



OUTCOMES OF COMPETITION ADVOCACY DECISIONS IN 2019-2020

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STUDIES AND ANALYSIS OF LEGISLATION DIRECTORATE

OUTCOMES OF COMPETITION ADVOCACY DECISIONS IN 2019-2020

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 2019 – 2020.

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 15 September 2021.

The data for the last of the two years considered, in this case 2020, will be reviewed in the next periodic survey, to be carried out during 2022.

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:

1. under art. 21,
2. under art. 22,
3. opinions pursuant to art. 22 issued pursuant to art. 4 of the Decree Law no. 1 of 24 January 2012¹ (hereinafter 22PCM);
4. reasoned opinions pursuant to art. 21-*bis* (including opinions pursuant to art. 21-*bis* sent to the administrations following communications pursuant to art. 5, paragraph 3, of Legislative Decree 175/2016² or in any case relating to the application of the TUSPP, here referred to as "21-*bis* TUSPP");
5. 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;
- negative: when there has been no compliance at all with what was recommended;

¹ Decree Law no. 1 of 24 January 2012 (enacting *Urgent provisions for competition, infrastructure development and competitiveness*, the so-called Grow Italy Decree) converted, with amendments, by art. 1, paragraph 1, Law no. 27 of 24 March 2012.

² Legislative Decree no. 175 of 19 August 2016 "*Consolidated Law on Public Holdings*" provides for the reorganisation of the 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.

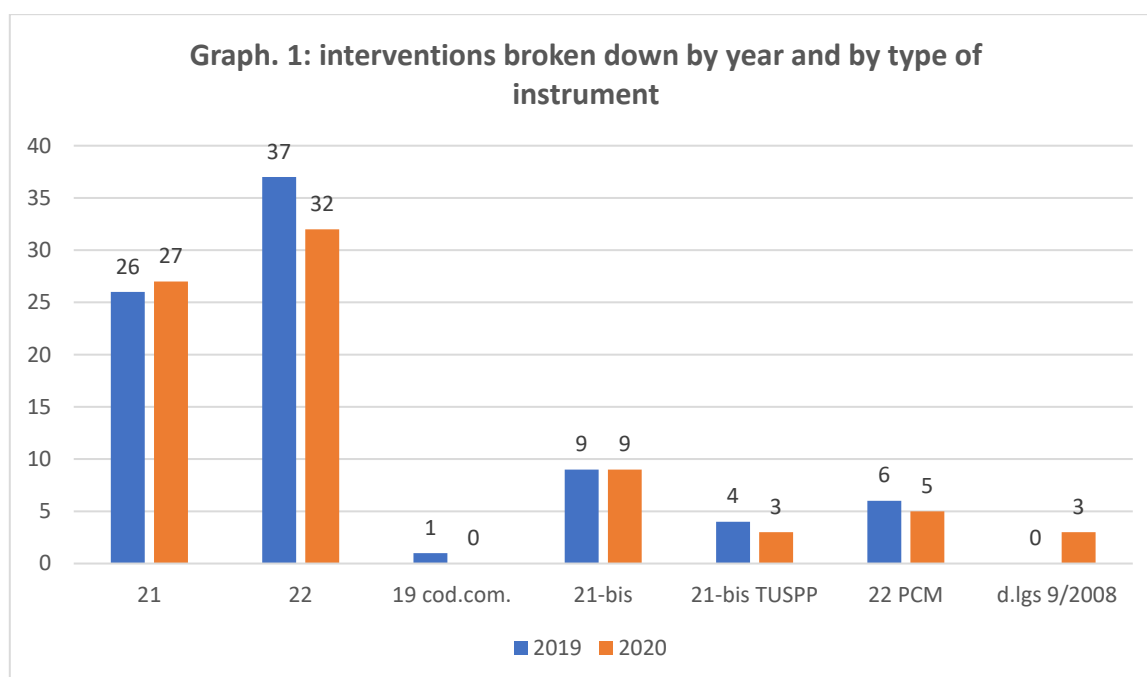
- not evaluable: when the assessment of the outcome has not been possible for any reason.

II. SUMMARY AND ANALYTICAL DATA 2019-2020

The monitoring activity covered all advocacy interventions carried out from 1 January 2019 to 31 December 2020, for a total of 162 decisions (83 in 2019 and 79 in 2020) adopted pursuant to Articles 21, 22 and 21-bis of Law no. 287/90, or pursuant to other sectoral regulations. Two annexes (**Annex A and Annex B**) attached to this document list the references of decisions considered in the study for 2019 and 2020 and the summary indication of the results.

1. Some general data relating to interventions (2019-2020)

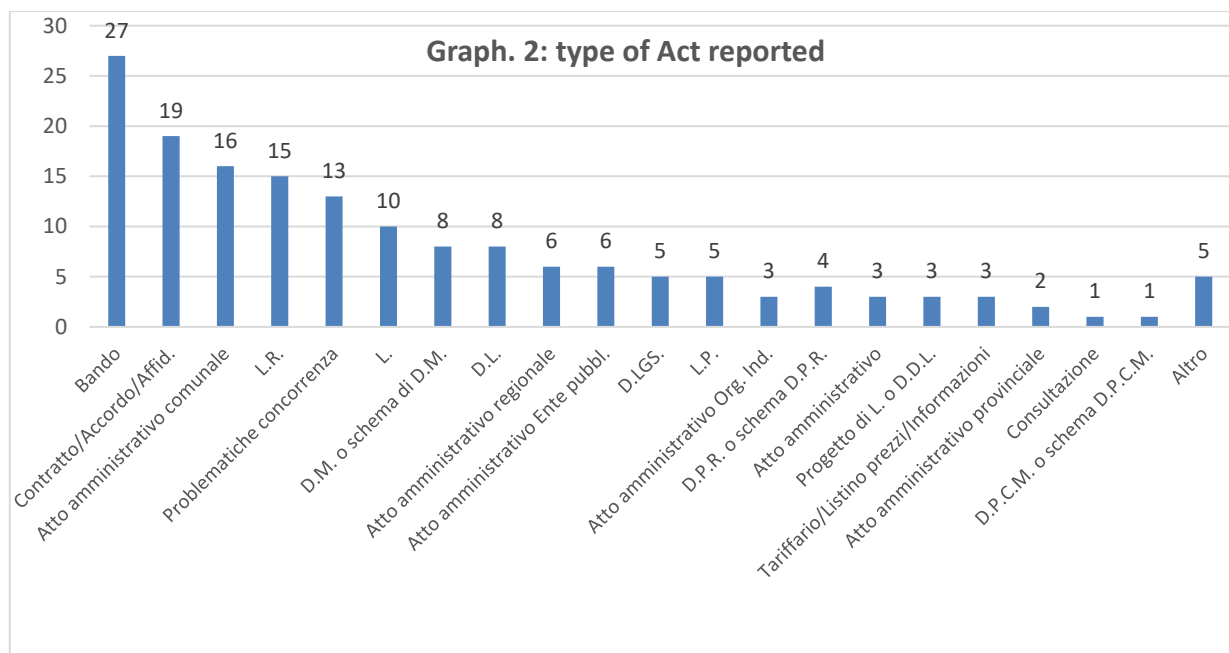
In the comparison between 2019 and 2020, there was a slight overall decrease in the number of advocacy interventions, from 83 to 79, essentially due to a reduction in opinions pursuant to art. 22 (from 37 to 32), whereas the reports pursuant to art. 21 (from 26 to 27), the 22PCM opinions (from 6 to 5), the reports pursuant to art. 21-bis (from 13 to 12) remained substantially equivalent. See Graph 1.



Source: AGCM processing on data 2019 and 2020

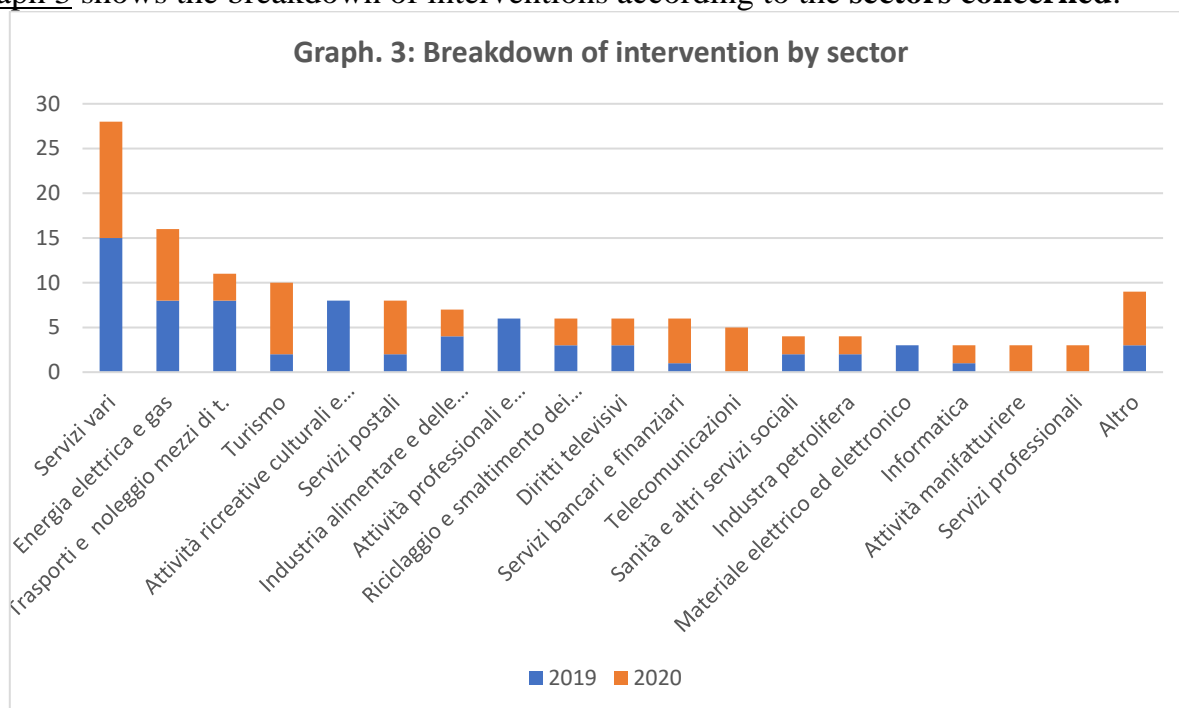
With regard to **the type of acts reported** in the two-year period, in 27 cases the intervention of advocacy concerned calls for tenders, in 19 cases it concerned acts of direct assignment or contracts/agreements, in 16 cases it concerned municipal administrative acts and in 15 cases

regional laws; there were 13 interventions aimed at reporting competition issues and 10 reports concerning laws (see [Graph 2](#))³.



Source: AGCM processing on data 2019 and 2020

Graph 3 shows the breakdown of interventions according to the **sectors concerned**:



As regards the **recipients**, in 88 out of 162 cases (54%), the advocacy intervention was addressed to Parliament or a central administration or body, in 65 cases (40%) to a local

³ It should be noted that the same report/opinion may also concern a plurality of acts of different nature.

administration or a Region, and in the remaining 9 cases (6%) the recipients were mixed (both local and central).

Finally, with regard to the **most recurrent profiles**, through the 162 total interventions, 242 competitive criticality profiles were highlighted (it is understood that the same intervention can also report more than one criticality profile). The most frequently encountered competition issues are attributable to "restrictions on the exercise of the business activity" (121 cases, equal to 50% of the total restrictions reported), among which the restrictions relating to *administrative laws or measures that alter the conditions of competition* stand out (106 cases, equal to 44% of the restrictions reported). The second place is occupied by the reports and opinions that have detected competitive restrictions in terms of "tenders and contracts" and "awards without tender" (respectively 54 and 39 cases, for a total of 93 cases equal to 38% of the restrictions reported): among these, from a quantitative point of view, interventions related to *participation or award requirements or criteria* (28 cases, equal to 12% of the restrictions reported), those aimed at reporting *renewals extensions or excessive duration of concessions* (19 cases, equal to 8% of the restrictions reported), those relating to contracts without tenders (15 cases equal to 6% of competitive restrictions).

2. Overall summary of advocacy activity (2019-2020)

The data processing in this section of the monitoring covered, in order to reinforce their reliability, only cases for which it was possible to assess the outcome, while cases considered "not evaluable" were excluded, according to the criterion already introduced starting from the monitoring relating to the two-year period 2017-2018⁴.

Therefore, 22 cases that could not be assessed were removed from the total of 162 cases and the processing of the outcomes referred to 140 interventions, 71 in 2019 and 69 in 2020. The success rate for the two-year period was **61%**: this rate was higher in 2020, when it reached 64%, while in 2019 it stood at 59%. Compared to the previous monitored two-year period 2018-2019, the overall compliance rate is growing overall (it was 55%).

Table 1 – Overall results by single year (2019-2020)

OUTCOMES	Total		Cases 2019		Cases 2020	
	no. of cases	%	no. of cases	%	no. of cases	%
NEG	54	39%	29	41%	25	36%
POS.OP.	30	21%	16	22%	14	20%
POS	56	40%	26	37%	30	44%
Overall total	140	100%	71	100%	69	100%
Success rate (POS + POS.OP.)	86	61%	42	59%	44	64%

Source: AGCM processing on data 2019 and 2020

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 central governments and the

⁴ The data were published in June 2019 on the Authority's website.

legislator (“central recipient”) had a slightly higher overall success rate than those with “local recipient”: the former had a success rate of 64%, while the latter had a success rate of 60%.

Table 2 - Overall results, broken down by type of recipient

Recipient	NEG	POS.OP.	POS	POS + POS.OP.	Overall total
Central	36%	29%	35%	64%	100%
Mixed	50%	50%	0%	50%	100%
Local	40%	9%	51%	60%	100%
of which					
<i>Municipalities</i>	43%	3%	54%	57%	100%
<i>Provinces</i>	100%	0%	0%	0%	100%
<i>Regions</i>	40%	13%	47%	60%	100%
<i>Port authorities</i>	0%	0%	100%	100%	100%
<i>ATO</i>	0%	100%	0%	100%	100%
Overall rate	39%	21%	40%	61%	100%

Source: AGCM processing on data 2019 and 2020

As for the **level of finality** of the reported act (Table 3), the success rate is notably higher when the Authority reported the competition issues contained in **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 **86%**, while in the case of definitive acts the success rate drops to 52%.

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	48%	18%	34%	52%	100%
Non-final acts	14%	30%	56%	86%	100%
Overall rate	39%	21%	40%	61%	100%

Source: AGCM processing on data 2019 and 2020

3. Success rates for legal basis of the intervention instrument

Table 4 shows, for the two-year period 2019-2020, the breakdown of the 140 interventions considered evaluable, depending on the legal instrument used:

Table 4 - Overall results, broken down by type of intervention instrument

Intervention instrument	NEG	POS.OP.	POS	POS + POS.OP.	n. of cases assessed**	no. of total cases	Overall total
21	49%	25.5%	25.5%	51%	47	53	100%
22	22%	27%	51%	78%	55	69	100%
21-bis	47%	0%	53%	53%	17	18	100%

21-bis* (TUSPP)	86%	0%	14%	14%	7	7	100%
22 PCM	50%	20%	30%	50%	10	11	100%
Other regulations*	0%	25%	75%	100%	4	4	100%
Overall rate	39%	21%	40%	61%	140	162	100%

* Interventions pursuant to the Electronic Communications Code or the Melandri Decree.

** Number of cases net of interventions classified as "non-evaluable".

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

With regard to the 47 reports pursuant to **art. 21** (23 in 2019 and 24 in 2020), considered evaluable, the overall success rate (Table 5) was, as mentioned, **equal to 51%**, compared to 49% of negative results.

The success rate of the reports varies significantly according to the type of recipient: in cases where the intervention is addressed to a central administration/institution, it is 40%, while in cases where the recipient is a local administration/institution, the success rate rises to 67% (and 50% in cases of a mixed recipient).

The results of the monitoring confirm a lower **success rate for this instrument** compared to others, but in any case higher than the two-year period 2018-2019, when it was 47%.

Table 5 – Overall results 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
2019	48%	22%	30%	52%	100%
2020	50%	29%	21%	50%	100%
- To central administrations/institutions	60%	28%	12%	40%	100%
- To local administrations/institutions	33%	17%	50%	67%	100%
- To central and local administrations/institutions	50%	50%	0%	50%	100%
Overall rate	49%	25.5%	25.5%	51%	100%

Source: AGCM processing on data 2019 and 2020

3.2. Outcome of opinions under art. 22

The 55 opinions considered evaluable, issued pursuant to **art. 22** - of which, 29 in 2019 and 26 in 2020 -, including the 12 MEF/Consip opinions, recorded, as already mentioned, the best results with **an overall success rate of 78%**; the monitoring data also reveal that this index marked an improvement over the two-year period, from 76% referring to 2019 to 81% in 2020 (Table 6).

Compared to the previous monitoring (two-year period 2019-2020), the success rate improved (it was 70%).

From the point of view of the impulse action and the administrative level of the recipient (central/local), and considering, for these purposes, the MEF/Consip opinions as a separate category, the data confirm that the success rate of the Authority's interventions is better in those cases where the intervention is requested by the recipient, which then complies in 85% of cases (rising to 90% if only the cases where the request comes from a central administration/institution are considered). On the other hand, if the impulse for the intervention has been *ex officio*, the success rate is 70%. The MEF/Consip opinions showed a success rate of 83%.

Table 5 – Results of opinions pursuant to art. 22 overall and broken down by type of impulse and type of recipient

	NEG	POS.OP.	POS	POS + POS.OP.	Overall total
2019	24%	31%	45%	76%	100%
2020	19%	23%	58%	81%	100%
Overall rate	22%	27%	51%	78%	100%
Data broken down by impulse action/administrative level of the recipient⁵					
Requested	15%	10%	75%	85%	100%
- From central and local administrations/institutions	10%	10%	80%	90%	100%
- From local administrations/institutions	20%	10%	70%	80%	100%
Ex officio	30%	26%	44%	70%	100%
- To central administrations/institutions	31%	31%	38%	69%	100%
- To local administrations/institutions	25%	13%	62%	75%	100%
MEF/CONSIP	17%	58%	25%	83%	100%

3.3. Outcome of opinions under art. 22 to PCM

As regards the opinions delivered to the Presidency of the Council of Ministers pursuant to art. 4 of the Grow Italy Decree⁶ (22PCM), 22 requests for opinions on regional laws were received by the PCM during the period considered, of which 14 in 2019 and 8 in 2020. With respect to these requests, in 11 cases (equal to 50% of the requests received) the Authority decided to express an opinion (of which, 6 in 2019 and 5 in 2020). Of these, 10 cases are considered "evaluabile", as one refers to the approval of a special statute, which has not been finalised.

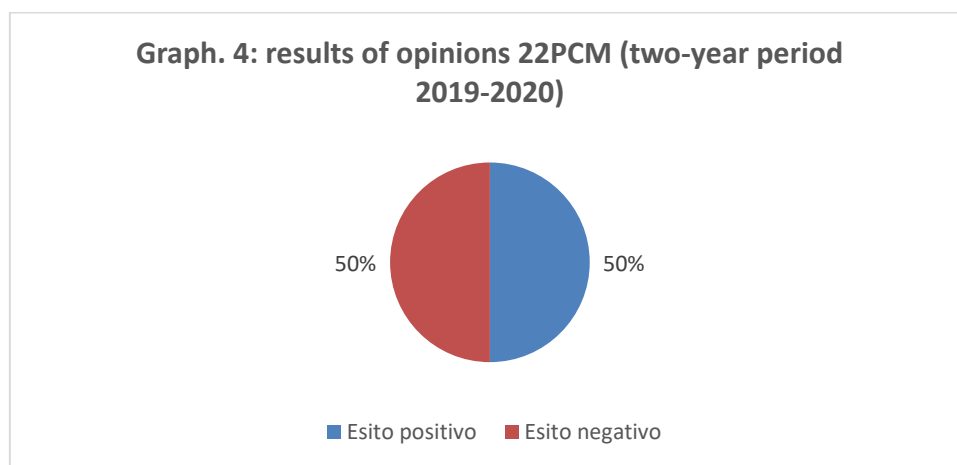
⁵ For the purposes of disaggregated classification, MEF/Consip opinions are considered to be a separate category.

⁶ 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.

With respect to the opinions made, the PCM challenged – for the profiles covered by the opinion - the regional law before the Court in only 2 cases (both in 2020, one of which led to the ruling of constitutional illegitimacy); in 3 cases, however, the provisions covered by the opinion have been modified, in whole or in part, in the sense desired by the Authority.

The positive outcomes are therefore 5, corresponding to a success rate of 50%; in the remaining 5 cases (50%), however, the PCM did not accept the suggestions of the Authority and in any case the related provisions were not modified in the desired direction.

The data for the two-year period show a significant increase in the absolute success rate of the related opinions (50% in the two-year period 2019-2020 compared to 21% in the two-year period 2018-2019), despite the smaller number of cases (Graph 4).



Source: AGCM processing on data 2019 and 2020

3.4. Outcomes of opinions under art. 21 bis

The interventions carried out pursuant to art. 21-*bis* that have received an evaluation were, in the two-year period examined, 25 (13 in 2019 and 12 in 2020) of which 7 classified pursuant to art. 21-*bis** TUSPP (4 in 2019 and 3 in 2020).

The overall success rate for this instrument was 42%. The percentage is 53% for interventions pursuant to art. 21-*bis* "ordinary", while it drops to 14% for those pursuant to art. 21-*bis** TUSPP. The percentage of positive cases therefore increased compared to the two-year period 2018-2019, which had recorded a positive outcome rate of 38%. In the comparison between 2019 and 2020, the success rate decreased from 50% to 33% (Table 7). The success rate is given: by the cases in which the act has been modified, following the opinion rendered or in any case the observations expressed by the administrations were considered suitable to clarify the competitive concerns detected by the Authority which, therefore, has not challenged the act reported before the competent TAR; by the cases in which the administration has complied during the trial and, therefore, the Authority has waived the appeal. A thorough evaluation of the instrument can only be carried out based on the outcome of the appeals relating to the cases concerned. In the majority of cases of negative outcome, the Authority appealed against the act reported to the competent TAR. A definitive assessment of the instrument will therefore only be possible at the end of the dispute.

Table 7 – Outcomes of reports pursuant to art. 21-bis 2019-2020, broken down by type of intervention and year

	NEG	POS	Overall total
21-bis	47%	53%	100%
21-bis TUSPP	86%	14%	100%
Overall average rate	58%	42%	100%
2019	50%	50%	100%
2020	67%	33%	100%
Overall average rate	58%	42%	100%

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

A total of 4 interventions fall within this item, one of which pursuant to art. 19, paragraph 1, of Legislative Decree no. 259/2003 on the Electronic Communications Code, with partially positive outcome, and 3 based on legislation on sports rights referred to in Legislative Decree no. 9/2008 (so-called Melandri Decree) all with positive outcome.

III. FINAL CONSIDERATIONS

In the two-year period 2019-2020, the Authority carried out 162 advocacy interventions; the most used tools were the opinions pursuant to art. 22, issued on 69 occasions, followed by reports pursuant to art. 21 (53), opinions pursuant to art. 21-bis (25, including 21-bis* TUSPP) and 22PCM opinions (11); to these a further 4 opinions are added, issued pursuant to other legislation.

In particular, 2020 marked, compared to 2019, a substantial equivalence of the reports pursuant to art. 21 [from 26 to 27] and of the total opinions 21-bis (including 21-bis* TUSPP) [from 13 to 12] against a slight decrease in the total opinions pursuant to art. 22 (including 22PCM) [from 43 to 37].

As regards the **subject of the interventions**, the trend recorded in the previous two years is confirmed: the prevalence of cases concerned calls for tender (27), acts of assignment, contracts or agreements (19), municipal administrative acts (16) and regional laws (15). More than in the past, interventions have been taken to highlight *competition issues* (13).

As regards the **sectoral areas** of intervention, the Authority's advocacy activities mainly concerned the services sector (28 interventions), electricity and gas (16 interventions), transport and vehicle rental (11 interventions) and tourism (10 interventions).

As regards **the type of restriction reported**, the competition issues most frequently found are confirmed to be those relating to restrictions on the exercise of the business activity (50% of the total restrictions reported), with particular regard to the restrictions relating to *administrative laws or measures that alter the conditions of competition* (44% of the restrictions reported); they are followed by competitive restrictions in terms of “tenders and contracts” and “awards without tender” (38% of the restrictions reported): among these, from

a quantitative point of view, interventions related to *participation or award requirements or criteria* (12%), those aimed at reporting *renewals extensions or excessive duration of concessions* (8%), those relating to contracts without tenders (6%).

As regards the results of the monitoring, the processing of the data concerned only the cases for which the results could be assessed, excluding the 22 interventions classed as "non-evaluable". Therefore, the processing of the results took into reference 140 interventions.

On this basis, the monitoring results showed a compliance rate, given the totality used, of **61%** (40% positive, 21% partially positive). In the previous surveys, the aggregate figure was 55% (two-year period 2018-2019) and 54% (two-year period 2017-2018).

In the comparison between 2019 and 2020, the compliance rate is growing, from 59% (37% positive, 22% partially positive) in 2019 to 64% (44% positive outcome, 20% partially positive) in 2020.

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 78%.

It should be noted that the emergency situation that regarded the entire year 2020 did not substantially affect, from a quantitative point of view and compared to 2019, the number of advocacy interventions carried out by the Authority; from a qualitative point of view, several interventions concerned pieces of legislation adopted to face the pandemic emergency, thus reiterating the importance, even in this context, of respecting the values of competition⁷.

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

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

Annex B - List of the 2020 interventions considered, with the relative outcomes

⁷ See: AS1684 *Remarks on the provisions contained in the Relaunch Decree* (1/7/2020); AS1670 *Competition issues that emerged in the educational publishing market following the COVID-19 emergency* (20/5/2020); AS1665 *Alternative reimbursement measures in the event of cancellation of tourist packages due to Covid 19 emergency* (27/5/2020).