



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL FOR ENERGY

The Director-General

Brussels, 06 August 2024  
ENER/DJ/VK/HvR/ma(2024)6098223

**Subject: European Commission reply to Internal Review Request No. 94., “ref. IR/2024/873987 by NGO Global Legal Action Network concerning AggregateEU first mid-term tender to ensure stability and predictability of energy supplies”**

Dear Dr. Fiala-Butora,

In your letter of 10 April registered under number Ares(2024)2661649 on 11 April 2024, you requested on behalf of your organisation that, pursuant to the Aarhus Regulation,<sup>1</sup> the European Commission carry out an internal review of the **mid-term “tender” of 15 February 2024 (the Contested Act)**.

After giving due consideration to your request, we inform you that the Commission concluded that **your request is inadmissible**, for the reasons explained in the Annex below.

Should you disagree with this reply, you may bring the matter before the European Ombudsman or before the General Court in accordance with the provisions laid down, respectively, in Articles 228 and 263 of the Treaty on the Functioning of the European Union.

Yours sincerely,

(e-signed)

Ditte Juul Jørgensen  
pp. Matthew Baldwin

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<sup>1</sup> Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies; *OJ L 264, 25.9.2006, p. 13–19*.

## ANNEX

### A. Preliminary Remarks

- **Context**

Following Russia's unprovoked war of aggression against Ukraine, it became clear that the EU needed alternative ways to ensure its energy supply. At the outbreak of the invasion, almost half of EU gas imports were sourced from Russia. The weaponisation of the gas supply and the Russian Federation's manipulation of the markets through intentional disruptions of gas flows have led to skyrocketing energy prices in the Union, endangering not only the economy of the Union, but also seriously undermining security of supply.

In March 2022, EU leaders agreed in the European Council to phase out Europe's dependency on Russian energy imports as soon as possible and, they invited the Commission to swiftly put forward a detailed REPowerEU plan.

The Commission announced in its communication of 18 May 2022 entitled 'REPowerEU plan' the setting up of an EU Energy Platform together with the Member States for the common purchase of gas, liquified natural gas (LNG) and hydrogen. As part of the REPowerEU Plan, the Commission also presented the strategy for an EU external energy engagement, which explains how the Union intends to diversify the Union's energy supply. This includes – among other initiatives – negotiating political commitments with existing or new gas suppliers to increase gas deliveries and thus to replace Russian gas deliveries to Europe.

The Commission proposed in 2022 a series of emergency regulations to be adopted by the Council that consist of coordinated actions and measures to address the problem, phase out EU dependency on Russian fossil fuels and help EU countries and citizens tackle the rising prices and scarcity of supply, among others:

- Market correction mechanism – Regulation EU 2022/2578;
- Storage filling and burden sharing – Regulation EU 2022/1032;
- Coordinated demand-reduction measures for gas – Regulation EU 2022/1369;
- **Solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders – Regulation 2022/2576 (“the Solidarity Regulation”)** adopted in December 2022 for the period of 1 year and prolonged in December 2023 until December 2024, which provided the legal basis of the mechanism for demand aggregation and joint purchasing of natural gas - **AggregateEU**.

The establishment of AggregateEU was therefore not an isolated measure. It does not promote the use of natural gas as an energy carrier of preference, nor does it aim at increasing the consumption of natural gas in the Union. In particular, it should be noted that the Solidarity Regulation has been adopted together with the Demand Reduction Regulation that seeks a 15 % reduction of the overall gas consumption in the Union. AggregateEU was established to

address the energy crisis and to facilitate replacement of Russian gas with more reliable supplies.

- **Provisions of the Solidarity Regulation on demand aggregation and joint purchasing of natural gas**

AggregateEU is the Commission's flagship instrument to implement demand aggregation and to support coordinated purchasing of natural gas at European level. This initiative pools gas demand from EU and Energy Community companies and matches this demand with competitive supply offers from the global market (excluding Russian gas). Following a call for "tender", companies can voluntarily conclude purchasing contracts with gas suppliers.

AggregateEU uses the term "tender", however this term should not be confused with tenders under the EU Financial Regulation<sup>2</sup> or other public procurement rules. On AggregateEU, a "tender" is a process whereby gas demand is collected, aggregated and ultimately matched with supply offers. AggregateEU has no role in the negotiation or signature of gas supply contracts. There have been two types of "tenders" in which buyers have been able to submit their demand: short-term "tenders" and mid-term "tenders". In the former, demand is submitted for calendar months in the near future. In the latter, demand is submitted for six-month periods - e.g. Summer 2024. Each "tender" process has been organised in successive phases and lasts roughly two weeks. An AggregateEU "tender" consists of the following steps:

- Demand Collection: buyers can submit their demands for specific locations and periods of time. Only one demand is allowed per location.
- Demand Evaluation: after all demands are collected, they will be thoroughly analysed to identify potential abuses of the process and remove them from demand aggregation.
- Demand Review: once the analysis is concluded, Demand Aggregation Info Sheets are published. In short-term "tenders", the total demand of all buyers is aggregated for each location and calendar month. In mid-term "tenders", the demand is not aggregated and, instead, the demand from each buyer is published as a separate, pseudonymous tender. The potential buyer can evaluate whether they wanted to proceed to the "tendering" and matching phases or decline to do so.
- Offer Submission: based on the aggregated demand, "tenders" will be created and published to buyers and sellers. Sellers can then submit supply offers with their indicative prices at different locations.
- Offer Matching: demands are then matched to offers on a pro-rata basis irrespective of the expiration date of the indicative price.

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<sup>2</sup> Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, *OJ L 193*, 30.7.2018, p. 1–222 – "EU Financial Regulation".

- **Matching Publication:** the results of the matching process are published. In short-term “tenders”, both buyers and sellers receive suitable matches, which include the following details: (1) gas amount, (2) average price and (3) relevant contact data of buyers and sellers. In the mid-term “tender”, only buyers receive the contact details of sellers who expressed their interest in selling gas to them for a particular six-month period.
- **Contract Negotiations:** takes place outside of the AggregateEU platform. Based on the matching results, participants can negotiate and conclude contracts to purchase gas at specific locations and in specific months.

AggregateEU therefore is a platform which serves as an information and matching forum on available and demanded gas. Neither the European Commission nor the service provider is engaged in the negotiations process or in contracting. The matching process does not result in any obligations on market participants to conclude a contract, or even to engage in negotiations.

## **B. Assessment**

### **1. Eligibility**

After examining the Request, the Commission concludes that the Requesting Party fulfil the entitlement criteria under Article 11 of the Aarhus Regulation and are thus entitled to make a request for internal review.

### **2. Administrative act**

According to Article 10 (1) of the Aarhus Regulation, eligible Requesting Parties are entitled to make a request for internal review to the **Union institution or body that adopted the administrative act** or, in the case of an alleged administrative omission, should have adopted such an act, on the grounds that such an act or omission contravenes environmental law within the meaning of point (f) of Article 2(1).

In their Request, the Requesting Party asks the Commission to perform an internal review of the **mid-term tender published on 15 February 2024** (hereafter: ‘the **Contested Act**’).

According to Article 2(1)(g) of the Aarhus Regulation, an administrative act is defined as ‘*any non-legislative act adopted by a Union institution or body, which has legal and external effects and contains provisions that may contravene environmental law within the meaning of point (f) of Article 2(1).*’

The Requesting Party correctly notes that, according to this definition, an act should have three elements to qualify as an administrative act within the meaning of the Aarhus Regulation. The act should:

- a) be a non-legislative act adopted by a Union institution,
- b) have legal and external effects, and
- c) contain provisions that may contravene environmental law.

In the case of *ClientEarth v EIB*, it was also confirmed that these elements are **cumulative**<sup>3</sup>.

However, the Contested Act cannot be considered as an administrative act adopted by a Union institution within the meaning of the Aarhus Regulation, for the reasons outlined in the next subsections.

### ***2.1. Administrative act adopted by an EU Institution***

The notion of an ‘administrative act’ in the Aarhus Regulation is closely linked to Article 263 of the TFEU. This is reflected in particular in recitals 11 and 12 of the Aarhus Amending Regulation.<sup>4</sup> An act can be considered as an administrative act adopted by a Union institution, if the Union institution adopted this act in the exercise of the prerogatives it enjoys as a public authority.<sup>5</sup>

The Requesting Party argues that the launching of the tender was an administrative act adopted by the Commission, because it was launched and published on the European Commission’s website. The Requesting Party further argues that the actions of the service provider are attributable to the European Commission, because the Commission contracted the service provider, who was acting on the Commission’s behalf.

However, the ‘mid-term tender’ was launched by the service provider when it informed the registered participants by way of a newsletter. The press announcement “*AggregateEU launches first mid-term tender...*” (emphasis added) was written and published on the Commission’s website for the purpose of policy communication only. As such, it was also marked by the appropriate disclaimer, which notes that the information on the website is of a general nature, not necessarily comprehensive, accurate or up to date, and not consisting of professional or legal advice.<sup>6</sup> The disclaimer also notes that the Commission will try to correct errors brought to its attention. In that regard, we can inform you that the reference to ‘the Commission having launched the tender’ has been corrected.<sup>7</sup> While the press announcement was drafted from a policy communication angle, and described the process in a simplified manner, the website also contained links to other websites, which described the process in a more technical and detailed manner. These documents explain in detail that the process is managed by the service provider.<sup>8</sup> Therefore, the news announcement did not itself constitute

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<sup>3</sup> Case T-9/19 *Client Earth v European Investment Bank*, para 143.

<sup>4</sup> Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

<sup>5</sup> *Ex multis*, C-584/17 P - *ADR Center SpA v. European Commission*, para. 65.

<sup>6</sup> See Legal Notice ([https://commission.europa.eu/legal-notice\\_en](https://commission.europa.eu/legal-notice_en)).

<sup>7</sup> See News Announcement: [AggregateEU launches first mid-term tender to ensure stability and predictability of energy supplies - European Commission \(europa.eu\)](https://energy.ec.europa.eu/topics/energy-security/eu-energy-platform/aggregateeu-launches-first-mid-term-tender-to-ensure-stability-and-predictability-of-energy-supplies-european-commission_europa.eu).

<sup>8</sup> See in particular *AggregateEU – questions and answer* ([https://energy.ec.europa.eu/topics/energy-security/eu-energy-platform/aggregateeu-questions-and-answers\\_en](https://energy.ec.europa.eu/topics/energy-security/eu-energy-platform/aggregateeu-questions-and-answers_en)).

the launching of the ‘mid-term tender’. It merely provided information to the public about the ‘mid-term tender’ in the form of a news announcement for policy communication purposes.

Under Council Regulation 2022/2576 (‘Solidarity Regulation’), one of the main tasks of the Commission concerned the selection of the service provider. In that regard, Article 5 of the Solidarity Regulation obliged the Commission to contract a suitable entity. The Commission has done so, when it awarded the contract to PRISMA on 24 January 2023. It is worth noting that the Solidarity Regulation sets strict conditions, both for the selection of the service provider (Article 6) and for tasks of the service provider (Article 7). These legal requirements leave little margin of discretion to the Commission in that regard.

Finally, it needs to be pointed out that an act of a private body may not be qualified as an administrative act of a Union Institution, within the meaning above, merely for the fact that it was undertaken in the performance of a contractual obligation vis-à-vis of a Union Institution.

## ***2.2. Legally binding and external effects***

To be subject to a request for internal review, the non-legislative act must have legal and external effects. According to recital 11 of the Aarhus Amending Regulation “*(u)nder Article 263 TFEU, as interpreted by the CJEU, an act is considered to **have external effects**, and thus to be capable of being subject to a request for review, if it is intended to produce legal effects vis-à-vis third parties.*”

According to recital 12 of the Aarhus Amending Regulation, “*...in order to ensure legal consistency, an act is considered to **have legal effects**, and thus to be capable of being subject to a request for review, in accordance with Article 263 TFEU, as interpreted by the CJEU.*”

According to recital 12, considering an act to have legal effects implies that an act can be subject to a request for review, regardless of its form, as its nature is considered with regard to its effects, objective and its content.

It thus follows that the assessment of whether an act has ‘legal and external effects’ for the purposes of the Aarhus Regulation should be the same as for whether the act can be subject to requests for review under Article 263 TFEU.

The Requesting Party claims in paragraph 43 onwards that ‘*an administrative act may therefore take a wide range of forms such as a letter, invitation, opinion, recommendation, or as in the present case a tender invitation*’ and that Recital 12 indirectly confirms this interpretation.

The Requesting Party furthermore alleges that in request for internal review IR/2023/275267, the Commission did not contest that a letter of objection could constitute an administrative act. However, the mere absence of such contestation by the Commission in that case does not mean the Commission endorsed the possibility of letter of objection falling within the definition of the Aarhus Regulation. Under ECJ jurisprudence, only **final and definitive acts** can be challenged and not preparatory ones<sup>9</sup>. It is clear that the Contested Act is not a definitive act, as it is merely an information and invitation to apply for participation in the procedure through the AggregateEU mechanism. As explained in the Background section, the procedure serves as a forum enabling market participants to exchange information on availability and demand of

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<sup>9</sup> T-195/08, *Antwerpse Bouwwerken NV v. Commission*, para. 28

gas supply. Any potential subsequent contractual negotiations and relationships are entirely outside the mechanism.

Moreover, even if in theory such instruments would fall under the internal review scope of the Aarhus Regulation, in order to be subject to internal review, an act would still need to have legal and external effects, which the contested act lacks as explained in the next sub-sections.

In case *Belgium v. Commission*, the Court validated the approach of the General Court in order to determine whether a given recommendation could have legally binding effects, which is the threshold established by the Court for an act to be amenable to judicial review under Article 263 of the TFEU. The Court established that in order to determine whether an act, in that case a recommendation, has legally binding effect, one needs to look into “*its wording and the context in which it appears, its content, and the intention of the institution which adopted it*”<sup>10</sup>

The same test should therefore be applied here.

### 2.2.1 Context of the act

As explained in the Background section above, the Contested Act was **adopted within the context of the Solidarity Regulation**. The basis for the AggregateEU platform is set in Article 1 of the Regulation, which states that:

*“This Regulation establishes temporary rules on:*

*(a) the expedited setting up of a service allowing for demand aggregation and joint gas purchasing by undertakings established in the Union;”*

The Regulation then further establishes the selection criteria of the service provider (Article 6) and tasks of the service provider (Article 7). The Regulation also establishes the rules for participation in demand aggregation and joint purchasing (Article 8). These legal requirements leave little margin of discretion to the Commission in that regard.

Under Article 5(1) of the Solidarity Regulation, the Commission is (only) tasked with contracting the service provider.<sup>11</sup> Although the Commission is granted some discretion regarding the service contract, it is of a more executive nature. This follows from Article 5(2), whereby the Commission shall define in its service contract “*practicalities of the operation of the service provider including the use of the IT tool, the security measures, the currency or currencies, the payment regime, and liabilities.*” It is thus clear that the Solidarity Regulation does not confer any discretion or power on the Commission whether to set-up the mechanism or with regard to the choice of energy carrier (as the Regulation covers natural gas only), only on the detailed operation modalities and practicalities of how the service operator should carry out their tasks pursuant to the Solidarity Regulation (e.g. IT design).

Moreover, the service contract between the Commission and a service provider only establishes a contractual relationship between the two mentioned parties and does not have a legal impact on any other parties. In particular, it does not have any legal impact on potential future contractual relationships between companies supplying and buying gas. Any such contracts are

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<sup>10</sup> Case C-16/16 P, *Belgium v. Commission*, 20 February 2018.

<sup>11</sup> see ‘At the request of the European Council and in line with REPowerEU, the Commission launched the EU Energy Platform in April 2022.’ [EU Energy Platform \(europa.eu\)](https://europa.eu/euenergyplatform/).

negotiated and entered into outside of the AggregateEU mechanism and are not part of the ‘tender’.

### 2.2.2. Content and wording of the act

In addition, it is evident from the content and wording of the Contested Act that the launching of the “tender” does not, nor was it meant to, create legal or external effects.

As explained, the purpose of the Aggregate EU Platform is to **match the availability and demand of gas supply, not to create any contractual or legal obligations** between suppliers and buyers of gas. This is clear from the wording and content of the background information of the AggregateEU mechanisms on the Commission website. This wording is phrased in non-mandatory terms towards the suppliers and buyers.

According to the information on the Commission Q&A website, participation in AggregateEU entails **aggregating demand and matching it with potential availability**.<sup>12</sup>

Furthermore, it is clearly stated that any contract negotiation takes place outside the AggregateEU platform and that, based on the results, participants *can* negotiate and conclude contracts. The results of the tender are not binding and do not create any contractual or other legal obligation on the participants. This is evident from the explanation of the phases and functioning of the AggregateEU mechanism, whereby “(p)urchasing contracts are negotiated between companies and gas suppliers outside AggregateEU.”<sup>13</sup>

This fact is clearly stated on the official AggregateEU website that the “*participation in a tender does not bind or entitle you to purchase gas. This process is non-binding and all contracts must be negotiated and concluded outside the platform.*”

It is further stated in the related Press Release that “(t)he Commission will **not engage in the purchase of gas and will not own any gas. Any contracting of gas takes place outside the mechanism and supply contracts will not be signed by the Commission, nor Prisma, but rather by the companies involved.**”

*‘It will be for buyers and sellers to negotiate supply contracts and terms of delivery. Such negotiations will take place outside the AggregateEU mechanism and are beyond the remit of the service provider. AggregateEU only serves as a mechanism to aggregate demand, tender it and match demand with supply.’*<sup>14</sup>

Moreover, participation and registration in the platform is not mandatory.<sup>15</sup> Gas companies and gas-consuming companies **can register** and subscribe to the AggregateEU services throughout the year.<sup>16</sup>

Furthermore, the Requesting Party alleges, in paragraphs 51-53 of their Request, that a tender unquestionably produces legal effects vis-à-vis third parties and that the Contested Act

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<sup>12</sup> See [AggregateEU – questions and answers \(europa.eu\)](#).

<sup>13</sup> [EU Energy Platform: Joint gas purchasing to increase energy security for Europe \(Factsheet\) - European Commission \(europa.eu\)](#).

<sup>14</sup> Press release [Joint gas purchasing \(europa.eu\)](#).

<sup>15</sup> See [AggregateEU – questions and answers \(europa.eu\)](#).

<sup>16</sup> See [EU Energy Platform \(europa.eu\)](#).



produces legal effects towards the buyers, the suppliers, and the Service Provider. They further state that the Contested Act creates **rights** of interested buyers that their demand will be evaluated and put out to tender and the right of suppliers that their bid would be considered and matched with potential buyers. This claim is, however, unsubstantiated by the Requesting Party and these claims are not supported by sufficient arguments and evidence.

As stated above, the present “tender” does not produce, nor is intended to produce legal effects vis-à-vis buyers and suppliers. Any subsequent contractual negotiations and relationships take place outside of the EU Platform. The Contested Act is not a tender within the meaning of the Financial Regulation which would lead to a contract (or a claim to conclude a contract) between suppliers and buyers. The publication of a “tender” under AggregateEU does not constitute a (public or private) procurement procedure.

Neither could the tender produce legal effects towards the service provider. Any legal effects towards the service provider can only result from the service contract itself, which establishes/sets details of legal terms between the service provider and the Commission, and from the Solidarity Regulation itself, which forms the basis for the contract and sets the tasks for the service provider.

The statement that the launch of tender would create rights for buyers and suppliers is also misguided. It was explained above that the wording of the tender and related informational websites point to the non-binding nature of the tender. The Solidarity Regulation itself notes that as the measures with respect to demand aggregation and joint purchasing will be implemented on a voluntary basis (recital 35 Solidarity Regulation). The “tender” is merely an information that the platform is open for the mid-term tender and does not in itself produce any legal rights for suppliers or buyers.

Therefore, contrary to what the Requesting Party claims, the launching of the tender on the AggregateEU Platform is neither intended to, nor results in any legal effects towards buyers and suppliers. It can in no way establish any rights for interested buyers or for interested sellers.

### *2.2.3 Intention of the act*

It is clear from the wording quoted in the previous section as well as the context of the act that the Contested Act is **not intended** to produce any legal and external effects.

As elaborated, the Solidarity Regulation did not confer on the Commission any discretion to create obligations or rights on suppliers or buyers of gas. The “tender” is simply a publication of information on potential demand and supply. **If no such delegation of power exists under the Regulation, there could not have been any intention** for a launch of “tender” by the Commission to **create external and legal effects**.

Moreover, as explained above, the present “tender” was not intended to be a tender within the meaning of the Financial Regulation, which would (directly) result in a purchase and/or contract.

It is also clear **from the background documents available on the websites** on the functioning and purpose of AggregateEU mechanism, that launch of the “tender” was not intended to produce legal or external effects. As explained above, the background documents state that the purpose of the AggregateEU mechanism is to **express availability and demand of gas supply**

with a view to diversify EU gas supplies and end dependence on Russian fossil fuel imports. Its function is to signal the demand and availability of gas supplies, not to create legally binding contracts on gas supply. The results of the mentioned “tender” are in no way binding on the participating companies and do not create any legal obligations for the participants. Afterwards, the companies are free to decide whether they enter into negotiations or conclude contracts with the participating suppliers from AggregateEU or not. Any subsequent contractual relationships are initiated, executed, enforced or terminated outside of the AggregateEU, without any involvement of the service provider or the European Commission.

Participation in the platform is voluntary and it is stated on the Commission website that the tender does not create any binding legal contracts or expectations for the participants. The “tender” also cannot create legal effects for the service provider, as such effects can only follow from the i) service contract and ii) the Solidarity Regulation setting the obligations for the service provider.

Therefore, as the launch for “tender” was intended to have an informational function and not to create legally binding contracts or obligations, it cannot be considered to have external and legal effects.

## ***2.2 Conclusion on the administrative act***

For the reasons stated above, the Contested Act is not an administrative act adopted by a Union Institution within the meaning of the Aarhus Regulation. Moreover, the Contested Act does not create any obligations on market participants and cannot then be considered as a challengeable act within the meaning of Article 263 TFEU, and subsequently as an act having legal and external effects within the meaning of Article 2(1)(g) of the amended Aarhus Regulation.

It is therefore not an administrative act under Article 2(1)(g) of the amended Aarhus Regulation.

It should also be noted that the purpose of the amendment of the Aarhus Regulation through Regulation (EU) 2021/1767 was meant to address an issue of locus standi in the previous version, and not to extend the category of challengeable acts under Article 263 TFEU.<sup>17</sup>

## **3. Conclusion on admissibility**

In view of the above, the tender does not constitute an administrative act subject to a request for review within the meaning of Article 2(1)(g) of the Aarhus Regulation. For this reason, the European Commission considers that your request for internal review is inadmissible. The Commission notes that, since the present Request for internal review is dismissed on admissibility, it is not necessary to address the merits of the Request.

In any case, the Commission would like to ensure the Requesting Party of its commitment to its environmental objective, as well as to the need to ensure security of supply and its ongoing efforts to depoliticise supply of gas and become independent from Russian supply.

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<sup>17</sup> See Recital 8 of the Amending Regulation (EU) 2021/1767.

The AggregateEU mechanism contributes to the objectives of transparency, security of supply, diversification and competitiveness. It does not lead to an increase in gas demand in the EU, total gas supplies from third countries to the EU or gas production. It provides opportunities for European buyers to procure gas at competitive conditions from alternative reliable suppliers, diversifying away from/replacing Russian supplies.

