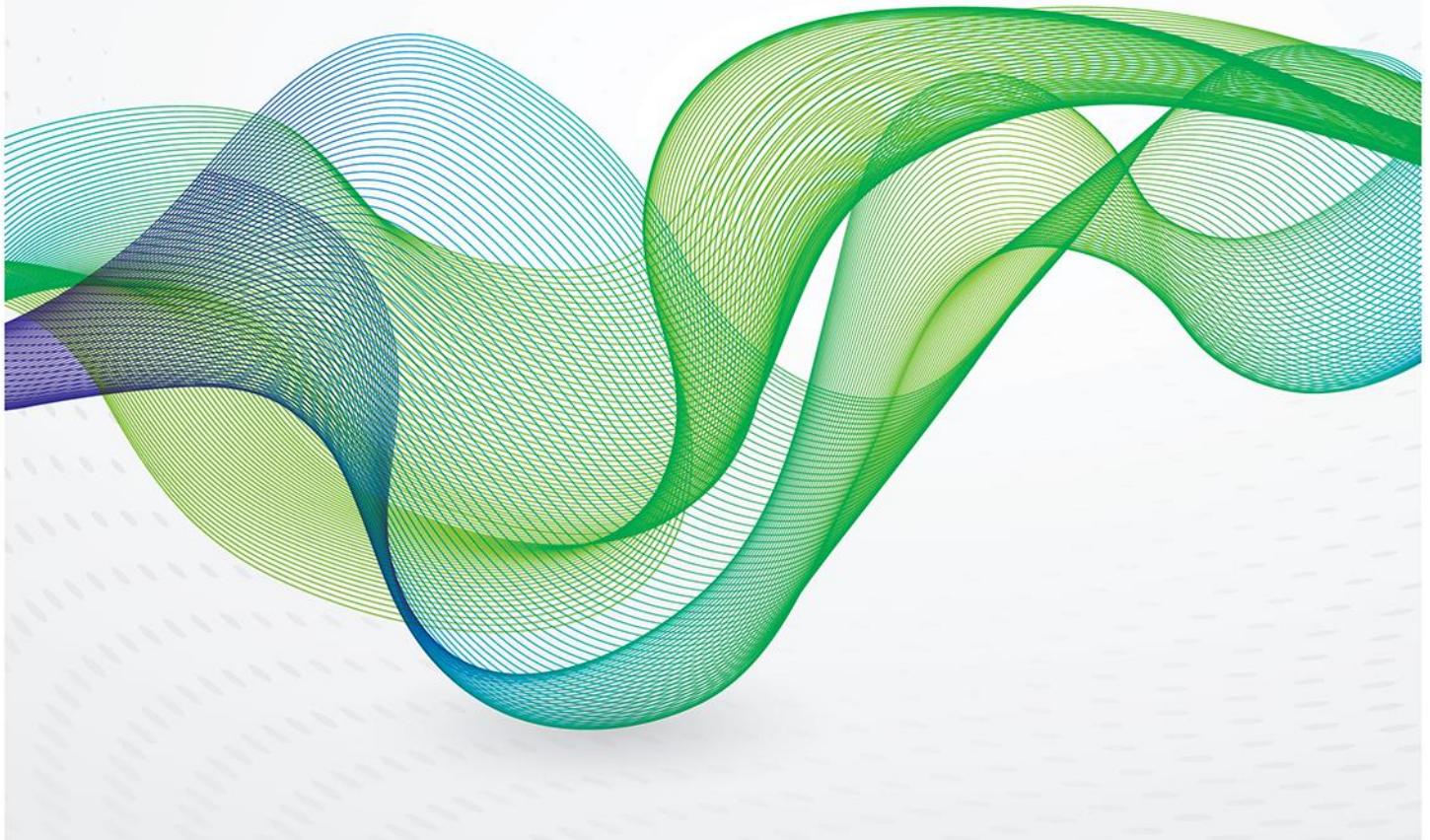




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German regulator's decision to suspend certification of Nord Stream 2 AG: F.A.Q.



On 16 November 2021 the German regulatory authority (BNetzA) suspended the procedure to certify Nord Stream 2 (NS2 AG) as an independent transmission operator (ITO) of the NS2 pipeline, 10 weeks after it had accepted its certification application on 8 September 2021.¹ BNetzA's decision has triggered an avalanche of questions about its potential impact on the length and the outcome of the certification process of the NS2 pipeline operator and about the timing of the start of gas flows via the NS2 pipeline – the most frequent of which this short comment aims to answer.

1. Why has BNetzA suspended the certification procedure?

The BNetzA's press release announcing the suspension states that 'following a thorough examination of the documentation', BNetzA 'concluded that it would only be possible to certify an operator of the Nord Stream 2 pipeline if that operator was organised in a legal form under German law'. In other words, BNetzA suspended the certification procedure because it believed that only a German-registered company can be certified as an operator whereas NS2 AG is a Swiss-registered company. However, it is not entirely clear why BNetzA accepted the NS2 AG certification application in the first place and confirmed that all the necessary documents were in place, if it believed that only a German-registered company could be certified.² Moreover, NS2 AG has made its certification application at BNetzA's request.³ If German registration was indeed a pre-requisite for certification – which is a legitimate (albeit debatable) position – then BNetzA must have known about it at the start of the certification process and should not have needed to conduct 'a thorough examination' during the certification process to establish if this was the case.

Our explanation is as follows. BNetzA may have requested – as its press release appears to suggest – that NS2 AG would 'transform its existing legal form' and re-register as a German company. In this case, a German-registered company would be operating the entire NS2 pipeline – from Ust-Luga in Russia to Greidswald in Germany. However, as neither EU nor German law extend beyond the German part of the pipeline (a short section located onshore in Germany and in the German territorial sea), BNetzA only has the right and responsibility to request the application of EU and German law in respect of the German part of the pipeline. NS2 AG appears to have rejected this variant and has instead decided to establish 'a subsidiary under German law solely to govern the German part of the pipeline', which would 'become the owner and operator of the German part of the pipeline'. This arrangement would be strictly in line with the amended Gas Directive's requirements on unbundling, TPA and tariffs which do not extend beyond the German section of the pipeline.

With hindsight, there were signs of tension between BNetzA and NS2 AG in the run up to the suspension decision, manifest in BNetzA's public statements of 4 and 22 October in which it requested NS2 AG to provide information 'without delay' and, 'if applicable', to submit evidence that all regulatory requirements for the operation are met; and that it was 'in conversations' with NS2 AG and expected it to provide assurances of meeting the regulator's requirements.

2. How does the BNetzA's decision impact the certification process timeline?

It is likely to cause a delay, which could be anything between a couple of months and half a year. BNetzA started the certification procedure on 8 September 2021 and was expected to issue a draft certification decision within a 4-month period mandated by the Gas Directive – that is on 8 January 2022 at the latest.⁴ Suspension of the procedure means that the period during which the suspension decision remains in effect does not count towards the 4-month period and counting will only re-start once suspension is lifted. This means BNetzA will have 6 more weeks to deliver the draft decision.

¹ BNetzA (2021).

² This was not an issue for Nord Stream AG as the unbundling requirement did not apply to pipelines from third countries prior to the adoption of the amended Gas Directive in 2019.

³ Nord Stream 2 (2021).

⁴ Gas Directive.

The length of the suspension period is the key factor – and the main source of uncertainty – which will impact the certification timeline. According to BNetzA, suspension will be lifted when ‘the main assets and human resources’ of NS2 AG have been transferred to a new German subsidiary (yet to be established by NS2 AG) and BNetzA is ‘able to check whether the documentation resubmitted by the subsidiary, as the new applicant, is complete’. Only when these requirements have been met will BNetzA be able to resume the certification process. (Notably, no new assessment by the German economy and energy ministry on the impact of NS2 AG certification on the security of gas supply will be needed and its prior assessment, which concluded that certification would not endanger the security of supply, will remain in force.⁵) It is understood that the establishment of the NS2 new German subsidiary may take a month or two, and some time will also be needed for transferring the assets and personnel. While there is no limit on the amount of time that BNetzA may spend on examining whether the re-submitted documentation is complete, it is obliged to make clear which documents are required for certification thus reducing the scope for delays.⁶

All in all, the length of the suspension period could be anything between a couple of months and half a year leading to a corresponding slippage of the original 8 January draft certification deadline towards March and potentially beyond. The EC (which has been notified about the suspension decision in advance) would then have 2 months (extendable by a further 2 months) to issue a (non-binding) opinion; BNetzA would then have up to 2 months for issuing a final certification decision. Therefore, it seems unrealistic to expect the final certification decision being issued before summer 2022 – unless the EC takes much less time for issuing the opinion than it is entitled to – and it cannot be ruled out that it will only be issued in autumn 2022.

3. Whether and how will the BNetzA decision affect the start of flows via NS2

If the NS2 operator were to start flowing gas in the absence of an effective certification decision and with the certification process still ongoing, this would constitute an administrative offence and the operator would be liable to incur fines from BNetzA. Under normal circumstances, no gas would flow through the NS2 pipelines until *after* its operator has been certified, that is sometime in summer or even autumn of 2022, and certainty after the 2021-22 winter season. Therefore, the BNetzA’s decision to suspend certification, which is likely to translate into a delay in issuing the final certification decision, means that no additional Russian pipeline gas flows will be sent to Europe beyond what Gazprom can send by using its booked – or available for booking – firm capacity on the existing export corridors, including Nord Stream, TurkStream, the Yamal-Europe pipeline, and the Ukrainian corridor. This in turn suggests continuation of high gas prices throughout the winter season (see F.A.Q.5).

An argument has been made in a past OIES publication⁷ that gas could start flowing via the NS2 pipeline if BNetzA were to indicate to the NS2 operator that no fines would be imposed and that it could start flowing gas *before* its certification process is completed and continue to do so on a time-limited basis to alleviate a gas supply shortage in Europe. BNetzA’s decision to suspend certification does not invalidate this argument and it remains a valid proposition that if the winter 2021-22 is very cold and the storages are very low, BNetzA may allow flows via NS2 while certification is pending. Such a scenario is also likely to depend on securing agreement on continued transit of gas across Ukraine post-2024.

4. Is the BNetzA’s decision to suspend NS2 certification technical (procedural) or political?

The BNetzA’s decision appears to be both technical and political. As noted earlier (F.A.Q.1), BNetzA had an option of simply not accepting the Swiss-registered NS2 AG certification application in September 2021, if its position was that only a German-registered company could be certified an

⁵ BMWi (2021).

⁶ Worth noting that NS2 AG had first submitted its application in early June, whereas it was only in early September that BNetzA confirmed that its documentation was complete.

⁷ Yafimava (2021).

operator. By accepting the NS2 AG application, BNetzA has effectively created for itself an option to suspend the certification process at any time of its own convenience on the technical (procedural) grounds (i.e. that a German subsidiary must be established). The answer to why BNetzA decided to create such an option is probably two-fold: on the one hand it may have hoped that NS2 AG would agree to re-register as a German company to operate the entire pipeline. On the other hand it may have wanted to create ‘a safety valve’ of being able to temporarily suspend the process on procedural grounds, if the politics around NS2 became too difficult. It cannot be ruled out that the timing of BNetzA’s suspension decision might be political, both domestically (the ongoing process of the coalition talks to form the new German government) and internationally (the heightened tensions between the EU and Russia in respect of Ukraine and Belarus as well as a threat of US sanctions emanating from the draft National Defence Authorisation Act (NDAA) 2022).

By suspending the NS2 certification process until a German subsidiary is set up, BNetzA has demonstrated that it abides ‘by both the letter and the spirit’ of the EU law ‘with respect to Nord Stream 2 under German jurisdiction’ in line with the July 2021 German-US agreement.⁸ This may go some way towards pacifying the staunchest critics of NS2 in Europe (especially Poland and Ukraine), defusing the threat of US sanctions, and ultimately safeguarding the NS2 certification process and the start of operation. This, however, could come at a price of delayed flows and higher gas prices throughout winter 2021-22.

5. How has the European gas market reacted to the BNetzA’s decision?

On the announcement of the suspension of the certification process the month ahead TTF price for December jumped over 15 per cent on Tuesday 16 November. On the face of it this seems odd since the likelihood of NS2 starting up and delivering any significant volumes in December was receding anyway with no positive news on approval. However, the market may have believed that NS2 would get certified – or at least some gas might have been allowed to flow – by December or that the suspension would upset Russia to the extent that any increase in volumes they had planned to send via Ukraine and/or Yamal Europe would now be withheld, constraining supply. There is clearly considerable concern in the market about a cold winter and constrained supplies from Russia. Now with Russia seemingly having filled its own storage, in principle this should make more supply available for export, even with rising Russia domestic demand, but this has not yet been materially reflected in the flows via Ukraine or Yamal Europe, although these are at steady levels which have helped to stabilise prices. The wholesale gas market in Europe is certainly, at the moment, hyper-sensitive to any bad news. As the weather gets colder and demand rises it could be a bumpy ride in the markets, unless Russia steps up supplies now it has more production available for export.

⁸ US Department of State, ‘Joint Statement of the United States and Germany on support for Ukraine, European energy security, and our climate goals’, 21 July 2021.

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