

# **OUTCOMES OF COMPETITION ADVOCACY DECISIONS IN 2021-2022**

**Rome, December 5<sup>th</sup> 2023**

***DIRECTORATE FOR LEGAL STUDIES AND LEGISLATION ANALYSIS***

# OUTCOMES OF COMPETITION ADVOCACY DECISIONS IN 2021-2022

## I. INTRODUCTION

This document reports the results of the periodic monitoring of the outcomes of reporting and advisory interventions (advocacy) undertaken by the Authority pursuant to Law No. 287/1990 and other sectoral regulations, and refers to data for the two-year period 2021-2022.

More specifically, an analysis is firstly made of the summary data, and then of the detailed data broken down by instrument, with further specifications where relevant. The data is updated to 31 October 2023.

The data for the last of the two years under consideration, in this case 2022, will be reviewed in the next periodic survey, which will be carried out during 2024.

The analysis focuses on the compliance rate, intended as recipients' compliance with the indications contained in the interventions by the Authority.

The interventions examined were broken down as follows:

1. reports pursuant to Art. 21;
2. opinions pursuant to Art. 22;
3. opinions pursuant to Art. 22, issued pursuant to Art. 4 of Decree-Law no. 1 of 24 January 2012<sup>1</sup> (hereinafter, 22PCM);
4. reasoned opinions pursuant to Art. 21-*bis* (including opinions pursuant to Art. 21-*bis* sent to administrations following communications pursuant to Art. 5, paragraph 3, of Legislative Decree 175/2016<sup>2</sup>, TUSPP, or in any case relating to its application, referred to herein as "21-*bis* TUSPP");
5. opinions pursuant to other sectoral regulations.

For monitoring purposes, the outcomes of the interventions are classified as follows:

- positive: full compliance of the actions taken with the requirements;
- partially positive: partial compliance;

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<sup>1</sup> Decree-Law no. 1 of 24 January 2012 (containing *Urgent provisions for competition, infrastructure development and competitiveness*, so-called "Cresci Italia") converted with amendments by Art. 1, paragraph 1 of Law no. 27 of 24 March 2012.

<sup>2</sup> Legislative Decree no. 175 of 19 August 2016 "*Consolidated law on publicly owned companies*" contemplates the reorganisation of the sector, implementing one of the central points of Law no. 124/2015, the so-called "Madia Reform". More specifically, Art. 5, paragraph 3, introduces a new assignment for the Authority, which must receive "*the deed of resolution for the incorporation of the company or the acquisition of direct or indirect investment*", for the purposes of exercising the powers referred to in Art. 21-*bis* of Law 287/1990.

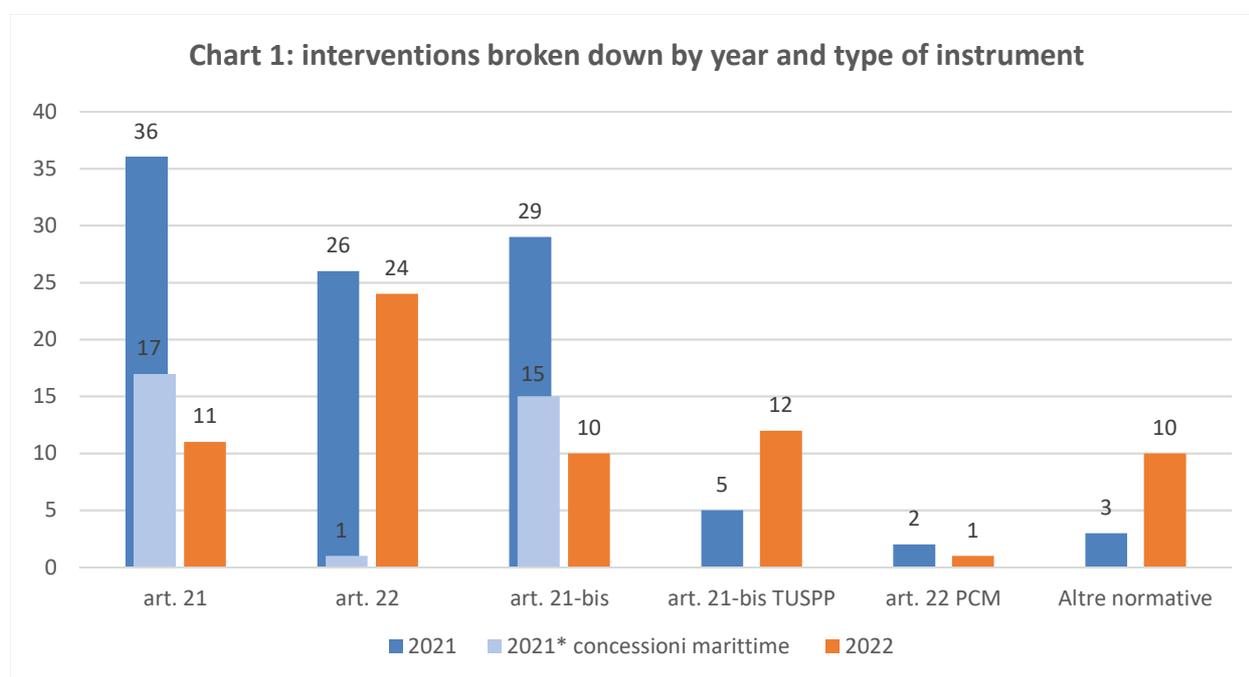
- negative: non-compliance;
- not assessable: impossible to issue an opinion for various reasons.

## II. 2021-2022 SUMMARY AND ANALYTICAL DATA

The monitoring covered all advocacy interventions carried out from 1 January 2021 to 31 December 2022, for a total of 169 decisions (101 in 2021 and 68 in 2022), adopted pursuant to Articles 21, 22 and 21-*bis* of Law No. 287/1990, or pursuant to other sectoral regulations. Two lists are attached to this document relating to all the interventions considered for 2021 and 2022, with a summary of the results.

### 1. Some general data relating to the interventions (2021-2022)

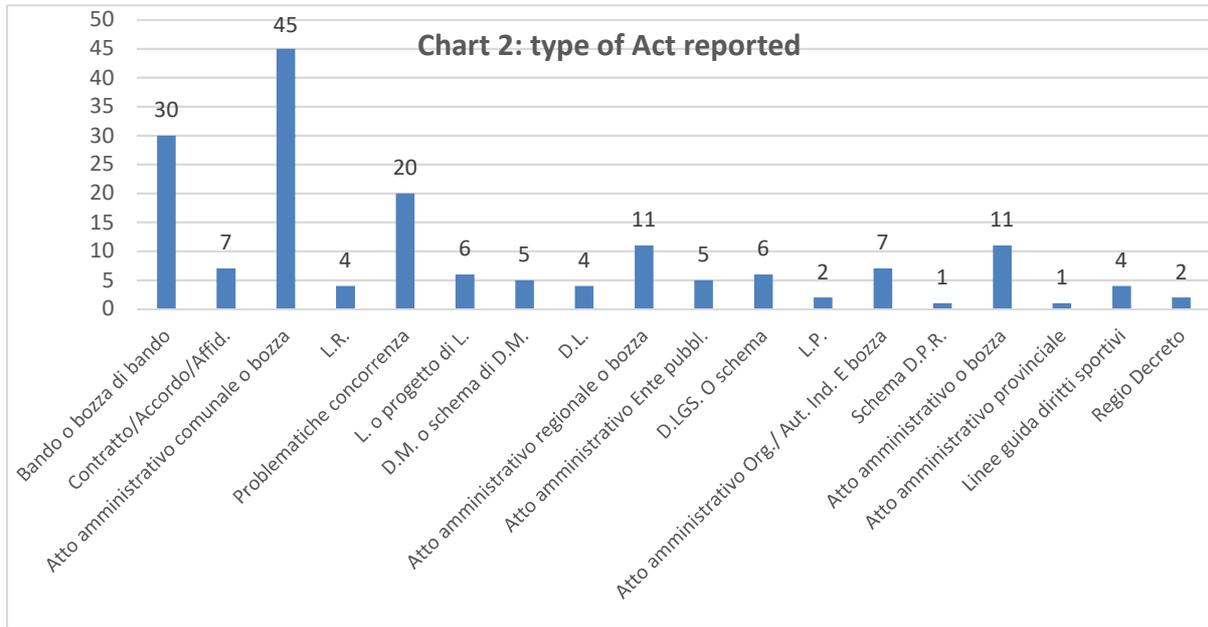
In the comparison between 2022 and 2021, there was an overall reduction in the number of advocacy interventions, which went from 101 to 68; this is substantially attributable to the significant decrease in both the opinions pursuant to Art. 21-*bis* and reports pursuant to Art. 21 (which went from 29 to 10 and from 36 to 11, respectively). In this regard, it should be noted that in 2021, most of these opinions/reports referred to the extension of state maritime concessions. The Authority adopted a total of 33 corresponding decisions (of which, 17 pursuant to Art. 21, 15 pursuant to Art. 21-*bis* and 1 pursuant to Art. 22). This line of intervention was not continued during 2022 (See [Chart 1](#)).



Source: AGCM calculations on 2021 and 2022 data

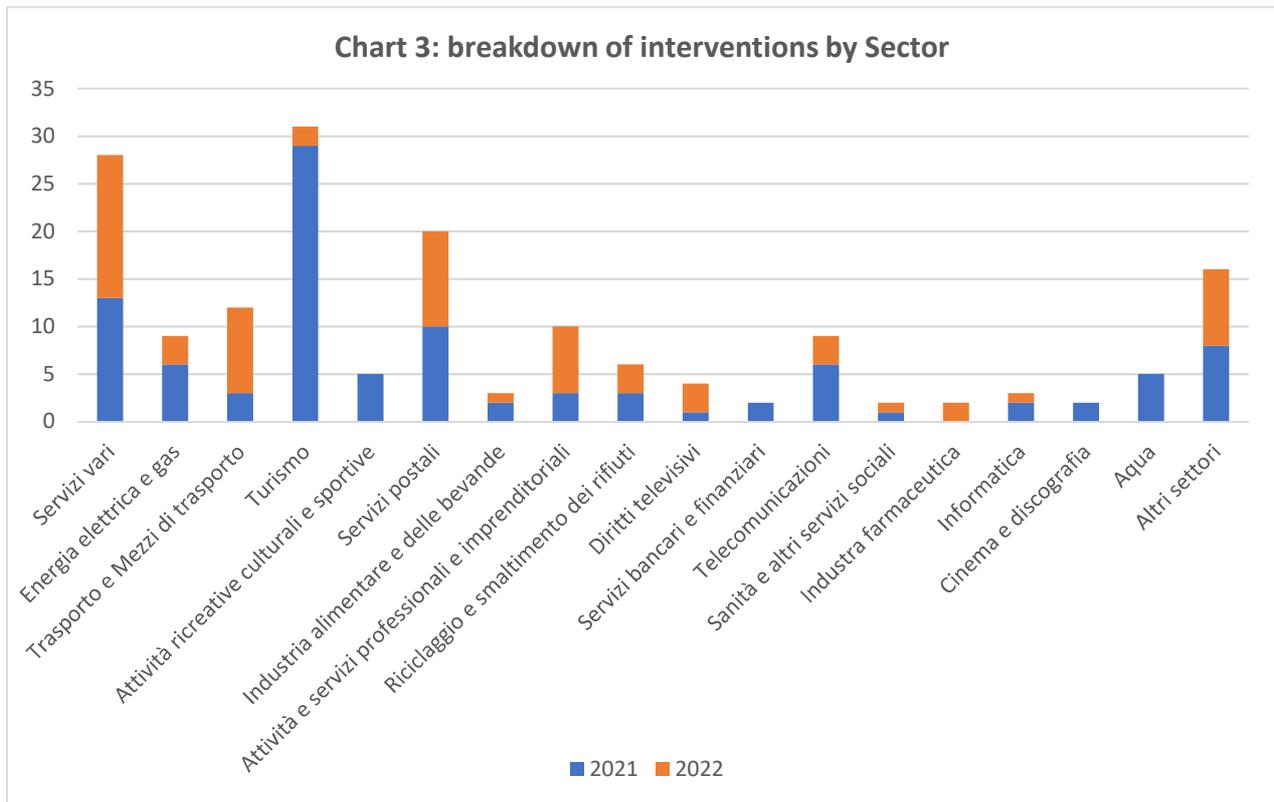
With regard to the **type of acts reported** over the two-year period under consideration, advocacy interventions mainly referred to municipal administrative acts or related drafts (45

cases), calls for tenders or related drafts (30 cases) or were aimed at reporting competition issues (20 cases) (for other types of acts see [Chart 2](#))<sup>3</sup>.



Source: AGCM calculations on 2021 and 2022 data

**Chart 3** illustrates the breakdown of interventions according to the **sectors involved**:



Source: AGCM calculations on 2021 and 2022 data

<sup>3</sup> It should be noted that the same report/opinion may also encompass multiple acts of a different nature.

With regard to the **recipients**, out of 169 cases, in 51 cases (30%) the advocacy intervention was addressed to the Parliament or to a central administration or body, in 111 cases (66%) to a local administration, and in the remaining 7 cases (4%), the recipients were mixed (both local and central).

Finally, with regard to the **most recurrent profiles**, through the total 169 interventions, 341 competitive concerns were highlighted (it is understood that the same intervention can also report more than one criticality profile). The most frequently encountered competitive concerns are attributable to restrictions on "tenders and contracts" (82) and "awards without tender" (131) (equal to approximately 62% of the total restrictions); as well as "restrictions on doing business" (114) (equal to 33% of the total restrictions). It should be noted that awards without tender accounted for about 38% of the total, due to the large number of cases relating to the extensions on state maritime concessions during 2021.

### ***Overall outcome of advocacy activities (2021-2022)***

In order to consolidate its reliability, the processing of data in this monitoring section referred only to cases where it was possible to assess the outcome, whereas cases considered as "not assessable" were excluded, according to the criterion already introduced for the monitoring relating to the two-year period 2017-2018<sup>4</sup>.

The 26 not-assessable cases were therefore subtracted from the total 169 cases, and the processing of the outcomes referred to 143 interventions, of which, 79 in 2021 and 64 in 2022. The success rate for the two-year period was **69%**: this rate was higher in 2022 reaching 72%, while in 2021 it was 67%. Compared to the previous two years monitored (2020-2021), the compliance rate has increased as a whole, as estimates from the previous monitoring indicated a 66% rate.

***Table 1-A – Total and single-year outcomes (2021-2022)***

OUTCOMES	Total		2021 cases		2022 cases	
	no. of cases	%	no. of cases	%	no. of cases	%
NEG	44	31%	26	33%	18	28%
P.POS.	15	10%	9	11%	6	9%
POS	84	59%	44	56%	40	63%
<b>Overall total</b>	<b>143</b>	<b>100%</b>	<b>79</b>	<b>100%</b>	<b>64</b>	<b>100%</b>
Success rate (POS + P.POS.)	99	69%	53	67%	46	72%

Source: AGCM calculations on 2021 and 2022 data

An analysis of the effectiveness rate of interventions according to the type of recipient to whom they were addressed (Table 2) showed that, similarly to the previous monitoring, this was substantially the same between those intended for central administrations and the

<sup>4</sup> Data was published in June 2019 on the Authority's website.

legislature ("central recipient") and those for a "local recipient": the former have recorded a 69% success rate, whereas the latter have a 70% success rate.

*Table 2 – Total outcomes, broken down by type of recipient*

Recipient	NEG	P.POS.	POS	POS + P.POS	Overall total
Central (48 cases)	31%	19%	50%	69%	100%
Mixed (4 cases)	50%	25%	25%	50%	100%
Local (91 cases)	30%	5%	65%	70%	100%
...including, in particular*:					
Municipalities (50 cases)	32%	6%	62%	68%	100%
Provinces (7 cases)	43%	14%	43%	57%	100%
Regions (17 cases)	24%	0%	76%	76%	100%
<b>Overall rate</b>	<b>31%</b>	<b>10%</b>	<b>59%</b>	<b>69%</b>	<b>100%</b>

\* only the most recurrent local levels are reported in detail (excluding, for example, Optimal Territorial Areas - ATOs, Chamber of Commerce, even though they are included in the "local" level).

Source: AGCM calculations on 2021 and 2022 data

As for the **level of finality** of the reported act (Table 3), the data clearly shows that the success rate is much higher (87%) when the Authority intervenes on **non-definitive acts** (e.g. draft calls for tenders, draft decrees, bills) compared to definitive acts (63%).

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

	NEG	P.POS.	POS	POS + P.POS	Overall total
Final acts (104 cases)	37%	6%	57%	63%	100%
Non-final acts (39 cases)	13%	23%	64%	87%	100%
<b>Overall rate</b>	<b>31%</b>	<b>10%</b>	<b>59%</b>	<b>69%</b>	<b>100%</b>

Source: AGCM calculations on 2021 and 2022 data

## 2. Results broken down by legal basis of intervention instrument

Table 4 illustrates the breakdown of the 143 interventions considered assessable over the two-year period 2021-2022, depending on the legal instrument used:

*Table 4 – Total outcomes, broken down by type of intervention instrument*

Intervention instrument	NEG	P.POS.	POS	POS + P.POS	no. of cases assessed**	no. of total cases	Overall total
<b>21</b>	48%	14%	38%	<b>52%</b>	29	47	100%
<b>22</b>	24%	19%	57%	<b>76%</b>	42	50	100%
<b>21-bis</b>	33%	0%	67%	<b>67%</b>	39	39	100%
<b>21-bis (TUSPP)</b>	35%	0%	65%	<b>65%</b>	17	17	100%
<b>22 PCM</b>	33%	67%	0%	<b>67%</b>	3	3	100%

<b>Other regulations*</b>	0%	8%	92%	<b>100%</b>	13	13	100%
<b>Overall rate</b>	<b>31%</b>	<b>10%</b>	<b>59%</b>	<b>69%</b>	<b>143</b>	169	<b>100%</b>

\* Interventions pursuant to the Electronic Communications Code; the so-called "Melandri Decree"; Legislative Decree no. 142/2020 on the regulation of professions.

\*\* Number of cases, less interventions classified as "not assessable".

The analyses of data and considerations relating to advocacy interventions broken down by legal instrument used by the Authority are set out below.

### 2.1. Outcome of reports adopted pursuant to Art. 21

The overall success rate was **52%** (Table 5) with regard to the 29 reports pursuant to **Art. 21** (19 in 2021 and 10 in 2022), considered assessable.

The success rate of reports varies considerably depending on the type of recipient: in cases where the intervention is addressed to a central administration/institution, it is 20%, whereas in cases where the recipient is a local administration/institution, the success rate increases to 71% (and 50% in the cases of a mixed recipient). The monitoring outcomes confirm a lower **success rate for this instrument**, presumably also due to the nature of the acts concerned, usually consisting of final regulatory or administrative acts (see Tables 3 and 4 above).

*Table 5 – Overall outcomes of reports pursuant to Art. 21, broken down by type of driver and type of recipient*

	NEG	P.POS.	POS	Overall total	POS + P.POS
2021 (19 cases)	53%	5%	42%	100%	<b>47%</b>
2022 (10 cases)	40%	30%	30%	100%	<b>60%</b>
- Central recipient	80%	10%	10%	100%	20%
- Local recipient	29%	12%	59%	100%	71%
- Mixed recipient	50%	50%	0%	100%	50%
<b>Overall rate</b>	<b>48%</b>	<b>14%</b>	<b>38%</b>	<b>100%</b>	<b>52%</b>

Source: AGCM calculations on 2021 and 2022 data

### 2.2. Outcome of opinions pursuant to Art. 22

The 42 opinions considered assessable, issued pursuant to **Art. 22** - of which 21 in 2021 and 21 in 2022 - showed better results with **an overall success rate of 76%**.

Table 6 illustrates the outcomes also based on the driver and the administrative level of the recipient.

As it emerged from other monitoring, the data confirms that the success rate of the Authority's interventions is higher in cases where the intervention is requested by the recipient, which then complies in 92% of cases (rising to 100% if we consider only cases where the request comes from a local or mixed administration/institution).

In the case where the driver for the intervention was *ex officio*, on the other hand, the success rate is 56%, decreasing compared to 70% from the last monitoring; unlike the data recorded for the interventions requested, in these cases the success rate is higher when the recipient is a central administration (67% of the total).

The opinions relating to Consip calls for tenders recorded a 100% success rate.

**Table 6 – Outcomes of opinions pursuant to Art. 22, total and broken down by type of driver and type of recipient**

	NEG	P.POS.	POS	Overall total	POS + P.POS
2021 (21 cases)	14%	24%	62%	100%	86%
2022 (21 cases)	33%	14%	53%	100%	67%
<b>Overall rate</b>	<b>24%</b>	<b>19%</b>	<b>57%</b>	<b>100%</b>	<b>76%</b>
<b>Data broken down by driver/administrative level of the recipient</b>					
<b>Requested (24 cases)</b>	<b>8%</b>	<b>25%</b>	<b>67%</b>	100%	<b>92%</b>
By central administrations/institutions (15)	13%	20%	67%	100%	87%
By local or mixed administrations/institutions (9)	0%	33%	67%	100%	100%
<b>Ex officio (18 cases)</b>	<b>44%</b>	<b>11%</b>	<b>45%</b>	100%	<b>56%</b>
To central administrations/institutions (9)	33%	22%	45%	100%	67%
To local or mixed administrations/institutions (9)	56%	0%	44%	100%	44%
<b>of which MEF/CONSIP (4 cases)</b>	<b>0%</b>	<b>25%</b>	<b>75%</b>	100%	<b>100%</b>

Source: AGCM calculations on 2021 and 2022 data

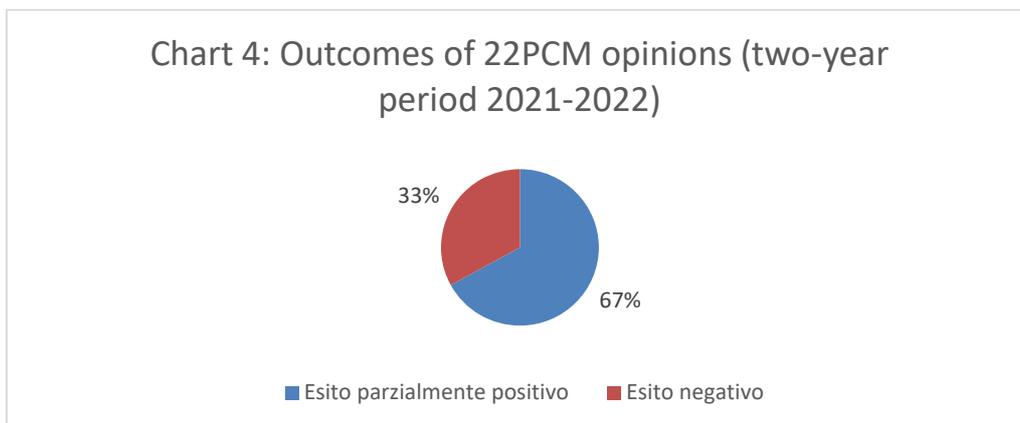
### 2.3. Outcome of opinions pursuant to Art. 22 to the PCM

With regard to the opinions submitted to the Presidency of the Council of Ministers (**22PCM**) over the period under consideration, the Authority expressed 3 opinions, of which 1 in 2022 and 2 in 2021. All three opinions were considered "assessable". With regard to the opinions issued, the success rate is measured based on the number of times when the PCM, having received the opinion of the Authority, decided to challenge the regional law before the Constitutional Court, for the profiles covered by the opinion, or the regional law was amended.

In the two-year period under consideration, the PCM did not challenge the regional laws covered by the opinions before the Constitutional Court. Nonetheless, in the two 2021 cases, although not challenged, the provisions were partially amended in the sense that was hoped by the Authority. The partially positive outcomes were therefore 2, equalling a success rate of 67%.

The data for the two-year period confirms the trend that has already been in place for some years, where the number of opinions issued by the Authority to the PCM on the

constitutionality of regional laws has decreased. In the previous monitoring, this amounted to seven, with a success rate of 83%.



Source: AGCM calculations on 2021 and 2022 data

#### 2.4. Opinions pursuant to Art. 21 bis

There were 56 interventions, carried out pursuant to Art. 21-*bis*, that received an assessment over the two-year period examined (of which, 17 classified pursuant to Art. 21-*bis* TUSPP). It should be noted that the success rate for this instrument is determined by the number of cases where the administration followed up on the Authority's requests out of the total number of interventions carried out pursuant to Art. 21-*bis*. More specifically, the following cases are positively assessed: the act was amended following the opinion or in any case the observations expressed by the administrations were deemed suitable to clarify the competitive concerns identified by the Authority which, therefore, did not challenge the reported act before the competent Regional Administrative Court; those where the administration complied in the course of the proceedings and the Authority consequently waived the appeal; those where the Administrative Court upheld the appeal by the Authority, with a ruling that became final. An in-depth assessment of the instrument can only be carried out fully after the conclusion of the appeals relating to the cases in question.

The average overall success rate for this instrument (Table 7) was 66%. The percentage stands at 67% for interventions pursuant to the “ordinary” Art. 21-*bis*, and at 65% for those pursuant to Art. 21-*bis* TUSPP.

Breaking down the interventions by year, it emerges that the overall success rate of those carried out in 2021 is *lower* (62%) than in 2022 (73%).

**Table 7 – Outcomes of the 2021-2022 reports pursuant to Art. 21-*bis*, broken down by type of intervention and year**

	NEG	POS	Overall total
21- <i>bis</i>	33%	67%	100%
21- <i>bis</i> TUSPP	35%	65%	100%
<b>Total average rate</b>	<b>34%</b>	<b>66%</b>	<b>100%</b>
2021	38%	62%	100%

2022	27%	73%	100%
<b>Total average rate</b>	<b>34%</b>	<b>66%</b>	<b>100%</b>

Source: AGCM calculations on 2021 and 2022 data

### 2.5. Outcome of opinions pursuant to sectoral regulations

13 interventions are included in this category, of which, one pursuant to Legislative Decree no. 259/2003 - *Electronic Communications Code*, four pursuant to Legislative Decree no. 9/2008<sup>5</sup> and eight pursuant to Art. 3, paragraph 3 of Legislative Decree no. 142/2020<sup>6</sup>.

Twelve cases had a positive outcome and only one case had a partially positive outcome, with an overall success rate of 100%.

## III. FINAL CONSIDERATIONS

The data for this monitoring records an overall success rate for advocacy interventions (69%) which has increased further compared to previous monitoring.

Regarding instruments, there was confirmation that advisory instruments (opinions pursuant to Art. 22) were more effective compared to the reports pursuant to Art. 21.

From a systematic and evolutionary perspective, the following aspects deserve consideration regarding the reference two-year period.

The total number of reports and opinions has decreased slightly: from 180 interventions carried out in the two-year period 2020-2021, this has come down to 169 interventions over the two-year period 2021-2022. In the latter period, cases went from 101 in 2021 to 68 in 2022. This decrease is certainly attributable to the high number of interventions that referred to state maritime and tourist-recreational concessions in 2021.

This aspect also influenced the type of restrictions most frequently found, with the cases referring to tenders prevailing and, more specifically, awards without tender (such as the extensions on state concessions).

Furthermore, the submission in 2021 and 2022 of the report "*Proposals for competitive reform for the purposes of the annual law for the market and competition*" (respectively, AS1730 and AS1824) to the Government, may have had a "deflationary" effect on the number of interventions that were addressed to the legislature or the central administration (27 in 2021 and 24 in 2022) over the two-year period. The submission of a framework report to the legislature, as a rule, absorbs individual interventions that, otherwise, would have been undertaken separately on specific issues.

<sup>5</sup> Legislative Decree no. 9/2008 (*Regulation on the ownership and marketing of audio-visual sports rights and relative distribution of resources* - so-called Melandri Decree).

<sup>6</sup> Legislative Decree no. 142/2020 (*Transposing Directive (EU) 2018/958 of the European Parliament and of the Council of 28 June 2018 on a proportionality test before adoption of new regulation of professions*).

Finally, it is especially important to consider the outcomes of the opinions pursuant to Art. 21-*bis*, which, unlike the outcomes of the previous monitoring, where the overall success rate was 39%, show a compliance rate of 66%.

The monitoring of advocacy interventions provides an assessment on the level of efficiency and effectiveness achieved by the work done, in line with the best practices found among the national Authorities of the European Competition Network.

***Annex A*** – List of 2021 interventions considered, with the related outcomes

***Annex B*** – List of 2022 interventions considered, with the related outcomes