



# Nord Stream 2: on the verge of sending gas to Europe

## 1. State of play: construction of both lines has been finalized<sup>1</sup>

Nord Stream 2 AG (NS2 AG) has finalized the construction of the Nord Stream 2 (NS2) pipeline: pipelay of the first line was completed on 4 June and the above-water tie-in on 10 June, and pipelay of the second line was completed on 6 September and the above-water tie-in on 10 September (Fig. 1). While the Trump Administration's adoption of the Protecting European Energy Security Clarification Act (PEESCA) in December 2019 and a threat of sanctions against the Swiss pipelaying vessels emanating from it significantly delayed the construction by necessitating their replacement by the Russian vessels (Fortuna and Akademik Cherskiy), the Biden Administration's decision to waive sanctions from NS2 AG in May 2021 (while keeping the sanctions against the Russian vessels in place) made finalization of construction less challenging.

## 2. Technical and regulatory certification challenges

Technical certification of the pipeline and regulatory certification of its operator are the two key factors, which will determine when NS2 will start flowing gas.

### 2.1 Technical certification

The aim of *technical* certification is to confirm a pipeline's integrity and operational safety. It is normally performed by an independent third party, which issues a certificate of compliance, in line with the applicable (inter)national standards.<sup>2</sup> NS2 AG was quoted on 10 June 2021 saying that pre-commissioning process<sup>3</sup> would start on 11 June 2021 and would be carried out 'with the goal to put the pipeline into operation before the end of this [2021] year'.<sup>4</sup> NS2 AG had previously stated that it was planning to use a 'dry' pre-commissioning technique and this decision appears to have been confirmed by the fact that the above-water tie-ins were performed on both lines. Unlike 'wet' pre-commissioning, 'dry' pre-commissioning does not involve a time-consuming hydrotest and hence allows the process to be completed in less than 3 months.<sup>5</sup> Dry pre-commissioning also reduces the risk of pipeline corrosion and avoids discharge of treated water into the sea.

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<sup>2</sup> Some companies, such as DNV GL have their own recognized specifications/standards.

<sup>3</sup> Pre-commissioning is activities carried out before gas filling of the pipeline to confirm the pipeline integrity.

<sup>4</sup> 'Nord Stream 2 to start work on filling pipeline on Friday', *Reuters*, 10 June 2021.

<sup>5</sup> Nord Stream 2, ESPOO Report, April 2017. 'Dry' pre-commissioning technique has already been used by Gazprom in respect of the TurkStream pipelines.

**Figure 1: Nord Stream 1 and Nord Stream 2 pipelines**



Source: OIES

There were signs that dry pre-commissioning may have been ongoing over the summer, as suggested by (survey type) vessel activity along the NS2 route, registered by the Marine Traffic website.<sup>6</sup> However, there had been little clarity on its progress until 4 October, when NS2 AG issued a press release, stating that the first line ‘underwent pre-commissioning activities to assure pipeline integrity’, which included ‘the internal inspection by special devices (pipeline inspection gauges), as well as external visual and instrumental surveys of the pipeline’.<sup>7</sup> NS2 AG has also announced that as of 4 October the gas-in procedure (filling the pipeline with gas) for the first line has also started. It has also stated that the pipeline is ‘built and independently certified according to applicable technical and industry standards to ensure reliable and safe operations’, while pre-commissioning is ongoing on the second line. On the same day, the Danish Energy Agency (DEA) confirmed that one line of NS2 ‘can be put in operation, because Nord Stream 2 AG has fulfilled relevant conditions including conditions concerning certification’.<sup>8</sup>

It is not clear which entities might be involved in the pre-commissioning and certification processes. Originally, the Norwegian company DNV GL, was envisaged to be NS2 AG’s main verification and certification contractor, with NS2 to be designed, constructed and operated according to the internationally recognised certification DNV-OS-F101, which sets the standards for offshore pipelines.<sup>9</sup> DNV GL was set to verify all phases of the project and confirm that the pipeline is successfully pre-commissioned. However, in November 2020 DNV GL was quoted as saying that it decided to suspend its ‘verification activities linked to vessels with equipment serving the Nord Stream 2 project’,<sup>10</sup> and in January 2021 – verification activities for the *pipeline* itself, adding that ‘as the situation currently stands’

<sup>6</sup> Marine Traffic website, [www.marinetraffic.com](http://www.marinetraffic.com)

<sup>7</sup> Nord Stream 2, ‘Gas filling of the first Nord Stream 2 string started’, press release, 4 October 2021.

<sup>8</sup> Danish Energy Agency, ‘Nord Stream 2 – pipeline B can be put into operation’, press release, 4 October 2021.

<sup>9</sup> Nord Stream 2, ESPOO Report.

<sup>10</sup> ‘Norway-based DNV GL halts Nord Stream 2 vessel work on US sanctions: spokesman’, *S&P Global Platts*, 26 November 2020.

it 'cannot issue a certificate upon the completion of the pipeline',<sup>11</sup> because of the continued threat of PEESCA sanctions. Overall, 16 other companies, specialising in quality assurance, engineering, and insurance, such as Baker Hughes, Bilfinger, AXA Insurance and others have reportedly suspended their participation in the project around the same time.<sup>12</sup> (The PEESCA envisages *inter alia* sanctioning of 'foreign persons' that have 'provided services for the testing, inspection, or certification necessary or essential for the completion or operation of the Nord Stream 2 pipeline'.) This would suggest that to finalize the pipeline's technical certification, NS2 AG would have to either contract another company that would not be deterred by the threat of US sanctions and could ensure *continuity* of the service previously provided by the original contractors, or else expect the original contractors to renew their participation in the project. The latter would require the Biden Administration issuing the sanctions waiver in respect of these companies, similarly to the sanctions waiver previously issued in respect of NS2 AG itself. Such waiver, although possible, does not appear very likely given an ongoing bipartisan opposition to NS2 in the US Congress; the House of Representatives has recently passed an amendment to the National Defense Authorization Act (NDAA) 2022 threatening to revoke the Administration's right to issue waivers.<sup>13</sup> While it is not entirely clear which entities have ultimately carried out the pre-commissioning and certification services, the NS2 AG statement confirming the pipeline has been 'independently certified' and the DEA statement confirming fulfilment of all 'conditions concerning certification' suggests the technical certification challenge has been successfully resolved.

It is now for the German regional authorities of Mecklenburg-Vorpommern – the region where the NS2 pipeline arrives ashore in Germany – to accept the technical certificates, which have already been issued and submitted,<sup>14</sup> thus allowing the pipeline to start flowing gas.<sup>15</sup> Under the German Federal Mining Act, two permits are needed for pipeline construction and operation in the Exclusive Economic Zone (EEZ) – a permit by the Stralsund Mining Authority in Mecklenburg-Vorpommern (issued January 2018) and a permit from the Federal Maritime and Hydrographic Authority (BSH) in Hamburg (issued March 2018). Under the Decree on High-pressure Natural Gas Pipelines, the Stralsund Authority is also responsible for the technical examination and acceptance of the project prior to the start of construction, prior to the start of commissioning and after commissioning. Gazprom's statement of 19 August saying it could supply 5.6 bcm of gas through NS2 before the end of 2021,<sup>16</sup> appears to suggest that it is confident that, from a technical point of view, at least one line of NS2 might be ready to operate. The NS2 AG statement of 18 October saying the gas-in procedure on the first line has been completed and sufficient pressure has been reached 'to start gas transportation in the future' suggests this confidence was justified.<sup>17</sup>

## 2.2 Regulatory certification

In November 2017, the EC initiated a revision of the Gas Directive to make it applicable to pipelines from third (i.e. non-EU) countries, aiming particularly at NS2.<sup>18</sup> The amended Directive, which entered into force on 23 May 2019, requires compliance of the operator of the German section of NS2 with unbundling, third-party access (TPA) and tariff (methodology) transparency provisions. The aim of the *regulatory* certification is to confirm the pipeline operator's compliance with the Directive's unbundling requirements (if certification is requested by an EU operator, Art. 10) and, additionally (if certification is requested by 'a transmission system owner or a transmission system operator which is controlled by a person or persons from a third country or third countries', Art. 11), that granting certification 'will not put at risk the security of energy supply' of the Member State and the EU. The national regulator is also

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<sup>11</sup> 'Norway-based DNV GL halts Nord Stream 2 certification work on US sanctions', *S&P Global Platts*, 4 January 2021.

<sup>12</sup> Many other engineering and insurance companies have also left, 'Exclusive: Baker Hughes, AXA Group, 16 others quit Nord Stream 2 pipeline – US', *Reuters*, 24 February 2021.

<sup>13</sup> U.S. lawmakers make last ditch effort to reverse Biden's waiver of Nord Stream 2 sanctions, RFERL, 15 September 2021.

<sup>14</sup> 'Gas injected into NS2, Danish energy regulator says pipeline can start operations', *Gas Matters*, 4 October 2021.

<sup>15</sup> 'Nord Stream 2 eyes operations before year-end as pipelaying completed', *S&P Global Platts*, 7 September 2021.

<sup>16</sup> 'Gazprom could supply 5.6 bcm of gas by Nord Stream 2 pipeline in 2021', *Interfax*, 19 August 2021.

<sup>17</sup> Nord Stream 2, 'The first Nord Stream 2 string filled with technical gas', press release, 18 October 2021.

<sup>18</sup> *Gas Directive*.

obliged to ensure that in addition to the unbundling requirement, the operator complies with TPA and tariff (methodology) transparency requirements, although this is not part of certification process *per se*.

The national regulator is obliged to open a certification procedure and has the right to do so upon notification by the TSO, upon a reasoned request from the EC, or on its own initiative. On 11 June NS2 AG submitted its application for certification at the request of the German regulator, BNetzA. On 13 September BNetzA announced that NS2 AG 'has now submitted all necessary documents for inspection' thus setting off a 4-month period, effective from 8 September, within which BNetzA is obliged to produce a draft certification decision.<sup>19</sup> It is understood that it is within this 4-month period that the German Federal Ministry for Economic Affairs and Energy is obliged to provide its assessment of the potential impact of certification on the security of energy supply, to be accounted for in the BNetzA's draft decision.<sup>20</sup> On 15 October the Ministry announced that it had consulted neighbouring countries about the impact of NS2 certification on gas supply security and was expecting their replies within a week or so.<sup>21</sup> Nine member states – Estonia, Italy, Latvia, Lithuania, Austria, Poland, Slovakia, the Czech Republic and Hungary participated in the consultation. Poland, the most vocal opponent of NS2, was represented by the Polish state-owned gas company, PGNiG, and its German subsidiary, PGNiG Supply & Trading. In their submission, dated 20 October, both have argued that the certification of NS2 under the Independent Transmission Operator (ITO) model will increase threats to the security of gas supplies to the EU and its member states, including Poland.<sup>22</sup> However, this argument was not accepted by the Ministry. On 25 October, having received and studied all the replies, the Ministry announced that NS2 certification would not endanger the security of gas supply to Germany and the EU.<sup>23</sup>

The Ministry's positive assessment is necessary but not a sufficient condition for NS2 certification, as BNetzA's confirmation of the NS2 operator's compliance with the amended Gas Directive's unbundling requirements is also needed. BNetzA's draft decision (which can be explicit or tacit) must then be notified 'without delay' to the EC, which is obliged to issue an opinion on it within 2 months (extendable by a further 2 months if the EC decides to seek the views of the Agency for Cooperation of European Regulators (ACER), Germany, or the interested parties<sup>24</sup>), following which BNetzA has 2 more months for issuing a final certification decision. The certification process can thus take up to 10 months, with the final certification decision made in July 2022 at the latest.<sup>25</sup> Although BNetzA is obliged to take 'the utmost account' of the EC opinion on its draft certification decision, neither the EC nor any third party have a veto power over BNetzA's final certification decision. Notably, the certification decision only becomes effective once the whole procedure has been concluded. It is possible that, following the EU Court of Justice (CJEU) OPAL exemption judgement of July 2021, the certification process might also include an energy solidarity assessment.<sup>26</sup>

### Could gas flows start before certification is completed?

If the NS2 operator were to start flowing gas while the certification process is ongoing and absent of effective certification decision, this would constitute an administrative offence and the operator would be liable to incur fines.<sup>27</sup> Therefore, under normal circumstances, the NS2 AG would start flowing gas

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<sup>19</sup> BNetzA (2021a).

<sup>20</sup> It is worth noting that as part of its agreement with the US, concluded in July 2021, Germany underscored its commitment to abide by both 'the letter and the spirit' of the Third Energy Package with respect to Nord Stream 2 under German jurisdiction to ensure unbundling and third-party access, including 'an assessment of any risks posed by certification of the project operator to the security of energy supply of the EU'. See 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.

<sup>21</sup> 'Germany expects Nord Stream 2 input from European neighbours within weeks', *Reuters*, 15 October 2021.

<sup>22</sup> PGNiG (2021a).

<sup>23</sup> BMWi (2021). According to PGNiG, 8 December was the deadline for the Ministry to deliver its assessment, see PGNiG (2021a).

<sup>24</sup> It is understood that to date EC has never sought ACER's view as part of certification process.

<sup>25</sup> Certification procedure and its timings are stipulated in Art. 10 and 11 of the *Amended Gas Directive* and in Art. 3 of the *Gas Regulation*.

<sup>26</sup> The CJEU has ruled that the principle of energy solidarity is justiciable and must be assessed *inter alia* as part of the exemption decision making process. See Talus (2021) and Yafimava (2021).

<sup>27</sup> 'Nord Stream 2 eyes operations before year-end as pipelaying completed', *Platts*, 7 September 2021.

only *after* the certification process has been completed and certification has been granted (i.e. in summer 2022 at the latest, if both BNetzA and the EC were to take the maximum period of time allowed by the *acquis* i.e. 10 months). However, from the gas supply perspective the winter of 2021/22 looks anything but normal, and it is conceivable that BNetzA could indicate to the NS2 operator 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 supply shortage in Europe.<sup>28</sup> This is especially pertinent as a relatively small amount of additional firm capacity has been offered for booking on other export corridors towards Europe.<sup>29</sup>

Alternatively, certification could be ‘fast-tracked’ with either or both BNetzA and the EC taking less time for assessment than the maximum period allowed by the *acquis*, followed by a swift start of gas flows. This scenario, while possible, could make BNetzA and the EC vulnerable to criticism of the certification process being insufficiently thorough, particularly from those countries that have been highly critical of NS2 and its certification, most vocally Poland. However, some of this criticism about timing could be deflected by the fact that NS2 AG had first submitted its certification request to BNetzA on 11 June, which suggests that BNetzA may have started reviewing the documents submitted as part of the request before the last required document was received on 8 September, when the official start of the 4-month certification procedure was triggered. This suggests that BNetzA may need less time than the 4 months allowed by the *acquis* and issue its draft certification decision ahead of its early January deadline.

Under either of these two scenarios, NS2 could start flowing gas in winter 2021-22, and potentially even before the end of 2021. Another scenario, under which no gas would flow via NS2 until summer 2022 when the certification procedure is completed at the end of the 10-month period, is also possible. Should the latter materialise it would mean that Russian pipeline gas exports to Europe would be limited by the amount of firm capacity booked (or available for booking) on the existing export routes for as long as NS2 remains uncertified, thus also limiting Russia’s potential contribution towards alleviating any European gas supply crunch over the 2021-22 winter period and beyond.

On 4 October – the day when NS2 AG announced it had started filling the pipeline with gas – BNetzA also announced that, since it cannot be ruled out that NS2 AG will put the pipeline into operation in the near future, it wrote to NS2 AG, requesting it to provide information ‘without delay’ and, ‘if applicable’, to submit evidence that all regulatory requirements for the operation are met, in particular with regard to non-discriminatory network access. At the same time, BNetzA is also reserving ‘the right to launch supervisory or abuse proceedings’ immediately, should ‘doubts about its compliance’ not be dispelled.<sup>30</sup> Just over two weeks later, on 22 October, BNetzA said it is ‘in conversations’ with NS2 AG and expects it will provide assurances of meeting the regulator’s requirements.<sup>31</sup> Whether these statements are an indication that flows could start prior to the completion of the certification process - if NS2 AG were to provide requested information - is an open question and one that may still be answered in the affirmative.

### Could certification be conditional on continued post-2024 Ukraine transit?

The German government’s position in respect of NS2 has been that some gas transit across Ukraine must be preserved if NS2 is to go ahead. Notably, in April 2018 Chancellor Angela Merkel stated that ‘a Nord Stream 2 project is not possible without clarity on the future transit role of Ukraine’.<sup>32</sup> This clarity was achieved in December 2019 through a trilateral Russia-Ukraine-EU transit agreement, which guaranteed preservation of – or payment for – transit across Ukraine during 2020-24 and envisaged a possibility of extension up to 2034. Germany has played an important role in helping to negotiate this agreement. In July 2021, as part of its joint agreement with the US – which was concluded after the US had issued a sanctions waiver for NS2 – Germany committed to ‘utilize all available leverage to facilitate

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<sup>28</sup> Fulwood and Sharples (2021).

<sup>29</sup> Approximately 56.4 mcm/day and 9.8 mcm/day of firm capacity offered have not been booked in monthly auctions for November via Poland and Ukraine respectively.

<sup>30</sup> ‘Gas injected into NS2, Danish energy regulator says pipeline can start operations’, *Gas Matters*, 4 October 2021, ‘EXCLUSIVE-Germany seeks competition assurances over Nord Stream 2 gas link’, *Reuters*, 5 October 2021.

<sup>31</sup> ‘German regulator in touch with Nord Stream 2 over certification issues’, *Reuters*, 22 October 2021.

<sup>32</sup> ‘Merkel says Nord Stream 2 not possible without clarity for Ukraine’, *Reuters*, 10 April 2018.

an extension of up to 10 years to the Ukraine's gas transit agreement with Russia'.<sup>33</sup> The new German government – the coalition talks for which are under way and expected to be finalized by the end of November – is likely to take the same position.<sup>34</sup> Olaf Scholz, the candidate for Chancellor of the SPD – the party leading the coalition talks with two other parties, Greens and FDP – who is expected to become Chancellor in December stated that 'Ukraine should remain a transit country'.<sup>35</sup> The presence of FDP and especially the Greens in the coalition government – both of which have previously demonstrated a lukewarm attitude towards NS2 – makes it all the more likely that Ukraine's post-2024 transit role will be addressed.<sup>36</sup> Notably, in September 2021 the US energy security envoy, Amos Hochstein, stated there is 'a breathing room' until the end of 2024 to ensure that Ukraine keeps its transit role.<sup>37</sup>

Therefore, it is possible that Germany may attempt to condition NS2 certification on continued transit across Ukraine after 2024, when the existing transit agreement expires. Should this attempt fail, it could seriously complicate, if not derail, certification. For this attempt to be successful, Russia would have to see tangible benefits for itself from continued post-2024 transit through Ukraine, such as more flexible transportation conditions and a lower transit tariff,<sup>38</sup> otherwise it may well perceive it as an attempt to obtain the same concession twice. The parties' ability and willingness to meet each other half-way would certainly make certification more straightforward.

### Certification model: ITO or OU?

Nord Stream AG has applied to be certified as an Independent Transmission Operator (ITO)<sup>39</sup> – one of the three unbundling models allowed under the amended Gas Directive. The ITO model allows a pipeline operator to remain a part of a vertically integrated undertaking (VIU), provided the applicable safeguards are in place, ensuring the operator's inability – or lack of incentive – to discriminate against third parties' gas in favour of that of the VIU as far as access to the pipeline is concerned.<sup>40</sup> The Directive stipulates that '[a]s regards the part of the transmission system' connecting Germany with Russia between the border of Germany and the first connection point with the German network, where on the date of its entry into force (23 May 2019) the transmission system belongs to a VIU, Germany is allowed not to implement the ownership unbundling (OU) model while it is obliged to implement one of the other models such as the ITO, the Independent System Operator (ISO), or any other form of unbundling which guarantees more effective independence of the operator than the ITO.<sup>41</sup> After the Polish competition authority had raised objections to Gazprom's intention of selling 50% of shares in NS2 AG to 5 European companies (WintershallDea, Uniper, OMV, Shell, and Engie) in 2016,<sup>42</sup> NS2 AG remained a wholly owned subsidiary of Gazprom. In 2020, the NS2 AG shares were transferred to LLC

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<sup>33</sup> 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.

<sup>34</sup> 'German parties aim to make Scholz chancellor by early December', *Reuters*, 21 October 2021.

<sup>35</sup> 'Ukraine should remain transit gas supplier – German politician', *TASS*, 27 September 2021.

<sup>36</sup> For the Greens' and FDP's positions on NS2, see 'Green party leader criticises Nord Stream 2 deal for undermining Ukraine's security', *Clean Energy Wire*, 23 July 2021, 'Nord Stream 2 must be in line with European regulation to receive permit – Baerbock', *Clean Energy Wire*, 20 October 2021, 'Cross-party German alliance opposes Nord Stream 2 pipeline', *Clean Energy Wire*, 21 February 2018.

<sup>37</sup> 'U.S. reassures allies over Nord Stream 2 but says it's 'a reality'', *Reuters*, 11 September 2021.

<sup>38</sup> In October 2021, the Ukrainian president stated a 50% discount could be applied to the tariff charged for transiting Russian gas through Ukraine in respect of volumes above 40 bcm, stipulated by the existing transit agreement. For this discount to become effective, it would have to be set by the Ukrainian regulator. However, this offer appears to have been made in respect of a time limited period of winter 2021-22 'to increase supply and ease the [European] region's energy crunch' and it is unclear whether it would remain valid afterwards, 'Ukraine offers Russia gas shipping discount to ease crisis', *Bloomberg*, 22 October 2021.

<sup>39</sup> Nord Stream 2 (2021a).

<sup>40</sup> NS2 AG has referred to its request as 'precautionary' as it does not recognise the amended Directive's applicability to NS2 and has continued a legal action for its annulment at the CJEU and the ongoing arbitration proceedings under Energy Charter Treaty (ECT).

<sup>41</sup> For a detailed analysis of how the Directive's unbundling requirements could be met by NS2 AG by implementing one of these models, see Yafimava (2019).

<sup>42</sup> 'Nord Stream 2 partners withdraw amid Poland pressure', *Financial Times*, 12 August 2016.

Gazprom International Projects (a 100% transportation subsidiary of Gazprom), which also owns the Nord Stream 1 (NS1) and Blue Stream pipelines. A transfer of NS2 AG shares to LLC Gazprom International Projects can be interpreted as a step towards fulfilling the Directive's unbundling requirements under the ITO model. As on 23 May 2019 the shares in NS2 AG – and therefore the (then under construction) NS2 pipeline itself – belonged to a VIU, NS2 AG meets the Directive's ITO eligibility requirement.

On 2 September 2021, the CJEU delivered a judgement on the case brought by the EC against Germany on 16 November 2018, that the latter has incorrectly transposed the Gas Directive into its national law by defining a VIU in a way that 'encompasses only undertakings which operate in the European Union'. The CJEU has agreed with the Advocate General's opinion that 'in a situation where natural gas or electricity produced outside the European Union by an undertaking is transported within the European Union through a transmission system that is owned by the same undertaking, there is an obvious risk of discriminatory conduct in the operation of that network, capable of affecting the transportation of the energy products of competitors' and concluded that 'it is necessary to adopt a broad interpretation of the concept of a 'VIU' such that the concept *may encompass, where appropriate, activities carried on outside the territory of the European Union*'.<sup>43</sup> Notably, while the EC had reluctantly agreed with BNetzA's certification of GASCADE as an ITO in 2012, it criticised BNetzA's exclusion of BASF and Gazprom from the definition of a VIU. While BNetzA has stated that it will continue to conduct the certification process in line with the Directive as currently transposed into the German law until it is amended,<sup>44</sup> it is likely that BNetzA will take the CJEU judgement into account while preparing its NS2 certification decision. Specifically, BNetzA might certify NS2 AG as an ITO, subject to it introducing rigorous safeguards against any potential conflict of interest between transmission and production/supply activities inside and outside the EU having a negative impact in the EU.

While this author believes that the NS2 operator is eligible for the ITO model, there is no single view on this matter. The EC, which will have to provide an opinion on BNetzA's draft certification decision, has reportedly said that the OU model, under which the pipeline would have to be sold off, is the only unbundling model for which NS2 AG could be eligible.<sup>45</sup> Polish state-owned companies PGNiG and PGNiG Supply & Trading, which in August 2021 applied to, and in September 2021 were accepted by, BNetzA to participate in the NS2 certification procedure, both have alleged that NS2 AG is not eligible for the ITO model and argued against its certification under this model.<sup>46</sup>

However, the German regional court, OLG Dusseldorf, which on 25 August rejected the NS2 AG appeal against BNetzA's earlier decision not to grant it a derogation from the Directive's requirements, appears to have indicated that NS2 is eligible for the ITO model.<sup>47</sup>

Furthermore, the OU model is unlikely to be politically acceptable to Russia and could expose it to US sanctions. In September 2021, the House of Representatives of the US Congress passed an amendment to the NDAA 2022, which stipulated an imposition of sanctions 'with respect on any entity responsible for planning, construction, or *operation* of the Nord Stream 2 pipeline or a successor entity', while also removing the Biden Administration's right, stipulated by PEESCA, to issue a sanctions waiver. Certification of NS2 AG as an ITO, allowing the preservation of the NS2 pipeline ownership within Gazprom, would provide an iron-clad guarantee against US sanctions, should this amendment ever enter into force.

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<sup>43</sup> Judgment of the Court, European Commission vs Federal Republic of Germany, C-718/18, 2 September 2021.

<sup>44</sup> BNetzA (2021b).

<sup>45</sup> 'Gerichte können Nord Stream 2 wohl nicht mehr stoppen', *Frankfurter Allgemeine Zeitung*, 26 August 2021.

<sup>46</sup> 'Poland's PGNiG approved to take part in Nord Stream 2 certification process', *S&P Global Platts*, 23 September 2021; PGNiG (2021b); PGNiG (2021c).

<sup>47</sup> OLG Dusseldorf, 'Nord Stream 2 against Federal Network Agency: complaint rejected', press release, 25 August 2021; OLG Dusseldorf judgement on Nord Stream 2 derogation (in German).

## Conclusion

As this Insight goes to press, NS2 is on the verge of flowing gas to Europe, waiting for regulatory clearance from Germany. When will the flows start? As the obstacles in respect of technical certification of NS2 appear to have been overcome, NS2 could start flowing gas to Europe in winter 2021-22, and potentially even before the end of 2021, under two scenarios (the first of which appears to be more realistic than the second):

- on an *ad hoc* and time-limited basis (which could subsequently become permanent) to alleviate the European gas supply crunch, if cleared by BNetzA, while NS2 AG regulatory certification is pending, or
- on a permanent basis with NS2 AG regulatory certification being ‘fast-tracked’ by BNetzA, the German government and the EC.

The question of guaranteeing continued post-2024 Ukraine transit is likely to become an important factor, influencing whether either of these two scenarios will materialize. Failure to agree on it could significantly complicate, if not derail certification.

There is also a scenario in which flows do not begin until after winter 2021-22 and potentially until the summer of 2022 if any unresolved questions appear around technical certification in 2021 and/or BNetzA, the German government and the EC use the entire time available to them to conduct regulatory certification, indicating that any pre-certification flows would be penalized. Under this scenario Russia’s pipeline gas exports to Europe (excluding Turkey) would be limited by the amount of *firm* capacity booked (or available for booking) on the existing export routes *for as long as NS2 capacity remains unavailable* – that is ~170-175 bcma (including up to 45.5 bcm via Ukraine<sup>48</sup>) – thus significantly limiting its contribution towards alleviating any European gas supply crunch in winter 2021/22 and European gas supply in the mid- to long-term.

Without assigning probabilities to any of these scenarios, there is still hope – perhaps even an expectation – that either of the first two scenarios will materialise, although the third scenario cannot be ruled out.

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<sup>48</sup> 40 bcma booked under 2020-24 Ukraine transit agreement and ~5.5 bcma offered as additional firm capacity.



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