

The Federal Network Agency suspends the process of certifying Nord Stream 2

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On 16 November, the German Federal Network Agency (*Bundesnetzagentur*, BNetzA) announced it was suspending the process of certifying Nord Stream 2 AG (NS2AG) as an independent transmission system operator. In its statement the regulator says that after analysing the documentation, it concluded that certification is only possible for a company operating under German law. As stated in the announcement, NS2AG, which is registered in Switzerland, has decided to establish a subsidiary in Germany which will only own and operate that part of the gas pipeline (around 5% of its total length) located in German territorial waters.

The process of certification will remain in suspension until NS2AG provides the German regulator with documents certifying the transfer to a daughter company (as a new applicant) of “main assets and human resources”, which will enable the application to resume. The newly appointed entity will have to meet the requirements for transmission system operators in the ITO (independent transmission operator) model, wherein the operator may remain within the structure of a vertically integrated company. These requirements are included in the German Energy Industry Act (*Energiewirtschaftsgesetz*, EnWG), and derive from the EU’s regulations on unbundling.

Once these requirements are met, the certification process can be resumed, and the remainder of the four-month period provided for by the EnWG will be used to process the application. As the procedure began on 8 September, there will be less than two months before the BNetzA officially reissues its draft decision. At that time, the European Commission will have another two months to issue an opinion, which the German regulator should then take into account “to the highest degree” when reaching its final decision.

Commentary

- The BNetzA’s suspension of the certification process is not a political decision, but was taken for legal considerations. According to unofficial reports, the German regulator had informed the applicant for a long time that any company wishing to be authorised to act as an operator in the ITO model must be registered in Germany. NS2AG, in turn, apparently insisted on trying to obtain certification in its current legal form.
- NS2AG’s establishment of a daughter company, which will serve as the owner and operator of that part of the gas pipeline located in German territorial waters (and thus within the EU), is an attempt to take advantage of some of the weaknesses of the

amended gas directive in order to limit the negative consequences of its provisions from Gazprom's perspective. The narrow territorial scope adopted in the directive (up to the borders of the territorial waters of the state where the cross-border pipeline ends) has motivated the Russian side to try and artificially divide the pipeline, only a small part of which (around 5% of its total length) will be subject to EU law. Adopting such a plan would leave the rest of the infrastructure outside EU regulations, giving Gazprom freedom to devise the rules for its operation.

- However, the German-registered company which owns and operates the pipeline's German section would have to meet a number of requirements under EU law. This applies principally to the unbundling requirement, the mechanisms for setting transmission tariffs, and the TPA (third party access) principle. According to the EnWG, the new subsidiary will also have to meet a number of criteria regarding the independence of the transmission system's operator from the vertically integrated enterprise (property, personnel, decision-making). The question remains as to whether the company will in fact have the required degree of independence. Moreover, the BNetzA communiqué makes no reference to the question of the date of the pipeline's completion, or when the company which should operate the German part of the route will be established. Both the EU gas directive and the EnWG provisions allow the issuance of an operator's certificate in the ITO model if the system belonged to the operator as of 23 May 2019.
- The BNetzA's decision has been met with mixed reactions in Germany. Representatives of the Green Party and other environmental organisations, who have opposed Nord Stream 2 for years and have called for the letter of the law to be strictly applied to the pipeline, as well as FDP politicians, responded positively to it. Understanding of the regulator's decision was also expressed by the Federal Ministry for Economic Affairs and Energy (BMWi), which considered the BNetzA's arguments to be correct. At the same time, the BMWi emphasised that the opinion issued on 26 October concerning NS2's impact on the security of gas supplies for Germany and the EU remains valid. A more cautious opinion was expressed by Alexander Dobrindt (CSU), who maintained support for the rapid launch of the pipeline, and emphasised its importance for the security of gas supplies.
- Russia's reactions to the BNetzA's decision have so far been restrained and moderate. In its statement NS2AG (100% controlled by Gazprom) declined to comment on the suspension of the certification process. The Kremlin's spokesman Dmitri Peskov said that the BNetzA's decision was not politically motivated, and that NS2AG was ready to meet all the requirements set by the German regulator. He also emphasised that the date for launching Nord Stream 2 depends entirely on the entities involved in the certification process, in which Russia cannot interfere.
- There are many indications that the German regulator's conclusion will delay the final decision in this matter, and by extension the date of the pipeline's launch. Thus, Russian expectations that the current gas crisis in the EU (in which Russia itself is playing a significant part) will accelerate the completion of the certification process, as well as the launch of the pipeline during the current heating season, are completely unrealistic.

- Although the ongoing certification process indicates that Russia is ready to submit (to a limited extent) to EU restrictions, the Russian Federation has not in fact abandoned its efforts to call the amended gas directive into question. Firstly, it is still trying to challenge before the German courts the decision which the BNetzA issued in May 2020, refusing to grant a derogation from selected provisions of the directive for the Nord Stream 2 gas pipeline. Secondly, it is trying to get the amendment repealed in the proceedings which the Court of Justice of the EU initiated. Thirdly, it has initiated an arbitration proceeding against the European Union, the object of which is to gain recognition that the amendments to the directive do not comply with the EU's international obligations, in particular those resulting from the Energy Charter Treaty.