

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

Presentation overview

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 - Scanteam case and the implications for applicability of the Utilities Directive on offshore wind
- Conclusion

Disclaimer



THIS IS A RABBIT HOLE!



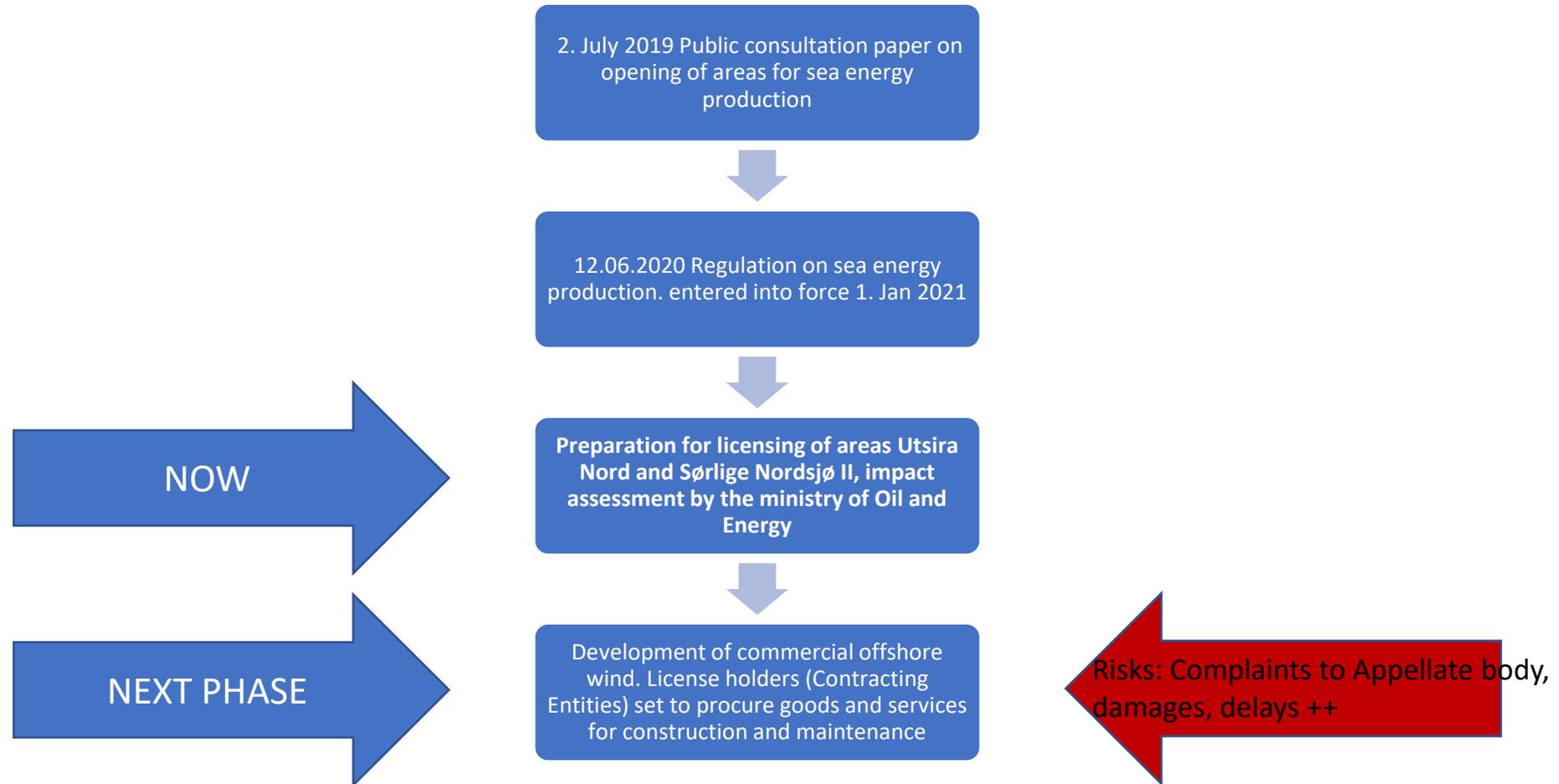
THE GOAL IS TO COMPRESS MY RESEARCH TO A 25 MIN
PRESENTATION. TECHNICAL QUESTIONS OF LEGAL
CHARACTER WILL BE ANSWERED AFTER THE
PRESENTATION

Background

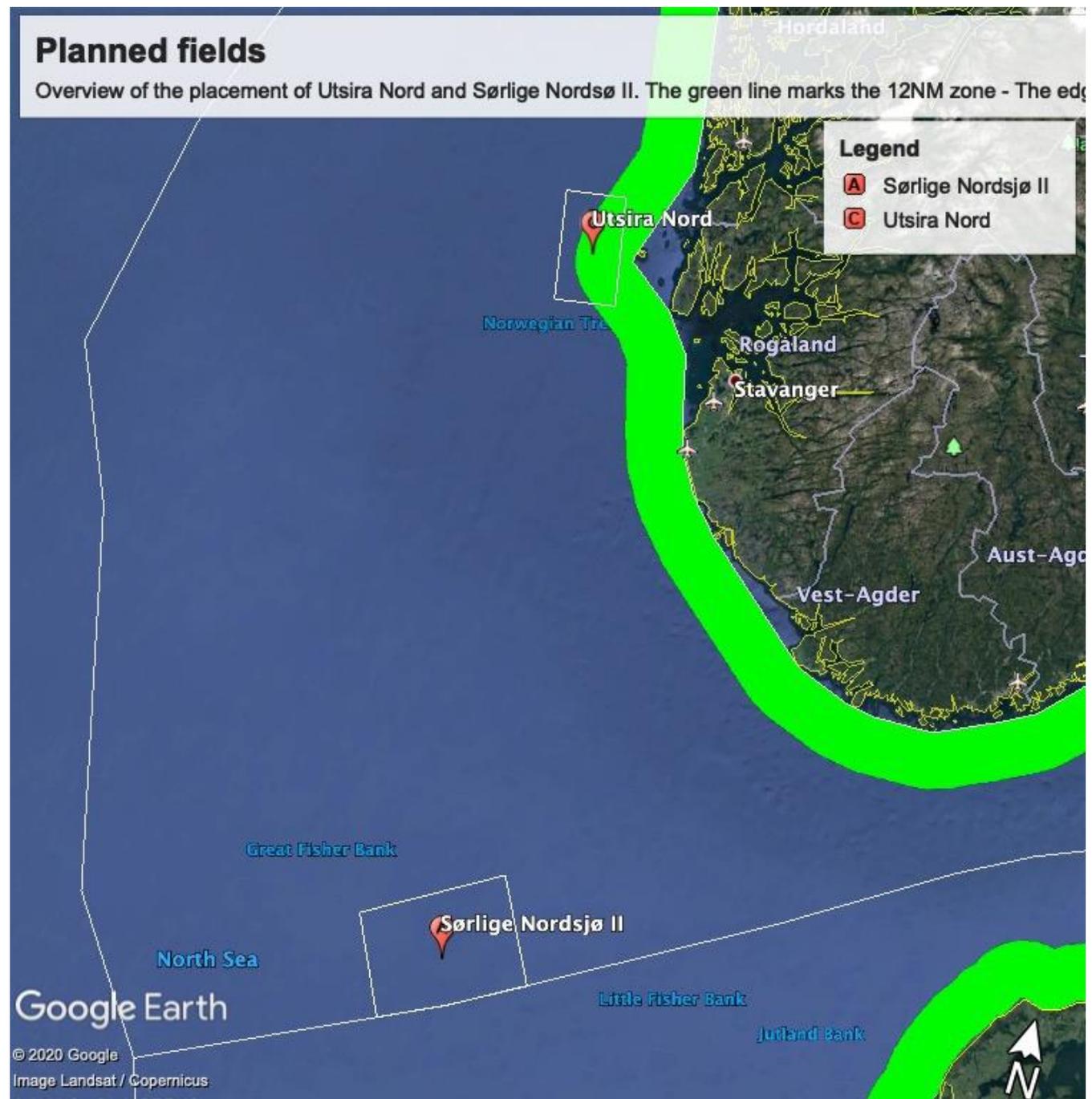
- Offshore wind will play a key role in future electricity generation in Europe
- Commission report (2019): 30% of total electricity supply by 2050
 - At the core of how Europe can go carbon-neutral by 2050
- Countries along the north sea are planning schemes to deploy the technology
- Norway: adopted regulation on ocean sea energy (havenergiforskrifta) june 2020
 - Entered into force Jan 1 2021
 - Planned fields placed in different marine zones which may lead to legal implications
 - No mentioning of the relation to EEA Law in the public consultation paper prior to the regulation
 - "We will assess it **if it becomes necessary**" – Ministry of Oil and Gas
 - In hindsight: Procurement law transpositions managed by Ministry of trade and fisheries.



Simplified roadmap of the development



Placement of
“Sørlige Nordsjø
II” using
coordinates from
the public
consultation
paper

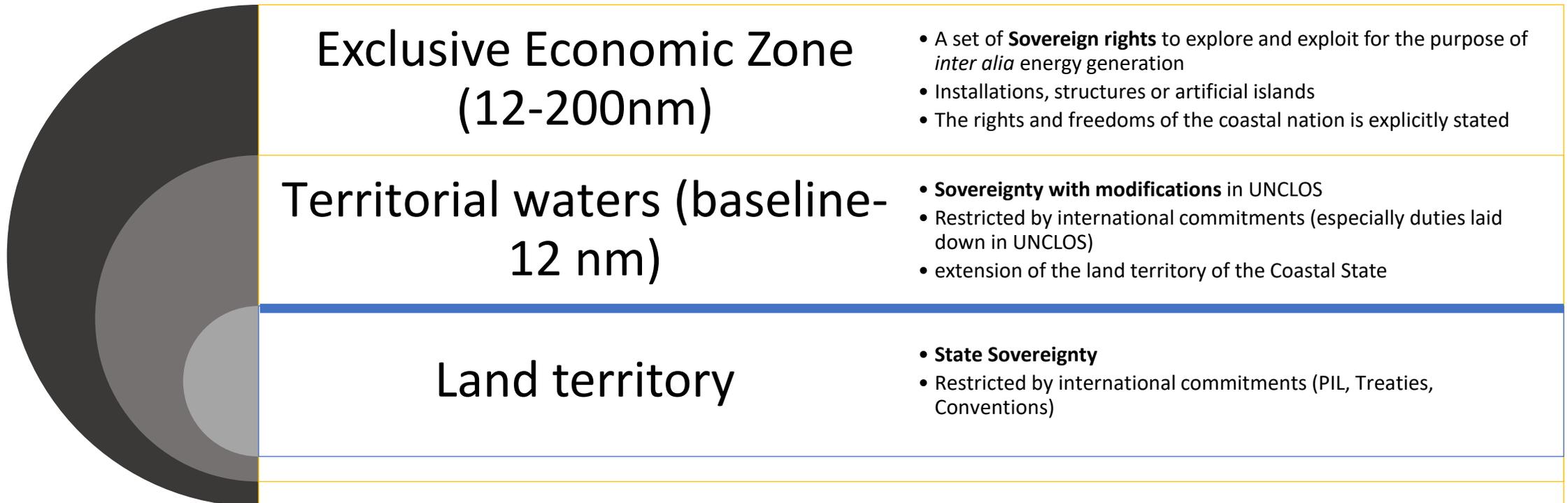


Actuality of the problem

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 Government of Norway has repeatedly held that the EEA Agreement does not apply outside territorial waters due to the wording of article 126.1:
 - Kvitsjøen Case LA-2001-1152 (Frostating)
 - Case no. 2229 (ESA Reasoned opinion)
 - Leinebris LF-2006-24118 (Agder)
 - Case E/8-19 Scanteam v. The Norwegian Government
 - Unresolved to this day, with Norway agreeing to obey in individual cases
- Need for legal certainty for economic operators and Contracting Entities
- Needs special attention:
 - Due to the size of investments involved and importance for the industry and society in the coming years
 - A question of great principle value
 - Area very ripe for discussion

Why is EEZ a big deal?





The Norwegian EEZ

Article 126.1 (consolidated text)

“The Agreement shall apply to the territories to which the Treaty establishing the European Economic Community is applied and under the conditions laid down in that Treaty, and to the territories of Iceland, the Principality of Liechtenstein and the Kingdom of Norway”. (my highlights)

Why do we have to analyse article 126.1 of the EEA Agreement when it's the Utilities Directive and offshore wind we are interested in?

- Utilities is commonly used to describe the organisations that deliver services – such as the provision of water, electricity, gas or transport – to a community - typically through fixed networks
- Often mixed picture of private and public undertakings: a need to open up "closed" markets, discipline the purchasing activities.
- Follows the general geographical scope of either primary Union law for Member States or the EEA Agreement for Contracting Parties to the EEA Agreement, unless specified
- The Utilities Directive is silent regarding its own geographic scope of application
 - Article 52 (1) TEU refers to "Member States"
 - Article 126.1 EEA refers to "territories"
- Does the wording amount to an intentional delimitation of the EEA Agreement beyond territorial waters, opposed to the whole jurisdiction of the Member States under EU law?
- ESA says no – functional approach to territory, delimitation similar to EU Member States
- Norway says yes – the wording does not require application beyond territorial waters, unless we unilaterally decide to
- Covers activities in third countries connected to a network in Member State/EEA – awkward solution? (Utilities reg. § 2-6 compared to art. 19 Utilities)
 - Thought experiment: offshore wind outside Kola peninsula in Russia connected to grid of Norway covered vs Offshore wind from Norway's EEZ connected to the grid not covered

Framework of analysis

Vienna Convention on the law of Treaties arts. 31-33

- Wording
- Context
- Object and purpose
- Good faith

EEA Agreement is a Treaty, yet something “more”

VCLT does not apply directly, but codifies existing Public International Law prior to the conclusion of the VCLT.

- Norway not a ratifying part, EU Cannot be a part
- Applies as Customary international law

EFTA Court does not refer to VCLT while interpreting the EEA Agreement

Legal order of its own that requires autonomous interpretation (Case E9/97 Sveinbjörnsdóttir, para 59) (Baudenbacher, 2019)

- A wish to emulate CJEU?

Subject to discourse in Norwegian Academia (Fredriksen). No definitive conclusion in the literature or from the EFTA Court

- argued by The Government of Norway, not addressed by EFTA Court in E-12/16-55 *Marine Harvest ASA* , para 57 (court reports)

My opinion

Covers the dynamic aspect of the interpretation process of the EEA Agreement

Simultaneously providing a tangible framework for the interpretation exercise

Results of the analysis - wording “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” – Oxford English dictionary

- Differences in the authentic languages of the provision (danish in particular)
- Territory not necessarily referring to the territorial jurisdiction of a State. Also defined more widely.
- In Treaties often used to delimitate the scope of application (see for example Svalbard Treaty art. 2 – but more explicitly mentioned “territoriale farvann”)
- Wording does not limit application to areas beyond territorial waters

Results of the analysis - Context

- Internal narrow context: used to describe Åland (Art. 126.2)
- Used 33 times in 20 different provisions in the main part
 - Does not give a meaningful contribution by itself.
- Treaty of Rome
 - Especially used by Finn Arnesen to show intentional differentiation (Simply, 2010)
 - Used to describe dependencies (art. 227)
 - Also used in various contexts and interchangeably with “Member States” and “Community” (See art. 48.3 lit a and c compared to lit d in Treaty of Rome)
 - Suggests a non-regulatory function in the Treaty of Rome
 - Weakens the argument of “territory” serving a regulatory purpose in Art. 126.1 EEA
- Subsequent practices and agreements?
 - Must show mutual understanding between the parties relating to the provision in question
 - Some isolated incidents, not consistent enough to be decisive
 - Kvitsjøen case - Judge: “too formalistic” – attorney general withdrew the appeal to Supreme Court
 - Application of exemption to ESA for oil and gas on CS (2004/17/EC)
 - Marine Strategy Framework directive not implemented

Results of the analysis: 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 and avoids an interpretation that diminishes the intended effect of the Treaty
- Ensuring homogeneity of such importance that EEA Agreement also prescribes a Court and a surveillance authority
- Association agreement that secures the EFTA states market access to the internal market on equal footing as the Member States, and vice versa (Joined cases E-9/07 and E-10/07 *L'Oréal*, para 27)
- A narrow interpretation of "territories" 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

Good faith – what is fair and equitable?

- Refraining from overly focusing on one factor (!)
- An 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 our case:
 - Limiting Geographical scope of EEA legislation beyond territorial waters gives the "EFTA side" an advantage due to having market access for the electricity produced, while also being able to conduct preferential procurement

Case E-8/19 Scanteam – A chance to clarify Art. 126.1

- Govt. of Norway held that article 126.1 limited application of PP Directive beyond territories of Norway
- Complained to KOFA, request on advisory opinion to sent to EFTA Court
- EFTA Court:
 - (62) 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
 - (73) “The Norwegian Government has argued that the territorial scope of the EEA Agreement differs between EFTA States and EU Member States due to the wording of Article 126 EEA. **As the Court has already found that the Directive applies if the procurement at issue is sufficiently closely linked to the EEA, there is no reason to examine Article 126 EEA.**”
- No clarification on the general application of EEA Agreement beyond territorial waters
- Instead, given a “back-door” through the *doctrine of sufficient linkage* (Extraterritorial application based on effect)
 - Based on Settled EU case law
 - BUT Loosely defined, reliant on concrete assessments in EU case law (see Boukhalfa case)
 - Sørilige Nordsjø II most likely to be “sufficiently closely linked to the EEA” due to:
 - Engaging Economic Operators inside the EEA (Discrimination on the basis of nationality)
 - Contracting Entities within EEA
 - Covered by the material scope of the Utilities Directive, which already covers identical projects in the territorial waters
 - The result of the development (most likely) is going to provide electricity to consumers residing inside EEA
 - Intended to enable provision of electricity to the public (art. 34 cf. art. 9)

Conclusion

1. Sørlige Nordsjø II (Norwegian offshore wind development in the EEZ) is covered by the Utilities Directive due to EEA legislation covers areas beyond territorial waters
 - Follows from an Interpretation of article 126.1 EEA
2. Scanteam-case provides a “case-by-case” assessment/solution where EEA legislation applies to activities regardless of their geographical placement, as long as they are sufficiently linked to the EEA (effect)
 - Offshore wind projects in the EEZ most likely to be covered

Thank you for your time!

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