Does the Utilities Sector Directive apply on offshore wind projects in the Exclusive Economic Zone of Norway in light of Article 126 of the EEA Agreement?

The geographical scope of the Utilities Directive (2014/25/EU) using the field «Sørlige Nordsjø II» as a case study

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Abbreviations

UNCLOS – United Nations Convention on the Law of the Sea

EEA – European Economic Area

EFTA – European Free Trade Association

ESA – EFTA Surveillance Authority

EEZ – Exclusive Economic Zone

C.S – Continental Shelf

UNCLOS – United Nations Convention on the Law of the Sea

SCA – Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of justice

TFEU Treaty on the Functioning of the European Union

TEU Treaty on the European Union

ECSC – Treaty on Establishment of the European cooperation on Coal and Steel.

EC – European Communities

EEC – Treaty Establishing the European Economic Communities (Treaty of Rome)

1 Introduction

1.1 Background

The thesis' objective is to determine if Directive 2014/25/EU[1] applies to offshore energy generation in the Norwegian Exclusive Economic Zone, a topic of clear importance, more so in light of the on-going efforts to increase offshore wind activity in Norway.

Offshore electricity generation, using floating and bottom-fixed wind turbines, is a rapidly maturing technology that is expected to play an integral role in future clean energy generation systems in Europe[2]. The technology has slowly but steadily been rolled out in some countries, and many more coastal countries along the North Sea are planning on schemes in order to make use of the technology in their energy mix in the coming years.[3]

Its importance is highlighted in the fall of 2020 by the EU Commission that has estimated that a total of 30% of the future electricity demand in the EU will be supplied by offshore wind by 2050,[4] making the technology an integral part of their strategy to make EU carbon neutral by 2050.[5]

Existing projects place the turbines in a water depth around 95-120 meters.[6] As the technology matures, future projects are more suited to be placed in larger depths at a longer distance from the shore. This is due to better wind pressure leading to better generation efficiency.[7]

Norway, with its long coastal line along the North and Norwegian Sea, has traditionally had a great economic interest in utilizing their coastal areas for its value creation.[8] Now the Kingdom of Norway is evaluating allowing for licenses to deploy offshore wind parks.[9]

[1] Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors
[2] International Energy Association (2019), p 12.
[3] Winje et al. (2019), p. 7
[4] European Commission (2020)
[5] Ibid
[6] Equinor (n.d)
[7] Moore et al. (2018)
[8] Solberg (2018)
[9] Public Consultation Paper regarding opening for Renewable Sea Energy (2019)

The value creating effect for Norwegian industry is estimated to be 117 Billion NOK over 30 years, creating 124.800 jobs in the process.[10] The development has been accelerated with the latest turn of events seeing the EFTA Surveillance Authority (ESA) accept State Aid to the floating offshore wind farm of Hywind-Tampen. To this day it is counted as the single highest individual aid approved by ESA.[11]

Technological advancements and increased need for clean energy supply also opens up for projects that are located further off from the shore of the coastal state. The Norwegian Ministry of Oil and Gas published its regulation on Sea energy production on June 15th, 2020, which will have an entry into force from January 1 2021.[12] Its main scope is to grant economic entities special or exclusive rights in order to develop offshore wind energy production for commercial use in the coastal areas of Norway, some of which are located in the Exclusive Economic Zone.[13]

1.2 Actuality and scope

Due to an ongoing divergence between the Norwegian Government and ESA on the applicability of EEA law in the Exclusive Economic Zone and Continental Shelf[14], the opening of these new areas creates legal implications that needs to be addressed before the award of contracts for constructing and operating offshore windfarms take place. This serves as the primary reason for why this thesis assesses the applicability of the Utilities Directive in the EEZ.

To this date, the Ministry of Oil and gas has not taken any stance on whether the award of the contracts following the procedure described in the royal decree falls within the scope of *inter alia* the article 7 of the Electricity Directive.[15] Moreover, upon personal e-mail correspondence with the Ministry it has also come to my attention that the Ministry has not taken a stance on whether the activity of procuring goods and services related to constructing and operating floating offshore wind parks in the EEZ will be subject to the regulation by the

[10] Winje et al. (2019), p. 4
[11] EFTA Surveillance Authority (2020)
[12] Regulation 12. June 2020 no. 1192 Regulation on Sea Energy (entry into force 01.01.20)
[13] See Act 4. June 2010 no. 21 Act on Renewable Ocean Energy Production (havenergilova) § 2-2 together with Regulation 12. June 2020 no. 1192 Regulation on Sea Energy § 1 lit 2
[14] NOU 2012: 2 Utenfor og innenfor: Norges avtaler med EU, p. 57
[15] Anchustegui, Østrem (2020)

Utilities Directive.[16] The Directive has been transposed into Norwegian Law in the Royal Decree for Procurement Rules in the Utilities Sector (*forsyningsforskriften*).[17] It is therefore in the best interest of Contracting Entities performing the procurement in the EEZ that the scope of the Utilities Directive is clarified in order to prevent unnecessary lawsuits and claims of damages by competitors.

This thesis' aim is to determine if Directive 2014/25/EU applies to procurement relating to offshore energy generation in the Norwegian Exclusive Economic Zone. I will use the field Sørlige Nordsjø II as a case study due to its placement in the Norwegian Exclusive Economic Zone.

1.3 Methodological remarks

Due to the scope and nature of this thesis, a few remarks about methodology are of importance for both public international law, EEA law, EU law and Norwegian national law. That said, this thesis will not concentrate on high theory on the interpretation of the EEA agreement[18]. Thus, there will be no complete review of the correct method for interpreting provisions laid down in the main section of the agreement, opposed to the amended secondary legislation.

Instead, I will review how article 126.1 should be interpreted in light of the Vienna Convention on the law of Treaties articles 31-33. One thing to note is that neither Norway, nor the EU are ratifying parties to the VCLT.[19] Moreover, the EEA Agreement is, according to the Convention itself, an agreement that falls outside the scope of the Convention.[20]

Using VCLT as the interpretational framework rests partly on these provisions being regarded as a codification of Customary International Law, which are binding even though the parties themselves are not, or cannot be, parties to the convention.[21] Another factor is that the Government of Norway has rapidity submitted in front of both the EFTA Court and national courts that the provisions of the main section of the EEA agreement must be interpreted in

[16] Olje- og Energidepartementet (2020) (email)
[17] Regulation 12. August 2016 no. 975 on Procurement rules in the Utilities Sector
[18] See among others Fredriksen, Mathisen (2018), Fredriksen (2010), Fredriksen (2009)
[19] See Vienna Convention on the Law of Treaties, Vienna 23 May 1969 (entered into force 27 January 1980) 1155 UNTS 331 (VCLT); EU cannot become a Party due to the Treaty only applying to treaties between States cf. art. 1.
[20] Ibid art. 3
[21] See Amrei (2017), p. 4; Dörr (2011), p. 525

accordance with VCLT art. 31-33.[22] That said, a justification on why the VCLT is suitable as the interpretational framework can be found in section 5.1.

Case law will in this thesis be used as relevant background to understand why article 126.1 is problematic for the application of the Utilities Directive in the Norwegian Exclusive Economic Zone. Other than that, VCLT provides room for using case law as a mean to identify a possible collective understanding among the parties of the Treaty. Relevant case law will be visited in section 5.5.4 covering subsequent practices, section 5.6 on the object and purpose of the EEA agreement, as well as section 5.7 covering *inter alia* interpretational loyalty in light of the specific characteristics of the EEA agreement.

The Treaty of Rome is used instead of the following treaties as relevant context for interpreting article 126.1 in the EEA agreement. This is mainly due to the Treaty of Rome served as an inspiration for the provisions in the EEA Agreement.[23] Another factor is that the Treaty is explicitly mentioned in article 126.1 of the EEA Agreement. Lastly, the following treaties expanded the strategic cooperation within the Member States.[24] Thus, the Treaty of Rome encapsulates the original degree of cooperation which served as an inspiration for the provisions in the EEA agreement. I will, however, use the corresponding English translations in the Maastricht Treaty and Treaty of Lisbon in order to simplify the analysis. In section 5.5.1 I will further expand upon my justification for using the Treaty of Rome is relevant context for interpreting article 126.1 in the EEA Agreement.

1.4 Structure

This thesis is divided into three main parts. The first part discusses the material and geographical scope of the Utilities Directive and seeks to clarify whether the Directive itself defines its geographical scope (section 3.1-3.3). The second part explains the background for why article 126.1 constitutes a problem in relation to the application of the Utilities Directive in the Norwegian EEZ (section 4.1). The interpretation of article 126.1 in light of the rules provided by VCLT art. 31-33 will be conducted in section 5

[22] See Report for Hearing in E-12/16-55 *Marine Harvest ASA v. EFTA Surveillance Authority*, para 57; Case E-8/19 *Scanteam v. the Norwegian Government*, para 72
[23] See the Basic Features of the EEA Agreement (n.d), section 12
[24] Fredriksen (2009), p. 536

In the third part of the thesis, I will discuss the importance of article 126.1 in light of the advisory opinion of the EFTA Court in the *Scanteam v. The Norwegian Government* Case[25] (section 6) and form a conclusion (section 7).

1.5 Scope and limitations

This thesis aims to clarify the application of EEA procurement law to offshore wind activities in the EEZ. However, exploring the full application of these rules, particularly in light of the rules regarding activities sufficiently exposed to competition – articles 34 and 35 of the Utilities Directive – is outside of the scope of this study, as this itself constitutes an area ripe for future research. Nevertheless, as competition grows in this sector, one cannot exclude the possibility of offshore wind development being exempted. This falls outside the scope of this thesis.

As for my assessment of the Utilities Directive, I will not assess the notion of "economic entity" and connected case law from the CJEU. The criterion of "economic entity" in article 1 of the Directive is thereby assumed to be fulfilled for the discussion on whether procurement covered by article 9 of the Directive applies in the Norwegian EEZ.

This thesis will only cover the scope of existing EEA legislation in relation to article 126.1. The issue of EEA relevance will not be covered as it is a discussion ripe for future research on its own. I will, however, make some remarks where the discussion gives a contribution for understanding the geographical scope of article 126.1

Moreover, there will be no complete assessment on the EEZ, and Continental Shelf as laid down by the UNCLOS as it itself is a subject that is increasingly ripe for future discussions in regard to offshore activities. I will, however, review some of the provisions that are connected to offshore wind.

Lastly, this is a topic ripe for discussion due to the fact that there is scant literature on the application of EEA law in the Economic Exclusive Zone. To date, there are a few articles written by *Arnesen* and *Fredriksen* that discuss this issue to some extent. A more detailed

[25] Case E-8/19 *Scanteam*

assessment was written by *Trosdahl* in a thesis published by Scandinavian Institute of Maritime Law. Relevant literature will be cited.

2 State competence in the sea

2.1 Overview of the United Nations Convention on the Law of the Sea

Due to the location of the planned offshore wind turbines in the field of "Sørlige Nordsjø II", a short introduction to the rules governing energy activities in the EEZ in in the UNCLOS[26] is expedient and will serve as a background in the coming sections. I will first show to the characteristics of the EEZ before I explain the connection of wind turbines to the framework laid down in UNCLOS.

2.2 Rights, liberties and limitations in the EEZ and its relation to offshore wind

The EEZ is regulated in UNCLOS Part V articles 55 to 75. This maritime area starts at the end of the territorial sea and is claimable up to 200 nautical miles from the shore of the coastal State.[27]

Within the Convention part V, the coastal States have been bestowed a *package* of exhaustively listed rights, duties and freedoms in the EEZ, opposed to sovereignty with slight modifications in the territorial waters.[28]

For the activity of generating electricity from the wind in the EEZ, article 56.1 lit (a) establishes that the State has "sovereign rights" for the purpose of "exploiting" the waters that are "superjacent to the sea-bed" and uses "production of energy from [..] winds" as an example. The wind turbines themselves are not mentioned in the provisions of UNCLOS. instead, Article 56.1 lit (b) (i) provides that the State has jurisdiction over "artificial islands, installations and structures". As wind turbines are large constructions that protrude from the waters in the EEZ, it is covered by both options. However, upon reading the provision together with article 60.1 lit (b), which holds "installations and structures" together with the activities mentioned in article 56, it is reasonable to assume that the said alternative covers

[26] United Nations Convention on the Law of the Sea, Montego Bay 10 December 1982 (entered into force 16 November 1994) 1833 UNTS 171 (UNCLOS)
[27] See article 55 UNCLOS
[28] Compare UNCLOS art. 2 and 56; limitations of the territorial sea found in UNCLOS PART III

wind turbines placed in the EEZ. This is taken as a basis for offshore wind turbines being "installations and structures" within the UNCLOS framework.

3 The Utilities Directive

3.1 The connection to offshore wind

In this section I will explain the connection of offshore wind development to the Utilities Directive.[29] I will also describe some general characteristics of electricity generation that will pose as a background for understanding this subsection.

Offshore wind turbines utilize the kinetic energy of wind and transforms it into electrical energy through the use of a generator, before transporting it through cables to the grid in order to be utilized for industrial or private purposes.[30] It follows the same general principles of land-based wind turbines with the exception of having different mechanisms for either floating or being fixed to the seabed.[31] Below is an illustration of the components of a wind turbine:[32]

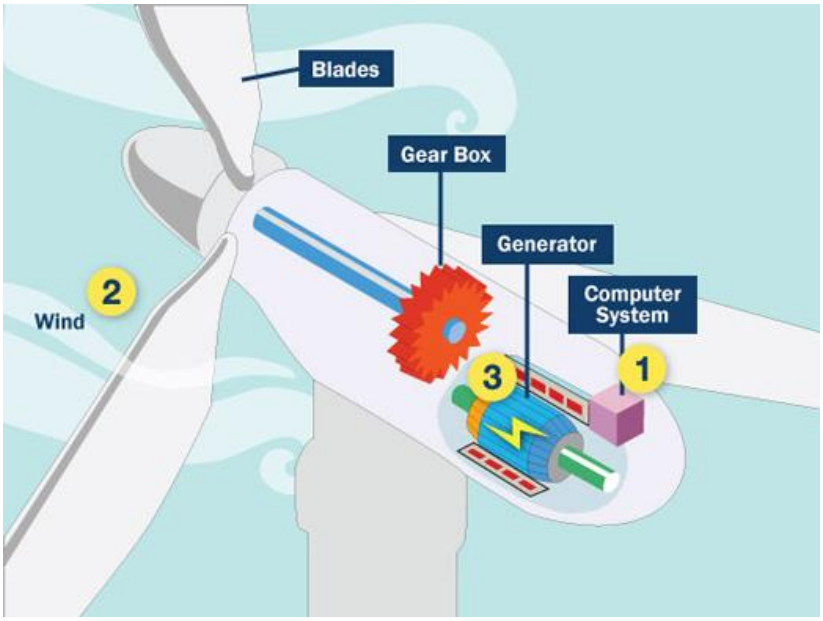

Figure 1: Wind turbine components

[29] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors
[30] TICO (n.d)
[31] Ideol (n.d)
[32] Source for picture found on TICO (n.d)

For this thesis article 9 of the Utilities Directive is a natural starting point as it regulates purchasing activities conducted by Contracting Entities and Contracting Authorities.[33] Article 9.1 lit (a) states:

> "the *provision* or *operation* of *fixed networks intended to provide a service to the public* in connection with the *production, transport or distribution* of electricity"

While the activities covered by the Article are "provision or transport", as well as "production, transport or distribution" of electricity, the network itself must be "intended to provide a service to the public". Its transposition in Norwegian law can be found in *forsyningsforskriften.*[34]

Recalling the *Hywind Tampen*-case from ESA[35], the Utilities directive did not to apply because the network was not "indented to provide a service to the public*"*. Instead, Hywind-Tampen was intended to supply oil platforms with clean energy.[36] Whereas the planned field of Sørlige Nordsjø II might be producing electricity to supply the public, potentially also attaching to interconnectors to the EU energy market.[37]

3.2 Material scope

The 2014 Utilities Directive was adopted by the EU following the Commission´s procurement impact assessment report in 2011.[38] Its main purpose is to discipline the purchasing of the Utilities sector and create an internal market that functions well.[39] In its white paper the Commission found that undertakings that operated with special or exclusive rights in the said sectors could be presumed to not having the incentives to procure efficiently.[40] This could be seen as leading to an inherent risk for the entities engaging in preferential procurement and neglection of suppliers from other Member states in competing in their local markets.[41]

For an activity to be covered by the Directive, it has to be a contract of pecuniary interest mentioned in Article 1.2 cf. the alternatives in Article 2.1, provided that the activities are

[33] Directive 2014/25/EU (Utilities) defined in arts 3 and 4
[34] See Regulation 12. August 2016 no. 975 on Procurement rules in the Utilities Sector § 1-4 (1) a) and (3)
[35] See section 1.1
[36] Equinor, Hywind Tampen (n.d)
[37] Public Consultation Paper regarding opening for Renewable Sea Energy (2019)
[38] See Directive 2014/25/EU (Utilities), recital 1
[39] Ibid, recital 2
[40] European Commission (2011), p 12
[41] Ibid

covered by articles 8-14. Moreover, the monetary value of these contracts must exceed the thresholds laid down in Articles 15-17.

In determining whether one activity is covered by the directive, article 34 of the Utilities Directive provides that all contracts "intended to enable" activities in article 8-14 are automatically covered by the Directive. The construction of offshore wind clusters are therefore contracts "intended to enable*"* provision or operation of a fixed network.[42] In addition, as shown in section 1.1, the Norwegian scheme for granting the rights to build offshore wind clusters are exclusive to the entities that receive them. Thus, the activity of constructing offshore wind turbine clusters for commercial energy generation in the field Sørlige Nordsjø II is within the material scope of the Utilities Directive article 9 and its transposition in the Norwegian legislation.[43]

3.3 Does the Directive define its geographical scope?

According to article 19.1, the Directive shall not apply to the pursuit of activities covered by the Directive located in a third country and where there is no use of a physical network or a geographical area within the Union.[44] The Norwegian transposition refers to an activity that does not involve "physical exploitation of a network or a geographical area in a state that is party to the EEA Agreement".[45]

An antithesis derived from the wording would mean that even though an activity is performed in a state not party to the EEA Agreement, the activity would be subject to the rules of the Directive as long as it involves physical exploitation of either a network or a geographical area in a state that is party to the EEA Agreement.

The Directive and its corresponding transposition do not explicitly solve the issue of whether it applies in the marine sectors such as the EEZ. Instead, it seemingly covers any activity in a third country that results in a physical exploitation of a network or a geographical area within the Union, or a State party to the EEA Agreement.

[42] See Directive 2014/25/EU (Utilitites) art. 34
[43] See Regulation 12. August 2016 no. 975 on Procurement rules in the Utilities Sector §1-4 (1) letter a)
[44] No sectorial adaptations could be found in Appendix XVI of the EEA agreement. Reference to "EEA agreement" instead of "Union" in Case E-8/19 Scanteam para 64, also see Regulation 12. August 2016 no. 975 uses "Party to the EEA agreement" in § 2-6
[45] See Regulation 12. August 2016 no. 975 on Procurement rules in the Utilities Sector § 2-6 (my translation)

For the Members of the European Union the solution is that article 52 of the TEU concludes that the Treaty applies to Member States without any further references of geographical limitations.[46] According to the Commission the scope is generally understood as all areas that are within sovereignty or jurisdiction of the Member States, including maritime areas.[47] This understanding is supported by a long chain of settled case law from the ECJ which establishes that secondary law has the same geographical reach as the TEU and TFEU, unless another solution is explicitly provided for in the secondary legislature.[48]

in *Commission v. Ireland*, the Court held in para 46:

> "Institutional acts adopted on the basis of the Treaty; the regulations apply in principle to the same geographical area as the Treaty itself"[49]

However, matters dealing with applicability of primary and derived legislation in the EEZ and CS have been dealt with in later cases.[50] The first was C-37/00 *Weber*[51] where the Court held with reference to Public International Law that the rights in the CS exists due to State Sovereignty on land.[52] As the rights in the CS were reliant on State Sovereignty, the activities performed in the CS could be said to be performed in the territory automatically covered by EU law.[53] In C-6/04 *Habitats* it was held that Community Law should be applied where the Member State had sovereign powers.[54] This must not be confused with extraterritorial application of EU law as dealt with in C-36/74 *Walrave*[55], which will be discussed in section 6.

Based on the aforementioned cases, the Utilities Directive must be applied regardless of the maritime zone where the Member State has sovereign rights and the activity in question is covered by the material scope of the Directive. For the case of offshore wind development in the Exclusive economic zone, the ruling is clear. The Utilities Directive must be applied by the Member States of the European Union. With the Member States relying on a legal source

[46] See Treaty on the European Union art. 52
[47] Commission (2012), para 5
[48] Waverijn, Nieuwenhout (2019), p. 1631 footnote 45 with references to EU case law
[49] See C-61/77 *Commission v. Ireland*, para 46
[50] See Case-C6/04 *Habitats*
[51] See Case C/37-00 *Weber* para 34
[52] Ibid para 36
[53] Ibid para 36
[54] See Case C-6/04 *Habitats* para 115
[55] See Case C-36/74 *Walrave*, para 28

external to the Directive (TEU) in order to ascertain the scope of application, the question is whether the same can be said about the Countries party to the EEA Agreement.

However, an issue that arises is whether there is a disparity between the scope of the Utilities Directive in light of the settled ECJ Case law and the transposed provision in *forsyningsforskriften*. The issue is actualised with the tight linkage between the wording "party to the EEA agreement" and its geographical scope set out in the EEA agreement article 126.1.[56]

The disparity could lead to an awkward situation for the case of offshore wind projects that is best served as a banal example: offshore wind activities in the EEZ of a third country connected to the electricity grid in a "Party to the EEA agreement" will be covered by the Directive. While the same activity performed in the EEZ of a nation covered by the EEA agreement falls outside the scope of the Directive.

Thus, it is clear that the Directive itself does not regulate its own geographical scope. Instead, an analysis of the interplay of the amended (and later transposed) EU secondary legislation in the EEA agreement, and the EEA main part, must be conducted for determining whether the Utilities Directive will apply to the EEZ of Norway.

[56] Regulation 12. August 2016 no. 975 on Procurement rules in the Utilities Sector § 2-6

4 Article 126.1 – the absolute limit of EEA legislature?

4.1 Introduction

Following the conclusion in the previous section, it is fundamental and necessary to look at EEA sources to determine the geographical scope of application of the Utilities Directive. Needless to say, the general scope of the EU and EEA treaties directly impact, condition and restrain the application of the Directive as secondary and derived legislation.[57]

Article 126.1 defines the scope of the EEA agreement. It presents a solution where the outer points of geographical applicability are the "territories" of the Contracting Parties. This provision is seen as a geographical delimitation to the scope of the EEA agreement by the Kingdom of Norway[58], resulting in a *default rule* in which Directives and Regulations that lack provisions on their geographical scope relies on.[59] The English wording of the provision is:

> "The Agreement shall apply to the territories to which the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community is applied and under the conditions laid down in those Treaties, and to the territories of the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation."

As pointed out in section 3.3 The Utilities Directive does not contain a provision on its own geographical scope. Thus, it relies on a legal source external to its own provisions to define where it comes into effect. For the EEA Contracting Parties, article 126.1 is the clause that presumably dictates where the implemented EU secondary legislation will have effect.[60] I will

[57] Utilities Directive is amended in Annex XVI of the EEA Agreement main part and does not officially constitute a secondary provision
[58] St.prp. nr. 100 (1991-92) Om samtykke til ratifikasjon av Avtale om Det europeiske økonomiske samarbeidsområde (EØS), undertegnet i Oporto 2. mai 1992, p. 103
[59] See EEA Agreement Protocol 1 on Horizontal Adaptations number 8 cf. Annex XVI Introduction last para
[60] Compare EEA Agreement Protocol 1 para 8 cf. ANNEX XVI

in the next section present the problem of article 126.1 before I interpret article 126.1 in accordance with VCLT in section 5.

4.2 The problem of article 126.1

The interpretation of the word "territories" in article 126.1 constitutes a crossroad between the Kingdom of Norway on one side and EU and ESA on the other side.[61] Norway has repetitively held that the EEA Agreement does not apply outside the "territory" of the Kingdom. The main argument has been that the geographical scope of the EEA Agreement differs between EU Member States and the EFTA Contracting parties due to the wording of article 126.[62] ESA has, on the other hand, held that article 126.1 must be understood in a functional manner leading to an application of EEA where the activities conducted are sufficiently tied to the provisions of the Agreement[63] – in line with the settled case law shown to in section 3.3.

I have created a table that shows the interpretations of the respective parties and the effect claimed. I will come back to the effect of the interpretations in section 5 during my assessment of article 126.1 in light of the VCLT.

Table 1: Overview of interpretations

	Interpretation	Effect
1. The Government of Norway	"Territories" shall be understood as a reference to geographical scope of the Agreement[64]	The EEA Agreement does not apply in the EEZ.
2. ESA	"Territories" shall be understood as a reference to the State the contracts are entered into or the place where they take effect[65]	The EEA Agreement applies in the EEZ if the activities have a strong connection to the EEA

[61] See NOU 2012: 2 Utenfor og innenfor: Norges avtaler med EU, p. 557
[62] Case E-8/19 *Scanteam*, para 73; LA-2001-1152 (Frostating Court of Appeal) *Kvitsjøen*; LF-2006-24118 (Agder Court of Appeal) *Leinebris*
[63] See Ot.prp.nr.99 (2005-2006) Om lov om endring i lov 17. juni 1966 nr. 19 om forbud mot at utlendinger driver fiske m.v. i Norges territorialfarvann, p. 21-22
[64] Compare to section 2.2
[65] See Ot.prp.nr.99 (2005-2006) Om lov om endring i lov 17. juni 1966 nr. 19 om forbud mot at utlendinger driver fiske m.v. i Norges territorialfarvann, p. 21-22

Based on what I have presented above, there are two seemingly well-founded interpretations of the article 126.1 – One giving strong connotations to the rules founding State sovereignty in marine areas in Public International Law, while the other to the functional legal system of the EU. In the next section I will seek to clarify which interpretation is the correct in light of the VCLT art. 31-33.

5 Interpreting article 126.1

5.1 Justification for the interpretational framework

The EEA Agreement is an agreement between several nations as well as the EU. As mentioned in section 1.3 neither Norway, nor EU, is part of the Treaty, albeit for different reasons. However, VCLT art. 31-33 is accepted to codify customary international law existing prior to the conclusion of the convention.[66] This means that its provisions can be regarded as binding guidelines for interpreting Treaties such as the EEA Agreement.

That said, the interplay between the methodology of Public International Law and EU/EEA specific methodology has been subject to discourse particularly in Norwegian academia[67] and still is an unresolved issue to this day.[68] The EFTA Court has had its contribution to fuelling the notion of EEA being a legal order of its own which requires autonomous interpretation. This is the personal view of former president of the EFTA Court Baudenbacher[69], but has also shined through in some the Court´s judgements. In the advisory opinion in *Sveinbjörnsdóttir v. The Government of Iceland* the Court held that the EEA agreement is an "international treaty *sui generis* which contains a distinct legal order of its own".[70]

To which degree the EEA Agreement deviates from traditional treaties is unclear as the Treaty itself exists in a plane between the EU legal order, and multilateral Treaties with the main focus being cooperation between states while preserving sovereignty. This middle ground between the EEA agreement and traditional treaties raises both theoretical and practical questions on how dynamically the treaty provisions can be interpret with reference to the homogeneity objective.[71] The EFTA Court, especially in the case of *Sveinbjörnsdóttir* seems to be adamant on the EEA agreement being somewhat more dynamic than other Treaties.[72]

[66] See Amrei (2017) p. 4, Utenriksdepartementets rettsavdeling (2013) p. 15
[67] See for example Halvard Haukeland (2010), Halvard Haukeland (2011), Haukeland, Franklin (2015)
[68] ESA (1999), p. 3
[69] Baudenbacher (2019), p. 119
[70] Case E9/97 *Sveinbjörnsdóttir*, para 59 (my highlights)
[71] See Hakeuland (2010), p. 4; Also discussed in TSOSU-2005-121865 (Søre Sunmøre District Court) (later appealed LF-2006-24118)
[72] Case E-9/97 *Sveinbjörnsdóttir*, para 60

That said, the case of *Sveinsbjörnsdóttir* may also hold the explanation on why the EFTA Court never explicitly refers to the interpretational guidelines in customary international law when interpreting the provisions of the EEA agreement. One explanation is a strong wish to emulate CJEU that also do not refer to the VCLT, rather than the lack of applicability.[73] A possible explanation can also be the inherent wish of the CJEU and EFTA Court to lay down their own methodological limitations. What makes this particular interpretational issue interesting for this thesis is the limitation the VCLT allegedly is said to impose on the provisions of the EEA agreement.[74]

In my opinion both the CJEU and the EFTA Court uses factors in its decisions that are compatible with the VCLT during their interpretation. The use of semantics, context and assessments of the object and purpose of a provision are all elements that are provided for in the VCLT art. 31-33 and is commonly used by the respective Courts.[75] Also, Article 31 leaves much flexibility in regard to the internal weighting between the interpretive factors. This leaves room for necessary EEA specific considerations in the interpretation.[76] Based on these assumptions, I will therefore use the provisions provided for in VCLT art. 31-33 to analyse article 126.1.

5.2 Generalities on VCLT Articles 31-33

Article 31 of the treaty contains the general rule for interpretation of international treaties. The provision has following wording:

> "A treaty shall be interpreted *good faith* in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of its *object and purpose*" (my highlights).

There are five factors in general that must be paid attention to when interpreting a treaty. The order of the factors does not correspond to their importance in the treaty interpretation process, thereby, they must be regarded factors that go into a "single combined operation".[77] I will in the following assessment treat each factor separately and use "good faith" as a guiding

[73] Haukeland (2010), p. 7
[74] Ibid, p. 7 footnote 47 with reference to Baudenbacher (2005), p. 27-51
[75] See discussion in Dörr (2011), p 536-538
[76] ibid
[77] See Amrei (2017), p. 4 references to International Law Commission (1966) p. 219, section 8

principle for the entire process of interpreting art. 126.1 EEA.[78] Furthermore, it must be noted that articles 32 and 33 provides supplementary guidelines for interpretation in certain situations. I will refer to these where they are needed.

5.3 Article 31.1 "The ordinary meaning" of art. 126.1

The first element of VCLT art. 31 is an analysis of the wording in order to find the "ordinary meaning" behind the provision in question. The main purpose of interpreting the wording of a treaty is to find the ordinary meaning which reflects the collective intention of the parties involved in the conclusion of the treaty.[79] The objective of the interpreter is to ascertain what the wording means in the Treaty. This leads to a gradual transition between the factor of "ordinary meaning given to the terms of the treaty" and the "context".

When it comes to article 126.1 it is the wording of "territory" that has sparked a series of communications between the Norwegian Government and the EFTA Surveillance Authority in form of a letter of formal notice[80] and a reasoned opinion.[81]

The word territory occurs two times in the provision. On both occasions, it has been used in the plural tense. In the first occasion, it has been used to describe "the territories to which the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community is applied" - The parties on the *EU-side* of the agreement, while the second time it is used to describe "the territories" of the *EFTA-side* of the parties.

As shown to in section 4.2 there are currently two well-founded interpretations of article 126.1. Its relevance for this thesis is that if the Norwegian interpretation is used, the EEA Agreement and amended Directives do not apply outside the territorial waters. I will in the following section assess whether the semantics of the word "territory" can give a contribution to clarify the meaning of the term "territory" in article 126.1.

[78] See discussion in Dörr (2011), p. 548-549
[79] Amrei (2017), p. 4
[80] The formal letter can be found in Ot.prp.nr.99 (2005-2006) Om lov om endring i lov 17. juni 1966 nr. 19 om forbud mot at utlendinger driver fiske m.v. i Norges territorialfarvann), p. 17-26
[81] See ESA (1999)

5.4 Logical and lexical semantics

In this subsection I will perform an analysis of the wording of "territories" in its singular form. Before analysing the text, it must be noted that there are 25 authentic language versions of the EEA agreement.[82] Article 33.1 of the Vienna Convention provides that in these circumstances the text is *"*the text is *equally authoritative* in each language".[83]

Due to the limited scope of this thesis, my main focus will be the English version of article 126.1. Where other versions contribute to the interpretation, I will also bring them into the assessment. I have limited the range of authentic languages that I will use in this assessment to English, Norwegian, Icelandic, Danish and French.

The rationale behind the delimitation is that both the Danish and Icelandic languages are closely related to the Norwegian language, and able to provide insight on what other Nordic contracting parties meant when concluding the provision with the wording "territory". The English language is the working language of the EFTA-Court[84], while French is the main working language of the CJEU.[85]

This table shows the different authentic language versions and their wording of the geographical limitation in article 126.1:

Table 2: Authentic languages

Language	wording
English	"[…] shall apply to the territories […] and to the territories of […]"
French	"[…] s'applique aux territoires […] qu'aux territoires de [...]"
Danish	"[…] gaelder for de omraader […] of for […] omraade"
Norwegian	"[…] skal anvendes på de territorier […] og på [...] territorium"

[82] See EEA agreement article 129.1
[83] My emphasis
[84] Baudenbacher (2019), p. 25
[85] Ibid, p. 379

Icelandic	"[…]gildir á þeim svæðum […] og á yfirráðasvæðum [...]"

5.4.1 English

In order to determine the "ordinary meaning" of the expression "territories" used in the English version, I consulted with different dictionaries.[86] While there are many different definitions published, these are the ones that give the clearest resemblance to the judicial usage of the term. Cambridge Dictionary described the word "territory" as:

> "(an area of) land, or sometimes sea, that is considered as belonging to or connected with a particular country or person"[87]

The definition from Oxford English Dictionary had the following definition of "territory":

> "An area in which one has or claims certain rights, or for which one has responsibility with regard to a particular type of activity" [88]

Both definitions cover a wide set of areas, and do not provide any clear indications on an outer limit of the word *"*territory*"*. The definition used in the Cambridge Dictionary provides an interpretation that is more focused on the sovereign aspects of the term "belonging to", while the definition from Oxford uses a wider wording that connotes to a more functional view where one "claims certain rights", or where one has "responsibility with regard to a particular type of activity". Even when using the more sovereignty-oriented definition from the Cambridge Dictionary, it can hardly be said that it presents a strong argument to limit the scope of the application to only the land area of a country and the territorial waters. Moreover, the definitions indicate that the collective intention of the parties was not only to regulate the scope in the main sovereign nation, but also the dependencies the nation may have.

[86] Compare to Amrei (2017), p. 6
[87] Cambridge Dictionary (n.d)
[88] Oxford Dictionary (n.d), section 1f

In relation to regulating the scope of the EEA agreement, the definitions presented above do not provide a sufficiently clear picture of an intentional delimitation of the scope of the EEA agreement. Thus, from the English wording of the article 126.1, there is no unambiguous indication that the Agreement was meant to be limited beyond the territorial sea.

5.4.2 The other languages

The word "territoires" is defined in the La Dictionnaire as:

> "Espace délimité d'un État, d'une province, d'une ville, d'une juridiction, etc"[89]

Much alike the English definitions "territoire" in the French language is defined as a "delimited area of a state, a province, a city, jurisdiction, etc".[90] The essence of "territoires" is the delimitation of a given area, which can be seen as a wide definition. However, it can also carry the argument for being state-oriented since the definition is using "Espace délimité d'un État". No definitive conclusion can be drawn from the French version either, since the definition of "territoires" makes room for both interpretations.

The Norwegian definition of "territorier" unlike the French and English version has a narrower core. The Norwegian Academics Dictionary defines the expression as:

> "landområde, havområde eller luftrom som en stat har suveren myndighet over"[91]

Although the definition of the word *"*territorier*"* is wider regarding what kind of areas that is covered – "land areas, sea areas or air space"[92] – the reference to "sovereign authority"[93] give strong connotations to complete sovereignty, which the EEZ is not[94], suggesting a narrower ordinary meaning limited to areas within exclusive jurisdiction of the State.

On the other hand, the Danish version of art. 126.1 uses the expression "omraader", which clearly has a wider scope than the term used in the Norwegian version. The expression is used to describe "a place, plot, area […] that is geographically delimited in relation to something else and has certain specific characteristics".[95] The broad definition of the wording suggests

[89] Le Dictionnaire (n.d)
[90] My translation from French
[91] Territorium (n.d)
[92] My translation from the Norwegian original text
[93] Translated from "suveren myndighet*"*
[94] See section 2.2
[95] Område (n.d) section 2 (aa has been changed to letter å)

that the use of "territory" in the English text was not intended to limit the geographical scope of the EEA agreement beyond the territorial waters.

The Icelandic version uses two different expressions for describing the territories of the States in which The Treaty establishing EEC and ECSC is applied - "svæðum*",* and the Contracting Parties in the EFTA pillar - "yfirráðasvæðum». This itself could mean that there was an intention of regulating these two sides differently. When it comes to the semantics of the expressions used, the word "svæðum" is defined as "ótiltekið opið rými utanhúss[96]" which translates to "undefined outdoor area"[97] – clearly covering areas such as EEZ.

The word "yfirráðasvæðum*"* on the other hand, is defined as "svæði sem einhver hefur yfirráð yfir"[98] - "an area which someone has in their control"[99], suggesting the Icelandic language version covers a wider scope of areas than the Norwegian version due to sovereignty not being mentioned. However, this does not explain the lack of uniformity when addressing the scope of the treaty for the two pillars opposed to the other language versions. One could also question whether "sovereign control" in the Norwegian definition provides *something addition to* just "control" mentioned in the Icelandic version – both versions providing strong connotations to the exercise of control due to some sort of sovereignty.

One explanation on the difference in some authentic versions could be that the collective intention of the parties was to regulate the EC side of the signatories with functional criteria as provided for by the Case law from the ECJ, while the EFTA-side could be guarde by the outer limits of State Sovereignty (the territorial waters). This view is also shared by *Trosdahl,* although following an analysis of the German version of article 126.1.[100] Another plausible explanation is that the wording was meant to reflect the dynamics of the Contracting Parties. While the EC Member States are listed together as a unit, the parties outside the EC are named individually – providing what individual sovereign area shall be associated in the Internal Market after the ratification.

A third option that also has support in all the authentic languages, is the usage of the word in relation to dependent areas associated with the sovereign nations that are mentioned in article

[96] svæðum (n.d)
[97] Each word looked up in ISLEX-ordboka
[98] Yfirráðasvæðum (n.d)
[99] Each word looked up in ISLEX-ordboka
[100] Trosdahl (2019), p. 55

126.1. As an example, Norway has several overseas dependencies such as Svalbard and Jan Mayen that are part of the Kingdom of Norway.[101.] These areas are often called dependencies or territories.[102] I will address this hypothesis further in section 5.5.2 and 5.5.3

5.4.3 Summary and reflection

An interpretation of the wording of article 126.1 in the different authentic languages does not provide definite guidance in whether the correct interpretation limits the geographical scope of the EEA agreement to the territorial waters of the Contracting Parties. Of the authentic versions I have assessed, the Icelandic version clearly distinguished itself by using two different expressions for the areas of the EC Member States and the EFTA countries party to the agreement. These findings have also been replicated in *Trosdahl*, where the author noted that the German version used "die Gebiete" for the EC Member States and "die Hoheitsgebiet*e*" for the EFTA Countries.[103]

Despite the Icelandic and German distinguishment, most authentic language versions of article 126.1 do not exclude the application of the EEA agreement in the EEZ despite some minor differences in the semantics. When it comes to the Norwegian meaning of the word "territorier" it delimitates the application of the EEA agreement to areas which are under "sovereign control" of the State. Even though this description connotes the best with sovereignty, it does not rule out the EEZ since it also is under sovereign control of the State in certain aspects as provided in section 2.2. This assessment shows that all the different authentic language versions rooms three different meanings of the word "territory".

5.5 Context

5.5.1 Deciding the relevant context

VCLT art. 31.2 states that the context first and foremost shall comprise, in addition to the text, preamble and annexes. lit (a) widens the context to also comprise of "any agreement relating

[101] See section 5.5
[102] Dependencies and Territories of the World (n.d)
[103] Trosdahl (2019), p. 55

to the treaty which was made between all the parties in connexion with the conclusion of the treaty", while lit (b) includes any "instruments" made by one or more of the parties.

In this section I will look at the close context of article 126.1 which is comprised of the provision itself, as well as other provisions where the term territory has been used in the EEA Agreement. Furthermore, I have chosen to include the Treaty of Rome as relevant context even though it does not directly relate to the conclusion of the EEA Agreement. In literature on VCLT art. 31 para 2 lit a context can amount to explicit guidance on the interpretation of a Treaty.[104] Aside from the EEA Agreement being based on the primary and secondary legislation of the Treaty of Rome, it also contains provisions on how the Agreement should be interpret in accordance with the provisions of the Treaty of Rome and judgements from the EU Courts prior to the date of signing.[105] Thus, the Treaty itself expresses a connection to the Treaty of Rome. An omission would therefore result in the loss of an important contributing factor.[106] I therefore do not regard the VCLT as a limiting factor for the inclusion of the Treaty of Rome as relevant context to interpreting article 126.1.

5.5.2 Internal Context

As recalled from section 5.3 the word "territories" is used in two places in article 126.1. First it is used to describe the "territories" which The Treaty establishing the European Economic Communities is applied". The second time it is used in in conjunction with the EFTA States. An interpretation where both parties are equally committed will first and foremost resonate best with the fundamental requirement of reasonableness.[107] Additionally, the preamble of the EEA Agreement holds that the Agreement itself tries to establish a European Economic area *"*based on common rules and *equal conditions* of competition".[108] This indicates that "territories" should be understood in the same way as it is understood in the Treaty of Rome and in the Case law of CJEU.[109]

However, the wording that needs to be assessed in this regard is "under the conditions laid down in those Treaties*"*. The question is whether it adds an element that indicates that one

[104] Dörr (2011), p. 551
[105] See EEA Agreement Art. 6
[106] See Arnesen (2010), p. 20-22 who uses The Treaty of Rome as context
[107] Dørr (2011), p. 548
[108] See EEA Preamble para 4 (my highlights)
[109] See section 2.3

side of the constellation is bound to different conditions than the other side. Does this mean that the Member States of the EEC and ECSC Treaty would have to define the contents of "territories" in a different manner than their EFTA counterparts?

An interpretation with this result would in fact need a secure legal basis as it constitutes a commitment that is larger for the EEC Member States than the EFTA Member States. Furthermore, it does not resonate well with the preamble of the EEA Agreement as well as the fundamental requirement of reasonableness. Thus, resulting in a presumption against this interpretation unless it is justified.

One possible explanation for this wording is that the Treaty of Rome and the ECSC establishes the internal market, while the EEA Agreement is an association agreement that secures access to the internal market of the said Member States. This would resonate well with article 1 in the EEA Agreement, which uses the expression "agreement of association" for the EEA Agreement.

By extending the context to Article 126.2 of the Agreement shows that the Contracting Parties agreed to keep Åland outside the EEA. With Åland being a Finnish dependency, one can ask whether the word "territory" itself is meant to delimitate the EEA Agreement beyond territorial waters. Despite this, the Contracting Parties used the wording "territory" for both Iceland and Lichtenstein – two countries that opposed to Norway did not have any territorial dependencies at the time of signing the EEA Agreement.

In the rest of the EEA Agreement, the word territory is mentioned 33 times in 20 different provisions.[110] Isolated interpretation of the provisions does not give any meaningful contribution for how the word "territory" should be understood. I will therefore in the next section compare some of the provisions in the EEA Agreement with their corresponding provisions in the Treaty of Rome.

5.5.3 The use of "territory" in the Treaty of Rome

As stated in section 5.5.1, the contextual value of the Treaty of Rome is important for clarifying the provisions in the EEA Agreement. This is also expressed by article 6 of the EEA Agreement.

[110] See articles 15, 28, 29, 31, 34, 36, 43, 50, 51, 53, 54, 55, 56, 57, 59, 62, 64, 80, 110, 126

The Treaty of Rome contains two provisions that regulates the scope of the Treaty. The first provision is article 227. The second provision is article 131, which regulates the main rule of including "non-European territories" in the scope of the Agreement.[111] I will first assess article 227.

Article 227 EEC establishes that the Treaty shall apply to the different Member States mentioned. A Reference to "territory" can be found in 227.4 where it is stated that the Treaty *"*shall apply to the *European* territories for whose external relations a Member State is responsible*"*.[112] It is also used in 227.3 for *"*overseas countries and territories*"* that are listed in an Annex to the Treaty.

In these provisions the word "territories" is not used alone. It is either used to describe territories located "overseas" or located in Europe as "European Territories", suggesting that the word "territory" alone is not used in the Treaty of Rome to delimitate the geographical scope of the Treaty beyond territorial waters – a use comparable to article 126.2, which might suggest that article 126.1 should be interpret in the same way.

In Norwegian literature, *Arnesen* expresses the opinion of the scope being different for the EEC Member States and the EFTA states due to the consistent use of "territories" throughout the EEA Agreement, opposed to the use of "Member States" and "The Union" in the Treaty of Rome.[113] This argument substantiates his claim for the EEA Agreement having a narrower scope than the Treaty of Rome.

However, a search through the Treaty of Rome reveals that the term "territory" is used in various contexts throughout the Treaty and sometimes even used simultaneously with the wording "Member States" and "Union" in the same provision. I will therefore present some of the provisions and discuss whether the term "territory" or "territories" is used in such a way that it gives the impression of an intentional deviation between the Treaty of Rome and the EEA Agreement. I am, however, limited to only present a few selected provisions in my assessment.[114] The question I seek to clarify is whether the use and non-use of the word "territory" is meant to regulate the scope of the provisions in the Treaty of Rome.

[111] See Treaty establishing the European Economic Community (Treaty of Rome) Part V
[112] My emphasis
[113] Arnesen (2010), p. 20
[114] Query of "territoire" in Treaty establishing European Economic Community (Treaty of Rome) – 101 results

The first example is article 48.3 in the Treaty of Rome containing rules on freedom of movement of workers which allows the workers:

> "(b)to move freely within the **territory** of Member States […]
>
> (c)to stay in a **Member State** for the purpose of employment […]
>
> (d)to remain in the **territory** of a Member State after having been employed in that State […] (my highlights)

If the term "territories" was meant to regulate the geographical scope in the Treaty of Rome, the freedom of movement for workers is restricted based on the purpose of the movement – they can move freely, but not outside territorial waters. They can stay in the EEZ for the purpose of employment, but once they are employed, they are restricted not go beyond territorial waters. This interpretation provides an illogical solution which indicates that in article 48.3, the term "territory" serves a non-regulatory function of the geographical scope – a conclusion also supported by *Trosdahl.*[115]

In article 85 EEC the terms "within the common market" has been used, opposed to its article 54 EEA that uses the term "within the territory covered by this Agreement":

> "Any abuse by one or more undertakings of a dominant position within **the common market"**

Interpreting the word "territory" as a geographical delimitation to Article 54 EEA does not give an interpretation result that is satisfactory, considering that the EEA Agreement seeks to create a "homogenous European Economic Area" in article 1. Additionally, abuses by dominant undertakings would have a narrower scope than the provisions on State Aid in article 61 EEA, which does not refer to "territory" – an interpretation that especially does not resonate well with article 1, which refers to "equal conditions for competition".

A similar question arises where the EEA Agreement does not use the term "territory" in its provisions. Does this indicate a wider scope than what article 126.1 infers? Article 40 covers the freedom of movement of capital and has the following wording:

[115] Trosdahl (2019), p. 74

> "[t]here shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons **resident in EC Member States** or **EFTA States**"

The wording "resident in EC Member States or EFTA States" could be swapped out with the wording "persons residing in the territories of the Contracting Parties" without changing the substance of the provision.[116]

My review above shows that there are reasons to believe that the word "territories" did not have any intended regulatory function in the Treaty of Rome. I am especially referring to article 48.3 where the term is used interchangeably with the terms "Member State". Furthermore, the use of territory is accompanied by "non-European" or "European" in art. 131 and 227, suggesting that the wording alone is not intended to regulate the geographical scope of the Treaty. Lastly, there are provisions in the EEA Agreement where the term "territories" is not used, which also leads to a weakening of the argument of article 126.1 delimitates the application of EEA legislation beyond the territorial sea.

5.5.4 Subsequent practice and agreements

VCLT Article 31.3 lit a and b requires that any subsequent agreements or practice between the parties shall be taken into account while interpreting a treaty in its context. There are no form requirements to the agreements. Thus, it covers informal agreements and tacit acceptance.[117] The bottom line is that the subsequent agreement must show a mutual understanding of an agreed interpretation.[118] I understand this criterion as an extensive access for the parties to show to any accepted subsequent agreements or practices that can shed light on the interpretation of a provision.

One event that is particularly interesting in this regard is the process of implementation of Directive 2004/17/EC on the coordination of procedural rules in the utilities sector in the EEA Agreement. In the Joint Committee decision, there are no references to the article 126.1[119], despite article 7 of that Directive explicitly applied to all activities relating to the "exploration of a geographical area for the purpose of" lit a "exploring for or extracting oil, gas, coal or

[116] See Article 6 EEA
[117] Dörr (2011), p. 544
[118] Ibid
[119] EEA Joint Committee Decision No 68/2006, para 2

other solid fuels". This new Directive led to extensive changes in the Danish Act on the Continental Shelf.[120] The incorporation of the Directive into the EEA agreement, without any adaptation texts, gives the impression that Article 126 was not seen as an obstacle. Another event that further supports this impression is that in 2013 the Norwegian Government was granted an exemption for entities covered by the said Directive that operated on Norwegian Continental Shelf.[121]

On the other hand, in the wake of the two separate cases of *Leinebris*[122] and *Kvitsjøen*[123], where both cases dealt with the application of the EEA provisions outside the territorial waters, the Norwegian Government loyally (yet reluctantly) followed the requests of ESA in their reasoned opinion by amending the required changes in the national legislation. Although, the Norwegian Ministry of Foreign Affairs did state in their communication back to ESA state that they disagreed on the interpretation of article 126.[124]

The 2012 Norwegian white paper addressing The Kingdom of Norway´s relation to EU sums up the Norwegian stance in general, where its stated that there is a disagreement on the geographical scope of the EEA Agreement, but Norway is reluctant on getting the question assessed by the EFTA Court or the Supreme Court and have chosen voluntary adaptation.[125]

When it comes to subsequent practice in relation to VCLT art. 31.3 lit b, Court practice in the respective parties to the Treaty is considered an important source in ascertaining whether there exists subsequent practice that can shed light on the interpretation. Although varying results in the case of *Leinebris* and *Kvitsjøen,* the case of *Leinebris* addressed illegal fishing (according to domestic law) in Norwegian EEZ. After going through a detailed assessment of ESA´s correspondence with the Norwegian government following the *Kvitsjøen* case, the judges concluded that it would be "too formalistic" to limit the geographical scope of the EEA agreement to merely the territory of the EFTA states.[126] Instead, the Court ruled that the employment conditions were sufficiently linked to the respective EEA territory so that the rules on free movement of workers also applied to employees onboard Norwegian fishing

[120] See Directive 2004/17/EC on coordination in Utilities sectors, article 75
[121] Ministry of Trade and Fisheries (2013)
[122] LF-2006-24118 (Agder Court of Appeal) *Leinebris*
[123] LA-2001-1152 (Frostating Court of Appeal) *Kvitsjøen*
[124] Ministry of Foreign Affairs (2006)
[125] NOU 2012: 2 Utenfor og innenfor: Norges avtaler med EU, p. 557
[126] LF-2006-24118 (Agder Court of Appeal) *Leinebris*

vessels, even though it is within the Norwegian Exclusive Economic Zone[127] - a conclusion that is in line with the standpoint of both the French Government and The Commission in the Court reports of the *Scanteam* Case, an important judgment that I discuss in detail in Section 6.[128]

An interesting topic to visit is what the other EFTA States party of the EEA Agreement considers as the correct interpretation. Following the adoption of the Marine Strategy Framework Directive[129] in the EU, The Kingdom of Norway has deemed the Directive not being EEA relevant on the grounds that it applies beyond territorial waters.[130] The other EFTA states did apparently not share this view, according to *Basse*.[131] Upon investigating this further, the annual report of the EEA Joint Committee in 2014 and 2015 shows that the EFTA sides were united in their view on the geographical scope.[132] Although not contributing by much in this section, it will be reviewed in the assessment of "good faith" in section 5.7.

Summarized, the subsequent practice and agreements concluded between the parties are varying in their contents. On one hand, the EEA Joint Commission deemed the 2004 Utilities Directive EEA relevant without any adaptations or voiced concerns regarding the applicability of the Directive outside the territorial waters. The following application of exemption from ESA also suggests that there has been an understanding that the EEA agreement is not limited to the territorial sea. On the other hand, there has been a mixed bag of both practices omitting the applicability outside the Territorial Sea in *Kvitsjøen* and later a modified approach in *Leinebris* where the conclusion was in line with ESA´s reasoned opinion.

Recalling the start of this section, both subsequent practices and agreements must show that the parties have a mutual understanding of the provision concerned, and that mutual understanding must form the basis of an agreement.[133] Practices, on the other hand, must be consistent and cannot be isolated acts.[134] My view is that none of these events satisfy being

[127] Ibid, para 29
[128] Report for the Hearing in case E-8/19 *Scanteam*, para 91
[129] Directive 2008/56/EC (Marine Strategy Framework Directive)
[130] Meld. St. 5 (2012-2013) The EEA Agreement and Norway's other agreements with the EU (in English), p 14
[131] See Basse (2020), p. 59
[132] Compare EEA Joint Committee (2014) Annex I para 51 and EEA Joint Committee (2015) para 42
[133] Dörr (2011), p. 554-555
[134] Ibid, p. 556

the basis for concluding that the parties have a collective understanding on the geographical scope of EEA legislation.

5.6 The object and purpose

The main aim of identifying the object and the purpose of the Treaty is to seek to achieve an interpretation that advances the Treaty´s aims. In that way one avoids any interpretation that diminish the Treaty´s intended effect.[135] This is perhaps the most characteristic feature of the methodology of the Court of Justice of the EU– the use of *effet utile* – to choose the interpretation result that grants the best intended effect.[136] In the following section I will discuss the object and purpose of the EEA Agreement.

5.6.1 The Object and purpose of the EEA Agreement

The main objective of the EEA agreement is to create a "a homogeneous European Economic Area".[137] This is done by enacting an Association agreement that secures the EFTA states market access to the internal market on equal footing as the Member States, and vice versa.[138]

The Agreement contains several mechanisms to ensure homogenous development. One example is article 1 which uses the wording *"*promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties*"*, which states that the cooperation is continuous, and that homogeneity is a process.

Another common mechanism is laid down in article 3, which obligates the parties to a general duty of loyalty. According to the provision parties shall "take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement".

One manifestation of the duty of loyalty between the parties is that the parties shall secure homogenous interpretation between the provisions in the EEA Agreement and the EEC as well as ECSC as long as they´re "identical in substance".[139] For this to happen, the EFTA

[135] Ibid, p. 545
[136] See C- 432/07 *Commission of the European Communities v Italian Republic* para 47
[137] See EEA recital 4
[138] See Joined cases E-9/07 and E-10/07 *L'Oréal*, para 27
[139] See EEA article 6

States also has to interpret the provisions in conformity with the "relevant rulings of the Court of Justice" that were given prior to the signatory date of the agreement.[140]

Furthermore, in securing the objectives of homogenous development, the agreement also establishes a Court and a surveillance authority under chapter 3 of the Agreement.[141] In this separate Agreement, it is stated that the Court "shall pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Communities given after the date of signature of the EEA Agreement".[142] In order to ensure effectiveness of the decisions by the Court it has been given jurisdiction in "actions concerning the settlement of disputes between two or more EFTA States regarding the interpretation or application of the EEA Agreement".[143]

Albeit the main focus is market integration. One implicit objective is also to preserve the legislative powers of the governments of the EFTA-states, which traditionally have enjoyed broad powers to issue laws. An unauthorized extension of the agreement will therefore pose constitutional issues, which arguably was not intended by the EEA agreement.

The main concern of the EEA Agreement is to secure a continuous reciprocal and homogenous relationship with the EU Member States within the fields of cooperation laid down by the agreement. In order to maintain the effectiveness of the objective, the parties have *inter alia* enacted a separate agreement on the creation of a Court and a Surveillance Authority – these mechanisms are considered to be much more elaborate than standard Free Trade Agreements[144] and plays an important role in ensuring the effectiveness of the objectives. In the next section I will discuss whether Court practice from the EFTA-Court give a contribution to the principle of effectiveness of the rights enshrined in the Agreement.

5.6.2 Effect-based interpretations in EEA context in the extension of the object and purpose

Article 61 of the EEA Agreement concludes that the any governmental conduct that threatens to or have the effect of distorting competition between the contracting parties is incompatible

[140] ibid
[141] See EEA Part VII Chapter 3 Section 2
[142] Compare art. 3.2 SCA and EEA art. 6
[143] See article 32 SCA
[144] see Case C-81/13, *UK* v. *Council*, para 59

with the provisions of the EEA agreement. Its corresponding provision in the Treaty of Rome used the word "Internal market", which shows that the scope of the agreement will cover any (mis)conduct as long as it's affecting the internal market, arguably also if the activity in question is not covered by the agreement. Although being a rule on State Aid, this provision gives the impression that effect-based legislation is not unheard of in the EEA Legal context.

Effect-based interpretation has also been used by the EFTA Court in order to ensure that the obligations laid down on the EFTA states in the EEA Agreement gets the intended effect. One example is the case of *Celina Nguyen v. The Norwegian State* where the EFTA Court held that national rules could not strip the EEA Motor Vehicle Directives for their effectiveness.[145] Moreover, in *Scanteam AS v. The Norwegian Government*[146] the Court held in the question of the applicability of the Public Procurement Directive in third countries (thus, outside the geographical scope of the EEA Agreement) that:

> "The Directive does not depend on the place of performance of a contract. The obligations under the Directive could easily be circumvented, if the location of a contracting authority or the place of performance of a public contract were decisive for its application"[147]

The Court also noted that the principles enshrined in the Public Procurement Directive must be given "practical effect".[148] By those standards it held that the aims of the Directive are: "equally relevant where the contracting authority or place of performance of a public contract are located in a third country".[149]

The aforementioned case law dictates that in the EEA legal context the effectiveness of EEA legislation has a strong position in order to secure a homogeneous parallel development in the Contracting Parties. Transferred to the question I want to answer, this provides valuable guidance on the relationship between wording in the EEA Agreement and the intended effectiveness.

5.6.3 Article 126.1 and the effect caused by the different interpretations

[145] Case E-8/07 *Celina Nguyen v. Staten v/Justis- og politidepartementet*, para 23-27
[146] Case E-8/19 *Scanteam*
[147] Ibid, para 62
[148] Ibid, para 63
[149] Ibid

In section 4.2 I presented two different interpretational results from the wording "territory" in article 126.1 of the EEA Agreement. In section 5.5.3 I omitted a third interpretation as it did not have sufficient support in the context of the Treaty of Rome. The conclusion was that the term was ambiguous, and it might as well be any of the two following interpretations. I will repeat these here[150]:

	Interpretation	Effect
1. The Government of Norway	"Territories" shall be understood as a reference to geographical scope of the Agreement[151]	The EEA Agreement does not apply in the EEZ.
2. ESA	"Territories" shall be understood as a reference to the State the contracts are entered into or the place where they take effect[152]	The EEA Agreement applies in the EEZ if the activities have a strong connection to the EEA

In the table, the interpretational alternative 1 has the effect of limiting the agreement beyond the territorial waters. In the context of the question this thesis seeks to clarify, this would mean that activities such as procurement for developing offshore wind in the EEZ are not governed by the Utilities Directive.

For our case study, the field of Sørlige Nordsjø II, and future projects in the coastal area beyond the territorial waters Contracting Entities could freely procure goods and services from Norwegian Economic Operators. This could potentially lead to a circumvention of the rules on illegal direct purchases in Remedies Directive (89/665/EEC) and its Norwegian transposition in § 13 letter a of the act on public procurements as the initiative of regulation is solely in the digression of the Department of Trade.[153]

Another result of this interpretation is that the Entities owning and running the wind turbine clusters seemingly enjoy the right to export clean electricity to the Internal Market of the EU – achieving better terms than Member States. An interpretational result where EFTA-states gets an unreasonable advantage compared to their EU-counterparts does not harmonize with

[150] Table
[151] Compare to section 2.2
[152] See See Ot.prp.nr.99 (2005-2006) Om lov om endring i lov 17. juni 1966 nr. 19 om forbud mot at utlendinger driver fiske m.v. i Norges territorialfarvann, p. 21-22
[153] See Act of 17. June 2016 no. 73 (anskaffelsesloven) LOV-2016-06-17-73 § 2 third para last sentence together with § 13 lit a

the prime objective of the EEA agreement – to have a deep integration in chosen sectors and to create a level playing field between economic operators throughout the internal market. This would also constitute a paradox to the effectiveness of the Agreement. On the other hand, interpretations 2 is in line with the principles the EEA Agreement seeks to safeguard mentioned in section 5.6.1 as well as the ensuring "practical effect" that is mentioned in the *Scanteam v. The Norwegian Government* in section 5.6.2

Recalling from section 5.6 the main aim of identifying the object and the purpose of the Treaty is to seek to achieve an interpretation that advances the Treaty´s aims and avoids an interpretation that diminishes the intended effect of the Treaty. My opinion based on the assessment above is that the interpretation alternative 1 must be avoided from the standpoint of ensuring the effectiveness of the homogeneity principle of the EEA agreement, as well as the intended effect of creating a level playing field within the internal market.

5.7 Good faith – the balancing of the interpretational components in VCLT art 31-33

5.7.1 Introduction

Through the section 5 I have used VCLT 31-33 in order to assess what "territory" means in light of the "ordinary meaning to be given to the terms of the treaty" its "context" and "object and purpose". As mentioned in 5.2 these factors must be regarded as factors that go into a "single combined operation". Furthermore, the VCLT itself does not reveal the relative weight of each factor.

In literature on Treaty interpretation *Dörr* holds that the good faith criterion has a bottom line that "requires fundamental reasonableness" in the interpretation process. Thus, abstaining from overly focusing on one factor,[154] while *Amrei* shows that the interpretation process should lead to a fair and equitable result omitting craftiness, refraining from taking unreasonable advantage at the expense of other parties of the Treaty, as well as honouring legitimate expectations of the Parties.[155] In my view, the legitimate expectations of the parties

[154] Dörr (2011), p. 548
[155] Amrei (2017), p. 18 with reference to Villiger (2009), p. 425-426 and Ipsen et al. (2014), p. 146

are reflected in the judicial landscape of the Treaty in question – one may as well refer to it as the *mode* of the Treaty.

5.7.2 Article 126.1 under scrutiny – what is a fair and equitable result?

A fair result takes care of the legitimate expectations of the parties. Recalling my assessments of the different factors in the interpretation of article 126.1, I noted in section 5.4 and its subsections that the term "territory" was not sufficiently clear on whether it limited the scope of the EEA legislation to the territorial waters.

Moreover, the assessment on the context of the agreement in section 5.5 and its subsections showed that the term had been used in a non-consistent way in the Treaty of Rome as well as in the EEA Agreement, leading to further weakening the standpoint on that the term was intentionally used to delimit the EEA Agreement opposed to the Treaty of Rome. The lack of subsequent agreements or practices to show a collective intent for delimiting the EEA Agreement narrower than the Treaty of Rome is a factor that weakens the view on "territories" being used in article 126.1 to delimit its scope beyond territorial waters.

In section 5.5.4 I ascertained that the EFTA Countries had a collective opinion in their understanding of the EEA relevance of the Marine Strategy Framework Directive. Although addressing another side of article 126.1 (EEA-relevance) the collective opinion of Iceland, Norway and Lichtenstein may indicate that the EFTA States originally regarded the wording "territory" to delimit the EEA Agreement to not apply beyond the territorial sea.

Interestingly, the Icelandic bill to the law on European Economic Area uses the word "territories" in a way that suggests that both Contracting Parties are equally committed to apply EEA Law throughout their "territories",[156] suggesting that the political standpoint has been modified after the ratification. This also suggests that the standpoint of the EFTA States may overly rely on the wording of article 126.1, omitting other factors that are to be emphasized in Treaty interpretation.

Lastly, in section 5.6, I dealt with the object and purpose of the Agreement and came to the conclusion that a functional approach to the geographical scope of the EEA Agreement was in line with the object of creating a level playing field in the European single market. Thus, an

[156] 1/116 Icelandic Government Bill on EEA, section "Um 126 gr."

interpretation that gives an unreasonable advantage to one of the Contracting Parties must be discarded both on the ground of being detrimental to achieving the object of the Treaty and placing one of the Parties in an unreasonable advantageous position. In the case of offshore wind, a circumvention of the Utilities Directive would pose as an unreasonable advantage due to the synergies it creates by both paving way for preferential procurement by the Entities developing and operating windfarms in Sørlige Nordsjø II and future projects that are touted to be further into the EEZ as the technology matures, as well as granting access to the internal market for the electricity produced – the best of both worlds in the eyes of a Contracting Party that is a net exporter of energy.

My opinion based on the totality of factors assessed in my analysis is thereby that a fair and equitable result is that article 126 must be interpret in a functional manner in line with the rulings of the CJEU for the EU Member States. This would also pose as the most loyal interpretation both in light of the Vienna Convention, and the object of the EEA agreement itself – homogenous rules in a level playing field.

6 Closing thoughts – Consequences for offshore wind after E-8/19 *Scanteam*

As noted in section 5.4.2 the most loyal and balanced interpretation of article 126.1 was to delimit the word "territories" in a similar manner as EU law. As the main aim of this thesis is to assess whether the Utilities Directive applies in the EEZ in relation to offshore wind it is also relevant to comment on other possible basis's for application.

In the *Scanteam*[157] Case the EFTA Court had to assess whether a procurement done by a Norwegian Foreign Mission in a third country was covered by the Public Procurement Directive[158]. The reason for the referral was that the Contracting Authority (Ministry of Foreign affairs) was complained to the Norwegian Public Procurement Appeals board (KOFA) for not publishing a contract above the threshold values in the TED database.

In the Court report, the Norwegian delegation had made article 126.1 a central topic in their plea to the Court.[159] Interestingly, the Court noted that the geographical scope of the EEA Agreement did not preclude the EEA law having effects outside the territory of the EEA under reference to C-214/94 *Boukhalfa*.[160] Furthermore, the Court showed to the application of article 55 and 54 being applicable to "conduct adopted outside of the EEA which have *foreseeable, immediate and substantial effects in the EEA*" in Case law from the EU Courts.[161]

Moreover, the Court held that EU Law applies "in judging all legal relationships in so far as these relationships, by reason either of the *place where they are entered into* or of *the place where they take effect*, can be located within the territory of the European Union".[162] Concluding that procurement is subject to EEA law where it is "sufficiently closely linked to the EEA, such as when it is liable to have a *direct impact on the functioning of the internal market within the EEA*".[163]

[157] Case E-8/19 *Scanteam*
[158] Directive 2014/24/EU on public procurement
[159] Report for the Hearing in Case E-8/19, paras 69-76
[160] E/8-19 *Scanteam*, para 66
[161] Ibid para 66 (my highlights)
[162] Ibid Para 67 (my highlights)
[163] Ibid para 72

Judging by EU Case Law, the requirements for establishing a linkage to EU/EEA law seems to be loosely defined and reliant on concrete assessments. In the Case *Boukhalfa*[164] the linkage requirements seemed to be fulfilled by the plaintiff´s working situation was subject to rules of German law even though the work was performed in Algeria.[165] For the case of procurement performed outside the territorial scope of the EEA Agreement, the Court held that it can be subject to EEA law by being liable of having direct impact on the functioning of the internal market or if other factors, such as the procurement language of the procedure, language requirements, the law that applies to the awarded contracts and the location of the component review body.[166]

As pointed out in section 3.3 the procurement activities to the Contracting Entities engage Economic Operators residing in the European Economic Area. The importance of offshore wind in the coming years is highlighted by several independent sources presented in section 1.1 and is touted to be the next oil-adventure for Norway. Thus, these procurement activities will have a substantial impact on competition within the internal market.

Regardless of the application of article 126.1, the *Scanteam* Case must be understood as a basis for applying EEA procurement law to any activity that directly impacts the functioning of the internal market, which also is covered by the relevant legislation that governs the activities that are being pursued. It legitimates the *doctrine on sufficient linkage* as it has been developed in the Case law of CJEU. Thus, the development of offshore wind within the material scope of article 9 would be covered by the procedural rules of the Utilities Directive regardless of the geographical scope of the EEA Agreement.

Opposed to an interpretation of article 126.1, the doctrine presents a solution that has to be assessed individually on a case-by-case basis. The nature of the assessment calls for a wide exercise of discretion that can lead to an increase in case load for both national Courts as well as the EFTA Court.

[164] Case C-214/94 *Boukhalfa*
[165] Ibid, para 16
[166] See E-8/19 *Scanteam*, para 69

7 Conclusion

In this thesis I have discussed the application of the EU Utilities Directive in the Exclusive Economic Zone of Norway - A question that is important to answer in light of the planned investments in offshore wind in the coming years. In section 3 of the thesis, I concluded that the Directive relies on external provisions for regulating its geographical scope. With the geographical scopes of the Treaty of Rome and EEA worded differently, it leads to a potential divergence between the scope of application in the EU, opposed to Norway as a Contracting Party to the EEA. To solve this, I applied the customary rules on Treaty Interpretation as provided in VCLT art. 31-33 in section 5 to assess article 126.1. I learned that the wording of the provision did not omit an application beyond territorial waters. Furthermore, the assessments on context in section 5.5 showed that the use of "territory" in the Treaty of Rome weakened the claim on there being an intentional disparity in the scope of application of the EEA legislation opposed to EU legislation.

Lastly, the assessments on the object and purpose of the Agreement and interpretational loyalty showed the future continuous role of the EEA Agreement is best maintained when using identical scopes for applying respectively EU legislation and EEA legislation. Based on my assessment of article 126.1, the conclusion is that the interpretation that has the best foundation in customary Public International Law is not limiting the EEA Agreement beyond territorial waters. Based on this, the overall conclusion is that the Utilities Directive have to be applied to the procurement activities covered by the material scope of the Utilities Directive in the EEZ of Norway. The reasoned opinion in the *Scanteam* case does, however, keeps both parties satisfied to a certain degree, as the *doctrine of sufficient linkage* ensures the application of existing EU/EEA legislation beyond the territorial waters, without resulting in a change in the *general rule* on the scope of the EEA Agreement. As noted in section 6, the effect on the internal market of the procurement activities would also suggest an application of the Utilities Directive to offshore wind activities beyond the territorial waters of Norway.

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