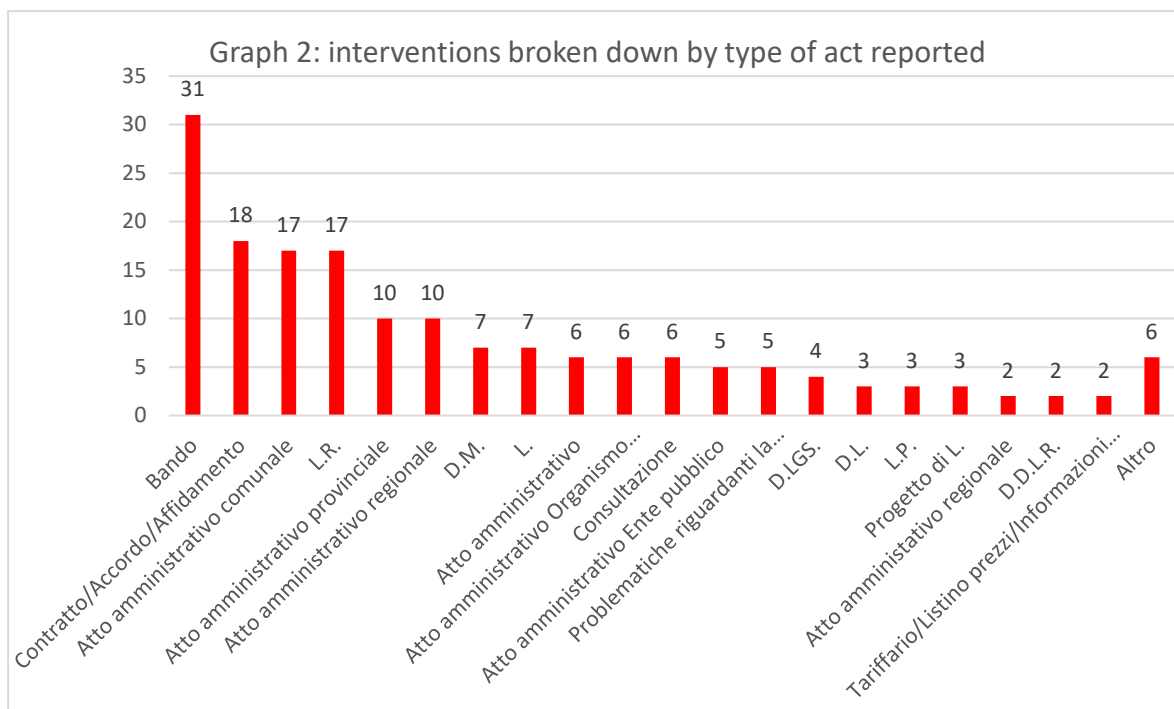
In the comparison between 2018 and 2019, there was a slight overall decrease in the number of advocacy interventions, from 87 to 83, due to a reduction in opinions pursuant to Article 22 (from 42 to 37), 22PCM opinions (from 8 to 6) and, above all, reports pursuant to Article 21-bis (reduced, overall, from 21 to 13, although the 21-bis TUSPP increased from 1 to 4), which were not offset by the increase in interventions pursuant to Article 21 (from 13 to 26). See Graph 1.



Source: AGCM processing on data 2018 and 2019

With regard to **the acts reported** in the two-year period, in 31 cases the intervention of advocacy concerned calls for tenders, in 18 cases it concerned acts of direct assignment or contracts/agreements, in 17 cases it concerned municipal administrative acts and, in the same

number, regional laws; moreover, there were 10 interventions concerning both regional administrative acts and those aimed at provincial administrative acts (Figure 2).

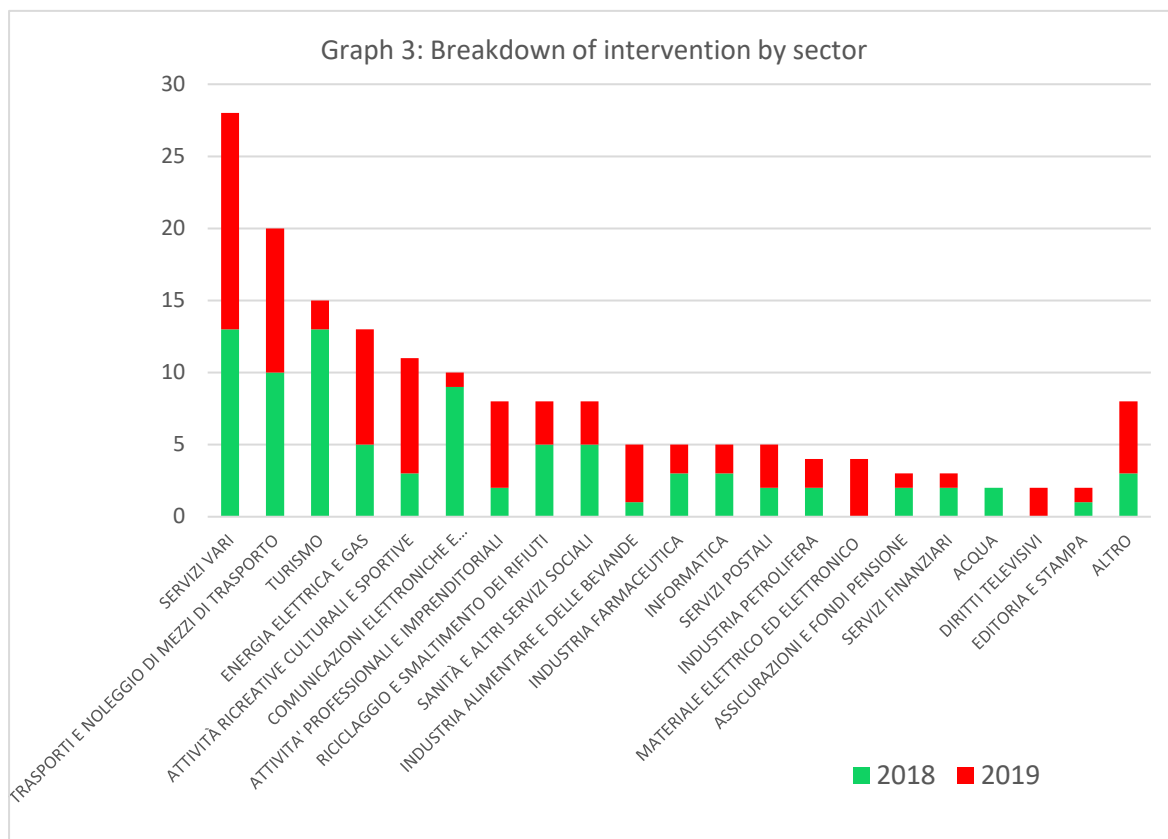


Source: AGCM processing on data 2018 and 2019

Regarding the **sectors** covered by the intervention (Graph 3), in 28 cases the advocacy activity concerned the services sector, in 20 cases transport services, while in 15 cases the tourism sector; energy services (13 cases), recreational, cultural and sports activities (11 cases) and TLC services (10 cases) follow.

In addition, as regards the **recipients**, in 88 out of 170 cases (51.7%), the advocacy intervention was addressed to Parliament or a central administration, in 77 cases (45.3%) to a local administration or a Region, while in the remaining 5 cases (3%) the recipients were mixed (both local and central).

Finally, with regard to **the most recurrent profiles**, through the 170 interventions carried out in the two-year period 2018-2019, 233 competitive criticalities were highlighted (the number is higher than the interventions carried out since an intervention can report even more than one criticality); the greater number of advocacy interventions, in particular, aimed to highlight competitive criticalities attributable to “**limitations on the exercise of the business activity**” (113 cases, equal to 48% of the total of competitive restrictions), among which the restrictions relating to "laws or administrative measures that alter the conditions of competition" stand out (95 cases, equal to 41% of competitive restrictions): in particular, within this category, discriminatory provisions (equal to about 15% of the total reported restrictions), the provisions that bind the supply of goods and services over time, in space and/or in methods (10%) or that introduce obstacles to the start of new economic activities (9%).



Source: AGCM processing on data 2018 and 2019

The second place is occupied by the reports and opinions that have detected competitive restrictions in terms of “**tenders and contracts**” (91 cases, equal to 39% of competitive restrictions), among which, from a quantitative point of view, interventions related to “awards (of contracts, subcontracts and concessions) without tender” (23 cases, equal to 10% of competitive restrictions), those aimed at reporting “automatic renewals and extensions of concessions” (21 cases, equal to 9% of competitive restrictions) are more significant, while the remaining 47 cases (equal to 20% of competitive restrictions) concerned the characteristics of the tender (with interventions that highlighted problems related to participation and/or award requirements, the size of the tender lots, temporary joint ventures, etc.).

## 2. Overall summary of advocacy activity (2018-2019)

The data processing in this section of the monitoring covered only cases for which it was possible to assess the outcome, while cases considered “not evaluable” were excluded. With this criterion – already introduced since last monitoring, relating to the two-year period 2017-2018<sup>3</sup> – it was intended to strengthen the reliability of the processing, given the numerical consistency of these cases recorded in the current survey (32 cases, equal to approximately

<sup>3</sup> The data were published in June 2019 on the Authority's website.

19% of the total interventions of the two-year period) that would affect the proportion of the results of the interventions that were instead “assessed”, diluting their relative “weight”.

Therefore, 32 cases that could not be assessed were removed from the total of 170 cases and the processing of the outcomes referred to 138 interventions, 71 in 2018 and 67 in 2019. The success rate for the two-year period was **55%**: this rate was higher in 2018, when it reached **56%**, while in 2019 it stood at **54%**.

Compared to the previous monitored two-year period 2017-2018, the overall compliance rate remains essentially stable (it was 54%).

*Table 1 – Overall outcome*

OUTCOMES	Total		2018		2019	
	no. of cases	%	no. of cases	%	no. of cases	%
NEG	62	45%	31	44%	31	46%
POS.OP.	33	24%	20	28%	13	20%
POS	43	31%	20	28%	23	34%
<b>Overall total</b>	<b>138</b>	<b>100%</b>	<b>71</b>	<b>100%</b>	<b>67</b>	<b>100%</b>
Success rate (POS + POS.OP.)	76	<b>55%</b>	40	<b>56%</b>	36	<b>54%</b>

Source: AGCM processing on data 2018 and 2019

Analysing the efficacy rate of the interventions according to the **type of recipient** they were addressed to (Table 2), it emerges that those intended for the legislator and central governments (“central recipient”) had a higher overall success rate than those with “local recipient”: the former had a success rate of 56%, while the latter had a success rate of 53%.

*Table 2 - Outcome of interventions, broken down by type of recipient*

Recipient	NEG	POS.OP.	POS	POS + POS.OP.	Overall total
Central	44%	27%	29%	56%	100%
Mixed	25%	50%	25%	75%	100%
Local	47%	18%	35%	53%	100%
of which					
<i>Municipalities</i>	46%	17%	38%	54%	100%
<i>Provinces</i>	56%	33%	11%	44%	100%
<i>Regions</i>	48%	22%	30%	52%	100%
<i>Port authorities</i>	33%	0%	67%	67%	100%
<i>ATO</i>	50%	50%	0%	50%	100%
<b>Overall total</b>	<b>45%</b>	<b>24%</b>	<b>31%</b>	<b>55%</b>	<b>100%</b>

Source: AGCM processing on data 2018 and 2019

As for the **level of finality** of the reported act (Table 3), the success rate is higher for **acts not yet definitive**, such as, for example, drafts of calls for tenders, draft decrees, bills, administrative acts put in consultation, etc.: in such cases, in fact, the success rate was **79%**, while in the case of definitive acts the success rate drops to **43%**.

**Table 3 - Outcome of the interventions, broken down by level of finality of the reported acts**

	NEG	POS.OP.	POS	POS + POS.OP.	Overall total
Final acts	57%	18%	25%	43%	100%
Non-final acts	21%	36%	43%	79%	100%
<b>Overall total</b>	<b>45%</b>	<b>24%</b>	<b>31%</b>	<b>55%</b>	<b>100%</b>

Source: AGCM processing on data 2018 and 2019

### 3. Success rates for legal basis

In the two-year period 2018-2019, the 138 interventions considered within the analysis, excluding non-evaluable cases as mentioned above, are thus distinct:

- (i) 32 (out of 39 total cases) pursuant to art. 21;
- (ii) 64 (out of 79 total cases) pursuant to art. 22 (including 16 opinions to Mef/Consp, excluding the opinions to the PCM);
- (iii) 14 (out of 14 total cases) pursuant to art. 22 at the request of the PCM;
- (iv) 24 (out of 34 total cases) pursuant to art. 21-bis (including opinions pursuant to the TUSPP);
- (v) 4 (out of 4 total cases) under other regulations.

The following are the data analyses and considerations relating to advocacy interventions broken down according to the legal instrument used by the Authority.

#### 3.1. Outcome of reports adopted pursuant to Article 21

Compared to the 32 reports pursuant to **art. 21** (11 in 2018 and 21 in 2019), the overall success rate (Table 4) is **47%**, compared to 53% of negative outcomes.

With regard to **the type of recipient**, it should be noted that: in cases where the intervention is aimed at a **central administration/institution**, the success rate is **26%**, while in cases where the recipient is a **local administration/institution**, the success rate rises to **65%** (which becomes 66% in mixed recipient cases).

**Table 4 – Overall outcome of reports pursuant to art. 21, broken down by type of impulse and type of recipient**

	NEG	POS.OP.	POS	POS + POS.OP.	Overall total
2018	46%	36%	18%	54%	100%
2019	57%	14%	29%	43%	100%
- To central administrations/institutions	74%	13%	13%	26%	100%
- To local administrations/institutions	35%	29%	36%	65%	100%
- To central and local administrations/institutions	34%	33%	33%	66%	100%
<b>Overall total</b>	<b>53%</b>	<b>22%</b>	<b>25%</b>	<b>47%</b>	<b>100%</b>

Source: AGCM processing on data 2018 and 2019

In the comparison between 2018 and 2019, the success rate went from 54% to 43%. Compared to the previous monitoring, relating to the 2017–2018 period, the success rate improved (it was in fact 28%), even if it is confirmed lower than that obtained with the interventions pursuant to art. 22 (see below), presumably also due to the nature of the acts recorded, consisting, in general, of definitive regulatory or administrative acts.

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

The 64 opinions assessed pursuant to **art. 22** (of which, 37 in 2018 and 27 in 2019) show **an overall success rate of 70%** (this count includes the 16 opinions issued to MEF/Consp); the monitoring data also reveal that this index showed an improvement over the two-year period, from 68% achieved in 2018 to 74% in 2019 (Table 5).

It should be noted that compared to the previous monitoring (two-year period 2017-2018), the success rate slightly improved (it was 68%).

Distinguishing the figure on the basis of the interventions adopted by the Authority **at the request of the public administration**, a compliance rate of 81% emerges. This success rate rises to 85% in cases where the request comes from a central administration/institution, while it stands at 77% when the request comes from local administrations/institutions.

*Table 5 – Overall outcome of opinions pursuant to art. 22, broken down by type of impulse and type of recipient*

	NEG	POS.OP.	POS	POS + POS.OP.	Overall total
2018	32%	38%	30%	68%	100%
2019	26%	33%	41%	74%	100%
<b>Requested</b>	<b>19%</b>	<b>23%</b>	<b>58%</b>	<b>81%</b>	<b>100%</b>
- From central and local administrations/institutions	15%	23%	62%	85%	100%
- From local administrations/institutions	23%	23%	54%	77%	100%
<b>Ex officio</b>	<b>50%</b>	<b>41%</b>	<b>9%</b>	<b>50%</b>	<b>100%</b>
- To central administrations/institutions	55%	45%	0%	45%	100%
- To local administrations/institutions	45%	36%	19%	55%	100%
<b>Overall total</b>	<b>30%</b>	<b>36%</b>	<b>34%</b>	<b>70%</b>	<b>100%</b>

Source: AGCM processing on data 2018 and 2019

The two-year period 2017-2018 had shown slightly better data regarding the overall success rate of the opinions requested from the Authority, equal to 85%. However, there was an improvement with regard to the opinions requested by local administrations, for which the level of compliance recorded was 77% (in the previous two years it was 67%).



If the intervention was *ex officio*, the success rate drops to 50%, but still remains decidedly higher than the same figure for the two-year period 2017-2018 (equal to 31%). Contrary to the opinions adopted on request, the success rate is higher when the recipient is a local administration (55%), compared to cases with “central recipient” (45%). This also occurred in the previous monitoring, but with lower percentages (38% and 23%, respectively).

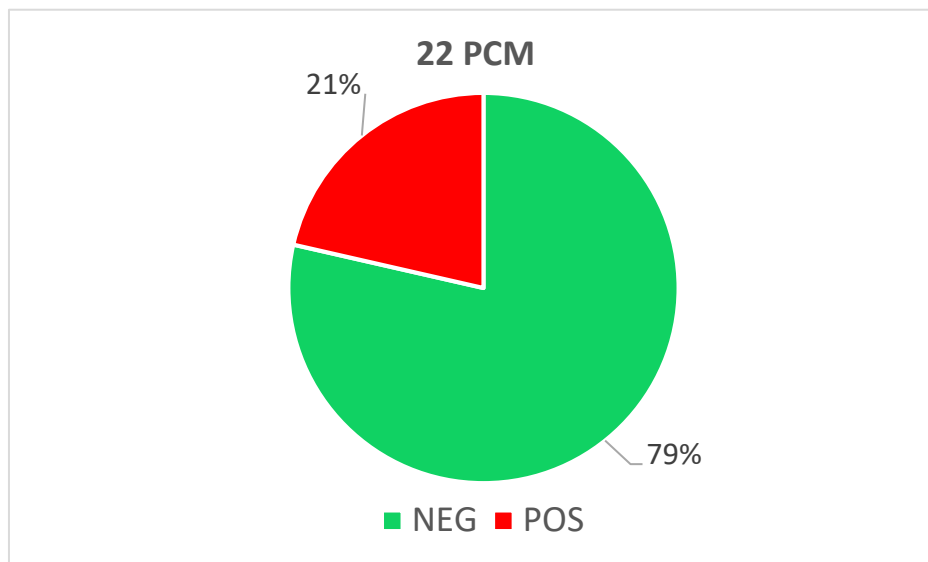
### 3.3. Outcome of opinions under art. 22 to PCM

With regard to opinions pursuant to art. 4 of the Grow Italy Decree<sup>4</sup> (**22 PCM**), 47 requests for opinions on regional laws from the PCM were assessed during the period considered, of which 33 in 2018 and 14 in 2019. With respect to these requests, in 13 cases (equal to 28% of the requests received) the Authority decided to express an opinion (of which, 7 in 2018 and 6 in 2019); in addition to the 7 opinions rendered in 2018, an additional opinion given to the PCM *ex officio* must be added<sup>5</sup>.

With respect to these opinions, the PCM appealed the regional law before the Constitutional Court in only one case, while in two other cases it led the Region to adapt through *moral suasion* (considered positive by assimilation, according to a substantial approach already followed in the previous monitoring).

The positive outcomes are therefore 3, corresponding to a success rate of 21%; in the remaining 11 cases (79%), however, the PCM did not accept the Authority's suggestions (Graph 4).

**Graph 4 - Outcome of 22PCM opinions (two-year period 2018-2019)**



Source: AGCM processing on data 2018 and 2019

<sup>4</sup> Decree Law no. 1 of 24 January 2012 – *Urgent provisions for competition, infrastructure development and competitiveness*, converted, with amendments, by art. 1, paragraph 1, Law no. 27 of 24 March 2012.

<sup>5</sup> In particular, it concerns the opinion AS1548 - LAZIO REGION - LAW 7/2018 - TRANSITIONAL PROVISIONS RELATING TO TOURIST GUIDES.

The data of this monitoring also confirm the downward trend in the success rate recorded for this instrument, which in the two-year period 2017-2018 was 25% and in the previous one, 2016-2017, had stood at 27%.

### 3.4. Opinions under art. 21-bis

The opinions assessed pursuant to art. 21-bis were 24 (equally broken down between 2018 and 2019), including 4 opinions 21-bis TUSPP (of which one in 2018 and three in 2019). The success rate was 38% (9 out of 24 cases in which the act was amended following the opinion given by the Authority or during the appeal before the administrative judge), compared with 62% of negative results (15 cases). The percentage of positive cases therefore decreased compared to the two-year period 2017-2018, which had recorded a positive outcome rate of 57%

In the comparison between 2018 and 2019, the success rate increased from 25% to 50%, while the number of cases with negative outcome decreased from 75% to 50% (Table 6).

In cases with negative outcome, the Authority appealed the act before the administrative judge. Following this dispute, the outcome of the case could change from negative to positive and it can therefore be considered that, with regard to art. 21-bis, a definitive assessment of the efficacy of the instrument will only be possible at the end of the dispute.

*Table 6 – Overall outcome of reports pursuant to art. 21-bis, broken down by type of intervention and year*

Period	NEG	POS	Overall total
2018	75%	25%	100%
2019	50%	50%	100%
<b>2018-2019</b>	<b>62%</b>	<b>38%</b>	<b>100%</b>
<b>2017-2018</b>	<b>43%</b>	<b>57%</b>	<b>100%</b>

*Source: AGCM processing on data 2018 and 2019*

### 3.5. Outcome of opinions under art. 22 with sectoral regulations

A total of 4 interventions fall within this item, one of which according to the legislation on sports rights referred to in Legislative Decree no. 9/2008, the so-called "Melandri Decree" (SR33, with positive outcome) and three other interventions made pursuant to art. 19, paragraph 1, of Legislative Decree no. 259/2003 on the Electronic Communications Code (all with partially positive outcome).

## III. FINAL CONSIDERATIONS

The monitoring activity covered all advocacy interventions carried out from 1 January 2018 to 31 December 2019, for a total of 170 resolutions (87 in 2018 and 83 in 2019); the most used instruments were opinions pursuant to art. 22, followed by reports pursuant to art. 21, opinions pursuant to articles 21-bis and 22PCM. In addition to these, there are 4 additional

opinions made under other regulations. 2019 marked an increase in reports pursuant to art. 21 (from 13 to 26) and opinions art. 21-bis TUSPP, from 1 to 4, and a simultaneous reduction in the number of all other types of interventions.

Most **of the interventions** concerned calls for tender (31), followed by contracts/awards (18), municipal administrative acts (17) and regional laws (17).

**Sectoral areas** of intervention mainly covered the services sector (28 interventions), transport (20), tourism (15), energy services (13), recreational, cultural and sports activities (11) and TLC (10).

As regards **the type of restriction reported**, in most cases the Authority's interventions were aimed at reporting the introduction of "**restrictions on the exercise of the business activity**" (113 cases, equal to 48% of the total competitive restrictions).

Also the reports and opinions that have highlighted competitive restrictions in terms of "**tenders and contracts**" (91 cases, equal to 39% of the reported restrictions) are relevant in number.

As already happened for the previous two-year period 2017-2018, the outcomes of 32 interventions classified as "not evaluable" were not included in this analysis. Therefore, 138 interventions were assessed, 71 in 2018 and 67 in 2019.

On this basis, the monitoring results showed a compliance rate, given the totality used, of 55% (31% positive, 14% partially positive). In the previous surveys, the aggregate figure was 54% (two-year period 2017-2018) and 53% (two-year period 2016-2017).

In the comparison between 2018 and 2019, the compliance rate is slightly decreasing, from 56% (28% positive, 28% partially positive) in 2018 to 54% (34% positive outcome, 20% partially positive) in 2019. Anyway, the partially positive, negative and non-evaluable outcomes of the interventions 2019 will be re-assessed in the next monitoring cycle.

The results of the monitoring confirms the role of competition consultant for the public administrations played by the Authority, with a success rate of opinions made under art. 22 equal to 70%.

The fact that the success rate increases when the opinion is issued following a request from a public administration (overall success rate 81%), both central (85%) and local (77%) is significant.

The monitoring activity of advocacy interventions allows the Authority to assess the level of efficacy and effectiveness achieved by its work, in line with best practices found among the national Authorities that make up the European Competition Network.

***Annex A*** - List of the 2019 interventions considered, with the relative outcomes

***Annex B*** - List of the 2018 interventions considered, with the relative outcomes