



## **OUTCOMES OF COMPETITION ADVOCACY DECISIONS IN 2020-2021**

**Rome, 6 December 2022**

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

# OUTCOMES OF COMPETITION ADVOCACY DECISIONS IN 2020-2021

## 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 2020 – 2021.

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 as of 30 September 2022.

The data for the last of the two years considered, in this case 2021, will be reviewed in the next periodic survey, to be carried out during 2023.

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

The interventions examined were broken down as follows:

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

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

- positive: when the addressee has exactly complied with the requirements;
- partially positive: partial compliance;

---

<sup>1</sup> 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.

<sup>2</sup> Legislative Decree no. 175 of 19 August 2016 "*Consolidated law on publicly owned companies*" provides for the reorganisation of the sector, implementing one of the central points of Law 124/2015, the so-called "Madia Reform". In particular, Article 5, paragraph 3, provides for a new assignment for the Authority, to which "*the deed of resolution for the incorporation of the company or the acquisition of direct or indirect investment*" must be transmitted for the purposes of exercising the powers referred to in Article 21-*bis* of Law 287/90.

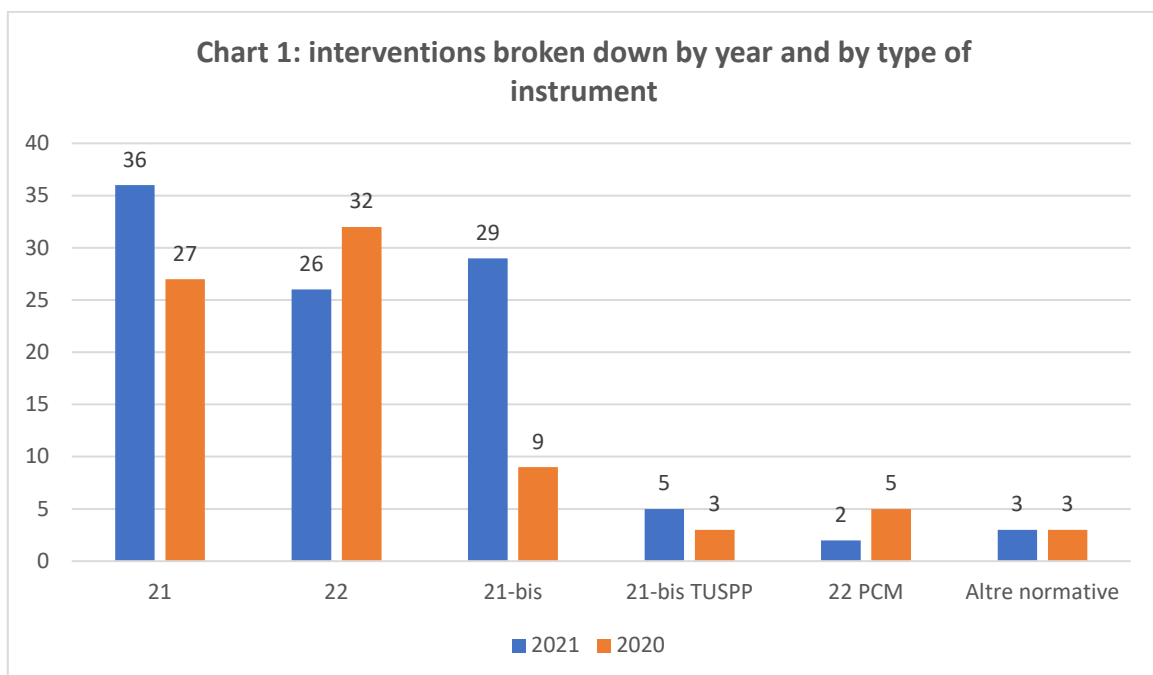
- negative: non-compliance;
- not assessable: impossibility of judgment for various reasons.

## II. 2020-2021 SUMMARY AND ANALYTICAL DATA

The monitoring activity covered all advocacy interventions carried out from 1 January 2020 to 31 December 2021, for a total of 180 decisions (101 in 2021 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 attached to this document list the references of decisions considered in the study for 2020 and 2021 and the summary indication of the results.

### 1. Some general data relating to interventions (2020-2021)

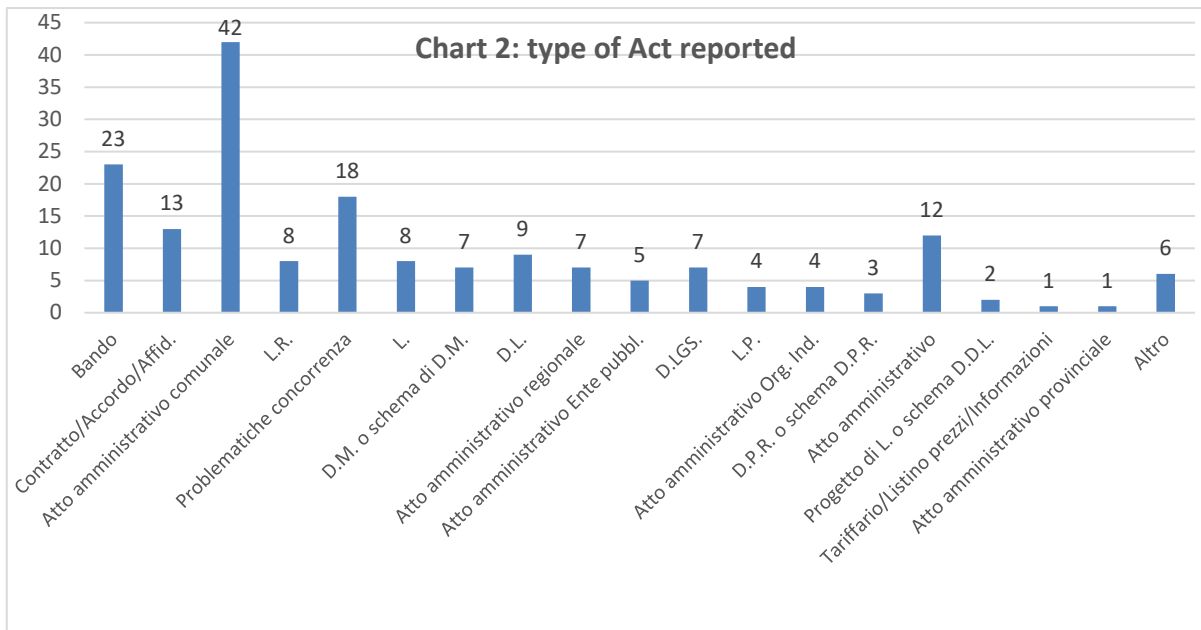
The comparison between 2020 and 2021 shows a significant increase in the number of *advocacy* interventions, from 79 to 101, substantially due to the significant increase in cases under Article 21-bis, including 21-bis TUSPP (34 in 2021 from 12 in 2020, mainly due to the high number of cases concerning maritime state concessions). See [Chart 1](#).



Source: AGCM processing on 2020 and 2021 data

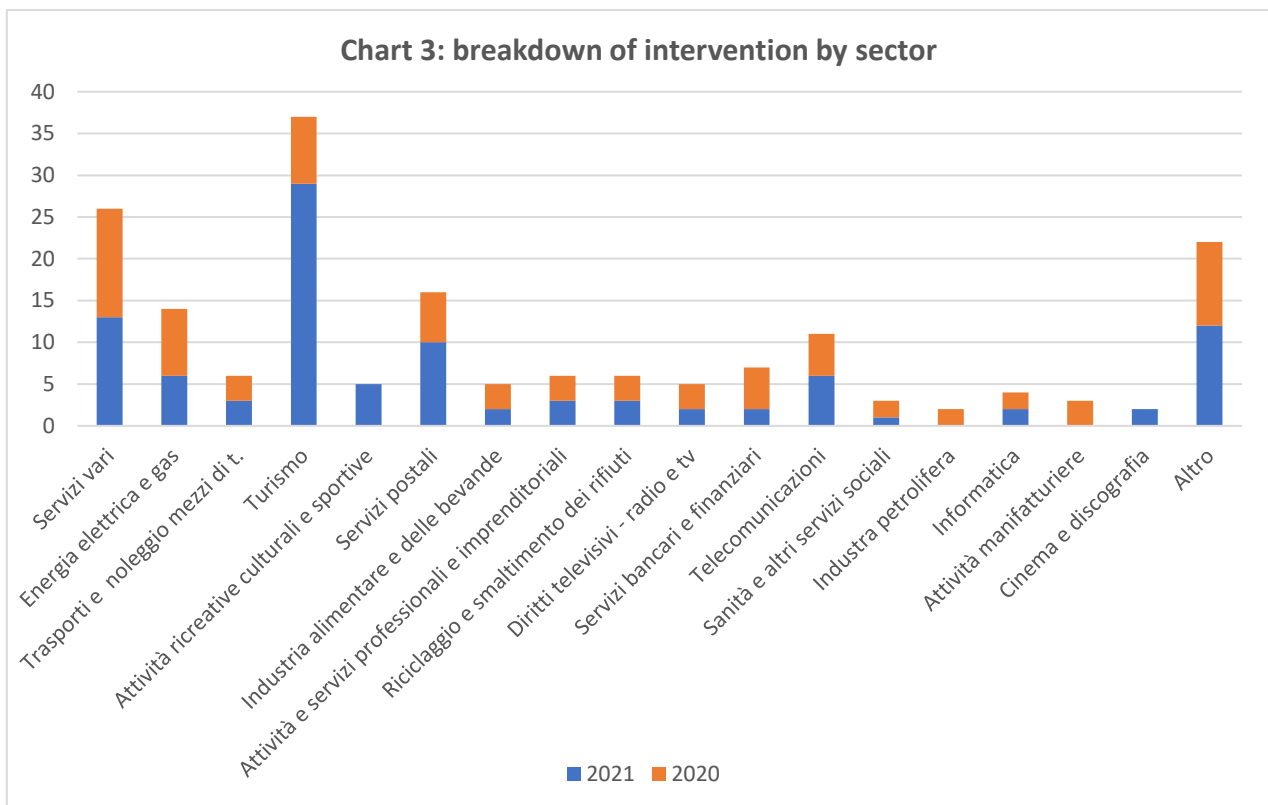
1. Regarding the **type of acts reported** in the two-year period, in 42 cases the *advocacy* intervention concerned municipal administrative acts, in 23 cases tender notices and in 18 cases the interventions were aimed at reporting competition issues (for further types of acts see [Chart 2](#))<sup>3</sup>.

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



Source: AGCM processing on 2020 and 2021 data

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



Regarding the **recipients**, out of 180 cases, in 69 cases (38.3%) the advocacy intervention was addressed to the parliament or a central administration or body, in 102 cases (56.7%) to a local administration, and in the remaining 9 cases (5%) the addressees were mixed (both local and central).

Finally, with regard to the **most recurrent profiles**, through the 180 total interventions, 236 competitive concerns were highlighted (clearly, the same intervention can report more than one criticality profile). The most frequently encountered competition concerns related to “tenders and contracts” and “awards without tender” (accounting for approximately 61% of the total restrictions encountered); “restrictions on doing business” (accounting for 31% of the total restrictions reported). It should be noted that the awards without tenders alone account for about 38% of the total, due to the large number of cases involving extensions of maritime state concessions in 2021.

***Overall outcome of advocacy activities (2020-2021)***

In order to reinforce their reliability, 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 assessable” were excluded, according to the criterion already introduced starting from the monitoring relating to the two-year period 2017-2018<sup>4</sup>.

Therefore, 19 cases that could not be assessed were removed from the total of 180 cases and the processing of the outcomes referred to 161 interventions - 71 in 2020 and 90 in 2021. The two-year success rate was **66%**: this rate was higher in 2020, when it reached 69%, while in 2021 it stood at 63%. Compared to the previous two-year period monitored (2019-2020), the overall compliance rate is growing (it was 61%).

*Table 1-A – Overall outcomes by single year (2020-2021)*

OUTCOMES	Total		Cases 2020		Cases 2021	
	no. of cases	%	no. of cases	%	no. of cases	%
NEG	55	34%	22	31%	33	37%
P.POS.	44	27%	17	24%	27	30%
POS	62	39%	32	45%	30	33%
<b>Overall total</b>	<b>161</b>	<b>100%</b>	<b>71</b>	<b>100%</b>	<b>90</b>	<b>100%</b>
Success rate (POS + P.POS.)	106	66%	49	69%	57	63%

Source: AGCM processing on 2020 and 2021 data

Analysing the effectiveness rate of the interventions according to the type of recipient they were aimed at (Table 2), a substantial equivalence emerges - compared to previous monitoring - between those aimed at central administrations and the legislature (“central recipient”) and those with a “local recipient”: the former registered a success rate of 66%, while the latter a success rate of 65%.

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

Recipient	NEG	P.POS.	POS	POS + P.POS	Overall total
Central (61 cases)	34%	25%	41%	66%	100%
Mixed (6 cases)	17%	66%	17%	83%	100%

<sup>4</sup> The data were published in June 2019 on the Authority's website.

Local (94 cases)	35%	27%	38%	65%	100%
among these, in particular*:					
Municipalities (57 cases)	37%	37%	26%	63%	100%
Provinces (8 cases)	37.5%	12.5%	50%	62.5%	100%
Regions (19 cases)	26%	37%	37%	74%	100%
<b>Overall rate</b>	<b>34%</b>	<b>27%</b>	<b>39%</b>	<b>66%</b>	<b>100%</b>

Source: AGCM processing on 2020 and 2021 data

As to the **level of finality** of the act reported (Table 3), the data clearly show that the success rate is much higher (89%) when the Authority intervenes on **non-definitive acts** (e.g. draft tenders, draft decrees, bills) than the final acts (60%).

*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 (126 cases)	40%	28%	32%	60%	100%
Non-final acts (35 cases)	11%	26%	63%	89%	100%
<b>Overall rate</b>	<b>34%</b>	<b>27%</b>	<b>39%</b>	<b>66%</b>	<b>100%</b>

Source: AGCM processing on 2020 and 2021 data

## 2. Success rates by legal basis of intervention instrument

Table 4 shows, for the two-year period 2020-2021, the breakdown of the 161 interventions considered evaluable, depending on the legal instrument used:

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

Intervention instrument	NEG	P.POS.	POS	POS + P.POS	no. of cases evaluated**	no. of total cases	Overall total
<b>21</b>	33%	53%	14%	<b>67%</b>	57	63	100%
<b>22</b>	15%	24%	61%	<b>85%</b>	46	58	100%
<b>21-bis</b>	55%	0%	45%	<b>45%</b>	38	38	100%
<b>21-bis (TUSPP)</b>	87.5%	0%	12.5%	<b>12.5%</b>	8	8	100%
<b>22 PCM</b>	17%	33%	50%	<b>83%</b>	6	7	100%
<b>Other regulations*</b>	0%	17%	83%	<b>100%</b>	6	6	100%
<b>Overall rate</b>	<b>34%</b>	<b>27%</b>	<b>39%</b>	<b>66%</b>	<b>161</b>	180	<b>100%</b>

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

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

Below are the analyses of the data and the considerations relating to the *advocacy* interventions divided according to the legal instrument used by the Authority.

2.1. Outcome of reports adopted pursuant to Article 21

With regard to the 57 **Article 21** reports (25 in 2020 and 32 in 2021), which were considered assessable, the overall success rate (Table 6) was **67%**.

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 26%, while in cases where the recipient is a local administration/institution, the success rate rises to 88% (and 75% in 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 affected, which usually consist of final regulatory or administrative acts (see Table 3 *above*).

*Table 6 – Overall outcomes of reports pursuant to art. 21, broken down by type of impulse and type of recipient*

	NEG	P.POS.	POS	Overall total	POS + P.POS
2020 (25 cases)	40%	40%	20%	100%	<b>60%</b>
2021 (32 cases)	28%	63%	9%	100%	<b>72%</b>
- To central administrations/institutions	74%	21%	5%	100%	26%
- To local administrations/institutions	12%	67%	21%	100%	88%
- To central and local administrations/institutions	25%	75%	0%	100%	75%
<b>Overall rate</b>	<b>33%</b>	<b>53%</b>	<b>14%</b>	<b>100%</b>	<b>67%</b>

*Source: AGCM processing on 2019 and 2020 data*

2.2. Outcome of opinions under art. 22

The 46 opinions considered evaluable, issued pursuant to **Article 22** - of which 19 in 2021 and 27 in 2020 - recorded better results with **an overall success rate of 85%** (substantially stable in the comparison between 2020 and 2021).

Table 5 illustrates the outcomes also based on the impulse act and the administrative level of the recipient.

As it has emerged from the other monitoring exercises, the data confirm 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 88% of cases (which rises to 90% when considering 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 stands at 80%, a figure that is nevertheless on the rise (compared to 70% in the last monitoring); even in these cases, the success rate is higher when the recipient is a local or mixed administration (100% of the total).

The opinions relating to Consip calls recorded a success rate of 100%, albeit with a significant incidence of "partially positive" results.

**Table 5 – Outcomes of opinions pursuant to art. 22, total and divided by type of impulse and type of recipient**

	NEG	P.POS.	POS	Overall total	POS + P.POS
2020 (27 cases)	15%	22%	63%	100%	85%
2021 (19 cases)	16%	26%	58%	100%	84%
<b>Overall rate</b>	<b>15%</b>	<b>24%</b>	<b>61%</b>	<b>100%</b>	<b>85%</b>
<b>Data broken down by impulse action/administrative level of the recipient<sup>5</sup></b>					
<b>Requested (26 cases)</b>	<b>12%</b>	<b>27%</b>	<b>61%</b>	<b>100%</b>	<b>88%</b>
From central administrations/institutions	13%	31%	56%	100%	87%
From local or mixed administrations/institutions 10	10%	20%	70%	100%	90%
<b>Ex officio (20 cases)</b>	<b>20%</b>	<b>20%</b>	<b>60%</b>	<b>100%</b>	<b>80%</b>
To central administrations/institutions 14	29%	21%	50%	100%	71%
To local or mixed administrations/institutions 6	0%	17%	83%	100%	100%
<b>of which MEF/CONSIP (5 cases)</b>	<b>0%</b>	<b>60%</b>	<b>40%</b>	<b>100%</b>	<b>100%</b>

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

Finally, as regards opinions rendered to the Presidency of the Council of Ministers (**22PCM**), 13 requests for opinions on regional laws were received by the PCM during the period under review, of which 8 in 2020 and 5 in 2021. With respect to these requests, the Authority decided to issue an opinion in 7 cases (5 of which in 2020 and 2 in 2021). Of these, 6 cases are considered "assessable".

In the two-year period under consideration, the PCM challenged - for the profiles covered by the opinion - the regional law before the Court in 2 cases (both in 2020, one of which led to the pronouncement of constitutional illegitimacy<sup>6</sup>; in the other case, the regional law was in any case amended<sup>7</sup>); in 3 other cases (2 in 2020 and 1 in 2021) the provisions, although not challenged, were in any case amended, in whole or in part, in the sense desired by the Authority. The positive (or partially positive) outcomes were therefore 5, equal to a success rate of 83%.

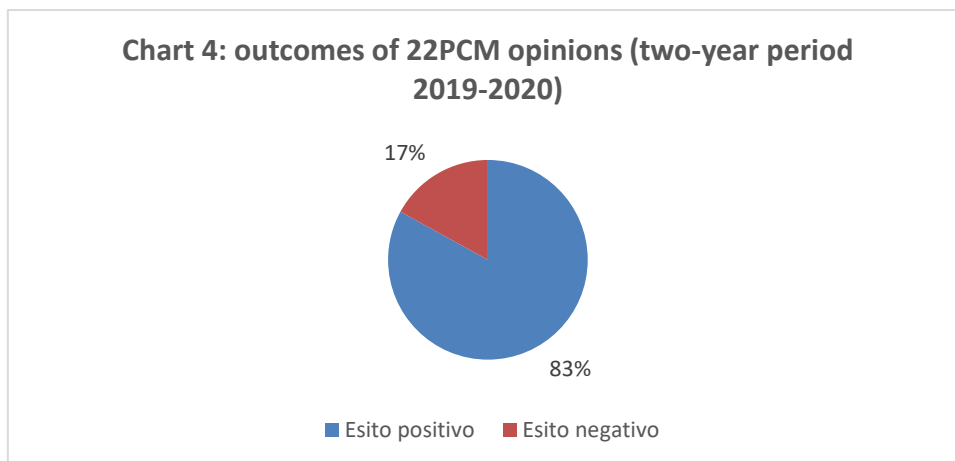
However, the absolute success rate, which is growing strongly (83% compared to 50% in the previous monitoring), should be considered with caution in the light of the smaller number of cases (Chart 4).

<sup>5</sup> For the purposes of disaggregated classification, MEF/Consip opinions are also considered as a separate category.

<sup>6</sup> AS1694 (S3949) *Trento Province Law no. 4/2020 - Regulation of openings on Sundays and holidays of commercial activities* (2020).

<sup>7</sup> S4025 *Piedmont Region Law no. 26/2020-allocation of large derivations for hydroelectric use* (2020).





Source: AGCM calculations on 2020 and 2021 data

#### 2.4. Outcomes of opinions under Art. 21 bis

The interventions carried out under Art. 21-bis that received an evaluation were 46 in the two-year period examined (of which 8 were classified under Art. 21-bis\* TUSPP).

It should be noted that, for this instrument, the success rate is given by the number of cases in which the administration has acted on the Authority's requests out of the total number of interventions carried out under Article 21-bis. In particular, the cases in which the act has been modified following the opinion rendered or in any case the observations expressed by the administrations have been considered suitable to clarify the competitive concerns detected by the Authority which, therefore, has not challenged the act reported before the competent Regional Administrative Court; those in which the administration has complied during the trial and, therefore, the Authority, has waived the appeal; those in which the administrative judge accepted the appeal of the Authority, with a final ruling. An exhaustive examination of the instrument can only be fully carried out following the outcome of appeals relating to the cases concerned.

For this instrument (Table 7), the average overall success rate was 39%. The percentage is 45% for interventions pursuant to the “ordinary” art. 21-bis, while it drops to 12.5% 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 2020 is *lower* (33%) than that relating to 2021 (41%).

**Table 7 – Outcomes of reports pursuant to art. 21-bis 2020-2021, broken down by type of intervention and year**

	NEG	POS	Overall total
21-bis	55%	45%	100%
21-bis TUSPP	87.5%	12.5%	100%
<b>Total average rate</b>	<b>61%</b>	<b>39%</b>	<b>100%</b>
2020	67%	33%	100%
2021	59%	41%	100%
<b>Total average rate</b>	<b>61%</b>	<b>39%</b>	<b>100%</b>

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

A total of six interventions fall under this heading, of which, in particular, one under Legislative Decree No. 259/2003 - *Electronic Communications Code*, four under Legislative Decree No. 9/2008<sup>8</sup> and, for the first time, one case under the new Art. 3, par. 3 of Legislative Decree no. 142/2020<sup>9</sup>.

All cases were successful.

## III. FINAL CONSIDERATIONS

The data of this monitoring record an overall success rate of *advocacy* interventions (66%), which is increasing further compared to previous monitoring. As to instruments, the greater effectiveness of advisory instruments (opinions under Art. 22) compared to Art. 21 alerts is confirmed.

From a systematic and evolutionary point of view, the following aspects appear worthy of consideration for the two-year period of reference.

The total number of reports has increased: from 162 interventions carried out in the two-year period 2019-2020, it has increased to 180 interventions in the two-year period 2020-2021. Within the latter, cases increased from 79 in 2020 to 101 in 2021. This increase is certainly due to the high number of reports that have concerned the state-owned maritime and tourist-recreational concessions.

This latter element also affected the type of restrictions most frequently encountered, which, compared to previous monitoring exercises, saw the prevalence of cases concerning tenders and, in particular, awards without tenders (such as extensions of state concessions).

There is also a decrease in the number of Article 21 reports addressed to the legislature or central administrations in 2021 (from 42 in 2020 to 27 in 2021). This outcome is probably attributable to the fact that in 2021 the Authority presented the report for the annual competition law (AS1730)<sup>10</sup> in which numerous competition issues related to different sectors were highlighted.

As in 2020<sup>11</sup>, in 2021<sup>12</sup> some interventions also concerned the adoption of functional regulatory or administrative acts to face the pandemic emergency, on the occasion of which

---

<sup>8</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>9</sup> Legislative Decree No. 142/2020 (*Implementation of Directive (EU) 2018/958 of the European Parliament and of the Council of 28 June 2018 on a proportionality test before the adoption of a new regulation of the professions*).

<sup>10</sup> The outcomes of the AS1730 report are not subject to this monitoring.

<sup>11</sup> See AS1684 *Observations on the provisions contained in the Relaunch Decree* (2020); AS1670 *Competitive issues that emerged in the school publishing market following the COVID-19 emergency* (2020); AS1665 *Alternative measures to reimbursement in the event of cancellation of tourist packages due to the Covid 19 emergency* (2020).

<sup>12</sup> See AS1717 *Methods of disbursement of appropriations for local radio and television broadcasters of the contribution for epidemiological emergency*; AS1815 *Memorandum of Understanding of the national dairy chain for the protection of Italian livestock*.

the Authority reiterated the importance, even in this context, of respecting the values of competition.

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 2021 interventions considered, with the related outcomes

*Annex B* – List of 2020 interventions considered, with the related outcomes