Liability for decommissioning of oil and gas installations on the Norwegian Continental Shelf

Norwegian public and private law perspectives

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1. Introduction

1.1 Topic of the thesis

In this thesis, we will explore the Norwegian regulation governing liability for decommissioning costs related to oil and gas installations on the Norwegian Continental Shelf (NCS). The objective is to review the interaction between public and private law within the petroleum industry concerning who is liable for the payment of the decommissioning obligation.

With liabilities, we refer to the different responsibilities that are connected to the decommissioning activities. Both responsibility for conducting the decommissioning and responsibility for bearing the costs will be covered, with the main focus on identifying if such responsibilities are clearly allocated within the legal system.

The number of offshore oil and gas installations approaching maturity will increase rapidly within the next decade, requiring obsolete installations to be removed. As a result, the petroleum industry is led over to a new phase. Financial and technical challenges related to removing the masses of infrastructure are requiring an increased focus instead of focusing on maximizing the profits from petroleum production alone.[1] Due to the challenges facing the decommissioning industry, it is important to study the major issue of who should be liable.

1.2 Background and actuality

Starting with the discovery of the Ekofisk field in 1969 and the development of petroleum activities therefrom, the oil and gas sector has grown to be the most important contributor to the Norwegian modern economy. Measured in the total value creation of government revenues, investments and exports, it is safe to say that the petroleum industry has been of significant importance to Norwegian economic growth and financing the Norwegian welfare state.[2]

[1] A.M Fowler et al "A multi-criteria decision approach to decommissioning of offshore oil and gas infrastructure" Ocean & Coastal Management, Volume 87 January 2014 p. 20.
[2] Norsk Petroleum, Norway's petroleum history, available at: https://www.norskpetroleum.no/en/framework/norways-petroleum-history/).

The North Sea is the powerhouse of the Norwegian Petroleum industry, with currently 71 Norwegian production fields in the North Sea spread across the 142 000 square kilometre area.[3]There are currently 90 fields in production on the entire NCS with specifically 12 concrete facilities (Heidrun A and Troll B are floating), 63 fixed steel facilities and 20 steel floating facilities are operative.[4]

The oil and gas activity on the Norwegian continental shelf is comprehensive, and in 2021 the industry generated NOK 272 billion for the Norwegian treasury.[5] Numbers from SSB estimate that as many as 158 400 people are employed in the Norwegian oil and gas industry, and about 68 300 of them are directly employed on the platforms.[6]

A large among of the infrastructure placed in the North Sea is however approaching the end of its expected lifetime and will have to be removed. So, what happens when the enormous amount of infrastructure that has been placed in the North Sea for five decades has fulfilled its economic lifespan and no longer serves any purpose?

As many of the largest facilities producing oil and gas are located in the North Sea, this region represents a substantial removal burden.[7] As of today, an estimate of 88 oil and gas installations have been decommissioned in the North Sea.[8] It is expected that the removal of oil and gas facilities will increase significantly over the current and the next decade.[9]
The industry estimate predicts that nearly 199, 100 tonnes of offshore infrastructure will be brought onshore from the Norwegian part of the North Sea by 2025.[10]
The costs of getting rid of these offshore installations can vary enormously. Some elements that are of great importance when estimating the costs are the size of the infrastructure,

[3] Norsk Petroleum, Activity Per Sea Area, available at: https://www.norskpetroleum.no/en/developments-and-operations/activity-per-sea-area/
[4] Ignacio Herrera Anchustegui et al "Understanding decommissioning of oil and gas infrastructures: A legal and economic appetizer" 12 Jul 2021 p. 56.
[5] Norsk Petroleum, Statens inntekter, available at https://www.norskpetroleum.no/okonomi/statens-inntekter/
[6] Statisk Sentralbyrå: https://www.ssb.no/arbeid-og-lonn/sysselsetting/artikler/over-150-000-jobber-i-oljebransjen
[7] Ashley M. Fowler et al *Environmental benefits of leaving offshore infrastructure in the ocean*, Frontiers in Ecology and the Environment (2018) p. 1
[8] "Decommissioning in the North Sea: Review of Decommissioning Capacity" published by Scottish Enterprise, Arup October 2014, available at: https://www.arup.com/perspectives/publications/research/section/decommissioning-in-the-north-sea p. 11.
[9] "Decommissioning in the North Sea: Review of Decommissioning Capacity" published by Scottish Enterprise, Arup October 2014 p. 11.
[10] Yngve Bustnesli et al, *Oil and Gas Activities in Norway: Regulatory and Contractual Framework* 1. edition, Gyldendal Norsk Forlag 2021 p. 121

geological factors like water depth, the nature of the resource being exploited and the technology available.[11] The structures in the North Sea are very large and comprehensive, and it's not unlikely the cost can come up towards 2 billion euros per project.[12] A key question is, thus, who is liable to pay for the operations as well as when something goes wrong?

Other aspects making the large fraction of petroleum facilities in the North Sea a major challenge is the harsh weather conditions and metocean conditions.[13] In addition, it is difficult to estimate exact numbers when market developments and other somewhat unpredictable factors decide the value of the oil. All these factors paint a complex image of the removal. The interdisciplinary nature of the industry, where legal, technical and political considerations come into play, makes it a very interesting subject to discover further.

The Norwegian Petroleum Directorate (NPD) has made some predictions relating to cessation costs. According to their reports, decommissioning activities represent about 3 % of the total sum of the NOK 2 744 billion spent on petroleum activities. This may sound like a modest share, but decommissioning costs rank third highest after operating costs (24%) and exploration costs (12%). In 2016 the NPD estimated that the cost for shutting down and disposing of infrastructure for the period 2016 and 2021 are NOK 23.4 billion and NOK 12 billion.[14]

What is it that decides when, or even if, offshore installations must be removed? This represents the great difference between resource exploitation from offshore installations and exploitation from structures onshore. Erosion, causing mechanical attrition that significantly increases the repair and maintenance costs as the years pass is a key problem in locating structures at sea. Another aspect is the fact that the number of hydrocarbons inevitably will decrease as the field matures, making it much harder, or even impossible, to extract them.[15]

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[11] Anchustegui et al (2021) p. 10

[12] HIS Markit, Decommissioning of Aging Offshore Oil and Gas Facilities Increasing Significantly, with Annual Spending Rising to $13 Billion by 2040, IHS Markit Says (November 29, 2016)

[13] Referring to the combined wind, wave and climate conditions as found in a certain location, Anchustegui (2021) p. 57

[14] The Norwegian Petroleum Directorate, Decommissioning costs, available at: https://www.npd.no/en/facts/publications/reports/resource-report/resource-report-2017/cessation/decommissioning-costs/

[15] Anchustegui et al (2021) p. 5

The bottom line is that every field will reach a point where they are no longer cost-efficient to run, this time is known as the economic limit and is shifting from 25 to 40 years.[16]

As we will review thoroughly in this thesis, the offshore energy structures are built on terms set by government-granted licenses. The licences are granted with time limits, and when they expire the general rule is that the licensee must implement the decommissioning decision.

1.3 Research question

The objective of this thesis is to determine the rules governing the financial liability connected to the obligation to decommission offshore facilities. In other words, we seek to inquire who has to pay for which costs, how these payments are ensured and what they accrue to in the Norwegian oil and gas regime. Essential to this question are the interactions between Norwegian public legislation and the private law contracts regulating the obligations and rights between the licensees that operate together under a license. Thus, we also inquire which liabilities are regulated by public law and which are regulated by private law. Doing so allows us to get a comprehensive study of the totality of decommissioning-related liabilities for oil and gas operators, the state and even third parties.

As we have seen, decommissioning activity will increase significantly within the next decade, sending Norwegian oil operations into a phase that is somewhat of an undiscovered page so far in the story of the Norwegian oil and gas production. Issues around liability connected to removal will become of great importance in near future. The main question is: who is going to pay when there is no longer anything to be gained?

When reflecting upon these questions we have identified two key issues concerning liabilities. We have classified these as public and private law regulated problems. The public problems are the ones that arise between the State and the licensees, and the private ones are the ones arising between the licensees operating on the NCS. This will be thoroughly reviewed in chapter 5. In our experience, these issues have not been properly discussed. The study of decommissioning-related liability is usually done by splitting the public law and private law divisions. In our analysis, we plan to do this differently because we are under the perception

[16] Anchustegui et al (2021) p. 5

that reviewing them together will give a more thorough presentation of the complexity of the rules.

We aim to discuss what liabilities that arise from decommissioning, and whether we can identify them as public law or private law issues. This perspective will help us desiccate the ruleset and clarify the question of who is liable for decommissioning costs.

As we have seen, the removal burden of the North Sea represents a huge economic cost for the ones left with the bill. Many powerful players are involved, and we are interested to find out if current regulations open up for the avoidance of liability through security schemes, deciding when and how they are kept responsible.

An important aspect of this is to what degree the licensees are free to safeguard themselves against responsibility, and what happens if shares in production licenses are sold, or if the owner defaults on their payment obligations. Under this umbrella, we also find regulations for payment systems and measures the licensees can use to force payment from a party, and how they can safeguard themselves from having to carry the payment obligation of other licensees.

One important aspect to address when discussing the allocation of liability for decommissioning costs is that the State, independent of the disposal solution will cover a significant part of the cost connected to the decision of disposal. The reason behind this is that the State through taxation legislation has given the licensee the right to demand a deduction for the cost connected to the decision of disposal. Secondly, the State is a direct participant in many licensees through Petoro AS.

For the licenses where Petoro is a participant, the State has to cover their proportionate part of the cost of the disposal decision connected to the license. Regulation of tax falls outside the scope of this thesis and will not be discussed in detail.[17]

1.4 Explaining some key concepts

To conduct petroleum activities on the NCS, it is required to obtain a “license”. The license is appointed by the Ministry of Petroleum and Energy (MPE). The State may tie conditions and

[17] With the current tax rate the licensee can demand deduction for 78 per cent of the cost related to the implementation of the disposal decision (divided into 28 per cent company tax and 50 per cent special tax, Ulf Hammer et al, *Petroleumsloven. Lovkommentar*, § 5-3. Vedtak om disponering, Juridika (kopiert 05. mai 2022)

requirements to the license, which are binding to the companies wanting to operate under the given license.

It is common for several companies to work together under the same license. As we will see in chapter 4, the public regulation imposes on the companies to enter into an agreement concerning petroleum activities. Under the agreement, the parties must establish a "joint venture" to conduct petroleum activities. The companies operating under the same licence will be addressed as the "licensees" in the following presentation.

When discussing "liability" we mean all claims to fulfil the financial obligation that arises from participating in a joint venture to explore or extract petroleum on the NCS under the license. All the while this thesis' main objective is the question of who is going to pay, the financial liabilities are what we will essentially review. The question of who is liable to implement a decision of disposal will be addressed. Throughout the thesis, we will be clear as to what type of liability is regulated under the specific paragraph.

1.5 Methodology

This thesis features a legal dogmatic approach. The concept of the dogmatic approach is studying the meaning and the significance of the legal system without considering other social sciences.[18] Approaching the research question with this methodology will allow us to clarify the question of who is liable to pay for the decommissioning obligation according to Norwegian public and private law.

Furthermore, this thesis adopts a complex study of different areas of the law. As decommissioning liabilities in relation to public regulations concerns the question of who should be liable to pay to the State, while the private aspect addresses the question of liability between the licensees that operate together in a joint venture on the NCS, several legal areas have to be studied. Because of this and to fully discuss the liability implications related to decommissioning, this thesis addresses issues that extend over the area of administrative law,

[18] About the dogmatic approach in legal science here: http://elib.sfu-kras.ru/bitstream/handle/2311/71664/Petrov.pdf;jsessionid=8492D4D8F5DC48D52E95D1BED9EF1662?sequence=1 ,p. 968

energy law and corporate law, as well as contract law. All these areas of the law are studied through the legal dogmatic approach discussed above. Additionally, as we discuss below, Public International Law is of relevance to this thesis.

To explain the use of sources and how to apply and interpret them, we will go through the public legislation, consisting mainly of the Act 29 November 1996 No. 72 relating to petroleum activities (hereafter Petroleum Act or PA) and its preparatory works. Furthermore, the associated Regulation are an important part of the Norwegian legislation (hereafter the Petroleum Regulations). When interpreting the provisions in the Petroleum Act and the Petroleum Regulations we will use the translation issued by the Petroleum Directorate.[19]

We will illustrate to what degree the regulations impose requirements for liability upon the members of the joint venture, and what remedies they have to ensure the licensees fulfil the removal obligation.

Public International Law is of importance for the topic of liabilities. Norway is obliged to follow international conventions as it is a party to imposing minimum requirements on decommissioning obligations. Two of the most central international conventions are the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter. These conventions are legally binding for the contracting state upon ratification. Additionally, the 1989 International Maritime Organization Guidelines (IMO guidelines) are not formally binding. However, UNCLOS (art. 60 par. 3) stipulates that contracting States are committed to consider and take the provisions into account when deciding on the disposal. The 1992 OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic is a binding regional convention that is of great importance for decommissioning activity. The conventions will be reviewed thoroughly in chapter 3.

Central to the relations of licensees with the state but also between the licensees themselves and third parties is the production license, a requirement set by the Petroleum Act to conduct oil and gas extraction activity. To obtain a production license you need to establish an

[19] Available at: https://www.npd.no/en/regulations/acts/act-29-november-1996-no2.-72-relating-to-petroleum-activities/#Section-5-4
https://www.npd.no/en/regulations/acts/act-29-november-1996-no2.-72-relating-to-petroleum-activities/#Section-11-2

agreement with provisions decided by the MPE.[20] Consequently, this agreement is the main source to interpret when determining the question of who within the joint venture is liable for decommissioning costs. Therefore, it is necessary to review how these agreements are to be interpreted and how to weigh them as legal sources.

The mentioned agreement consists of two parts. The Special Provisions make up the regulatory framework of the joint venture.[21] Additionally, the agreement has two attachments, referred to as the Joint Operating Agreement (JOA) and the Accounting Agreement (AA). These two attachments are commonly referred to as Attachment A and B, but in this thesis, we will refer to them as JOA and AA. The articles under the JOA supplements various provisions of the Petroleum Act and the content are decided by the MPE with binding effect.[22]

It is also worth mentioning that the JOA is an agreement with strong public law impact and should consequently not be interpreted in accordance with all general principles applicable to contract interpretation under Norwegian law, meaning that the interpretation of the JOA is a much more restrictive interpretation than would generally be the case with commercial contracts between professional parties.[23] The general rule is to do an objective interpretation of the wording, which implies that the literal meaning is of vital importance. Still, any evident purpose behind the provision may also be taken under consideration.

Another important private source is the Decommissioning Security Agreements (DSA) entered between the transferee and the buyer of a license to safeguard themselves against the alternative liability arising if the buyer defaults on the decommissioning payment obligations. The recommended model agreement for operators on the NCS is issued by NOROG.[24]
The NOROG 5 decommissioning agreement is a model contract issued by this interest organisation. It is not mandatory for the parties but recommended when licenses are transferred.[25] Such financial security agreements have limited weight as a legal source and

[20] See chapter 4
[21] Agreement concerning Petroleum Activity available at: https://www.regjeringen.no/globalassets/upload/oed/vedlegg/konsesjonsverk/k-verk-vedlegg-1-2-eng.pdf
[22] Article 7 of the Special Provisions state that any amendments must be approved by the MPE
[23] Bustnesli et al (2021) p. 176
[24] Norsk olje & gass, tidl. Oljeindustriens Landsforening (OLF), er interesse- og arbeidsgiverorganisasjon for selskaper tilknyttet norsk olje- og gassvirksomheten
[25] Norsk olje og gass, Norwegian Oil and Gas Recommended Model Agreement for decommissioning Security for removal obligations (2010), available at: https://www.norskoljeoggass.no/globalassets/dokumenter/naringspolitikk/skatt-og-fiskalt/modellavtaler/norog-5--decomssioning-security-agreement-for-removal-obligations-engelsk-150517.pdf

there is no legislation or case law concerning the subject. Still, general Norwegian contract law principles apply when interpreting the agreements.

1.6 Thesis structure

Our research consists of six parts. The next chapter will give us a basic understanding of the administrative bodies governing decommissioning and the overarching Norwegian petroleum policy. Before introducing the decommissioning alternatives, we will explain some key terms and how we are going to use them in the thesis.

Chapter 3 aims to give us an understanding of the legal grounds for the removal obligation we can interpret from public Norwegian law. We will see how public international law imposes minimum requirements that must be implemented in public Norwegian law.

Furthermore, chapter 4 will give an overview of the Norwegian legislation governing decommissioning. Important are the requirements connected to the award of a production license and the rules requiring the licensee to submit a decommissioning plan to the Government. Chapter 5 of the Petroleum Act, with its Petroleum Regulation, gives the State significant control over the cessation and decommissioning of the disposal. The overview in chapter 4 lays the groundwork for the liability rules we aim to analyse in chapters 5 and 6.

Chapter 5 studies the specific liability rules regarding the obligation to conduct the decommissioning, as well as the rules governing who is financially liable for the operation. The focus of this chapter is if, and in that case how, chapter 5 of the PA succeeds to allocate decommissioning costs and safeguard against default.

In chapter 6 we will review how the public law liabilities are reflected in the agreements between the participants that operate under a license. Additionally, we will identify what mechanisms are in place for licensees to safeguard themselves from decommissioning-related liabilities.

Before diving into the vast matter of these liability questions, we need to give a short review of the inner workings of Norwegian oil and gas administration. In the following, we will see how the Norwegian oil and gas administration holds a firm leash around the necks of the NCS licensees, especially regarding maintaining the Norwegian oil and gas policy of protecting State interests. Thereafter, a clarification of the decommissioning concept is in order.

2. Understanding decommissioning of oil and gas infrastructure

2.1 Introduction

The topic of this thesis concerns the Norwegian regulation of liabilities for decommissioning in the relationship between the State and the licensees operating on the NCS. The following chapter will help us better understand the governance of Norwegian oil and gas resources, and how the administrative bodies work toward ensuring that revenues from the petroleum industry end up profitable for the Norwegian people and the State itself. Additionally, under point 2.3 we will clarify the key terms in decommissioning activities and give a brief explanation as to why the decommissioning options are relevant under point 2.4.

2.2 The Norwegian oil and gas governance

Today, the petroleum industry represents a vital part of the Norwegian economy. The overall goal is to facilitate profitable production of oil and gas in a long-term perspective[26] Norwegian petroleum policy is aiming for the largest possible share of the value creation arising from extracting fields, to eventually accrue to the State, beneficial for the entire community[27] To obtain these overarching policy goals, the resources must be governed within a well-organized administration that safeguards that the interests of the State, is not forgotten when the petroleum production ceases and decommissioning awaits. The administrative bodies directly or indirectly involved in the decommissioning will be addressed and briefly explained in the following.

Extensive regulatory powers have been delegated to the Government and the Ministry of Petroleum and Energy (MPE).[28] As a result, the petroleum utilization and general petroleum sector management are subject to close government control and are consistent with national policies.[29] The MPE is the main administrative body with the overall responsibility for

[26] Para 1-2 of the Petroleum Act stipulates the long-term perspective of petroleum utilization
[27]Norwegian Petroleum, The Petroleum Tax System available at: The Petroleum Tax System - Norwegianpetroleum.no (norskpetroleum.no)
[28] Bustnesli et al, *Oil and Gas Activities in Norway* (2021) p. 24
[29] Bustnesli et al, (2021) p. 30

controlling the petroleum sector, including the decommissioning activity. Through the Petroleum Act, the MPE is authorized to set subsequent and specific conditions to any approval, permit, license, and consent granted by the administrative body.[30] Furthermore, the MPE is responsible for the ownership interests in Gassco AS, a stately owned company independently operating the gas transport system.[31] The Norwegian Petroleum Directorate (NPD) is a subordinate agency, working as an important advisory resource for the MPE.[32].

Finally, petroleum activities on the NCS are managed through a licensing system where the Norwegian State is a direct participant through the State's Direct Financial Interests (SDFI), managing the economical engagements of the State.[33] Government interests are realized through a special taxation system applicable for all relevant costs arising from petroleum activity, including those connected to decommissioning.[34] As a result of the State's shareholdings through SDFI, the reality is that the largest fraction of the decommissioning costs is paid directly by the state to the operators at the time of removal.[35] The reason is that the State, regardless of the tax deductions, will have to pay the costs adding up to the State equity share in the licenses.[36] The intricacies of the Norwegian petroleum taxation system will not be discussed further than to illustrate the state's participation in the relationship between the state and the oil companies.

The SDFI is managed by Petoro, a wholly state-owned company responsible for the commercial aspects of the SDFI.[37] Petoro's main objective is to maximise the State's revenues and utilize the resources optimally within each production license.[38]

[30] Bustnesli et al, (2021) p. 173
[31] See https://www.gassco.no/
[32] Norwegian Petroleum Directorate, Om oss, available at: https://www.npd.no/om-oss/
[33] Bustnesli et al, (2021) p. 79
[34] Norwegian Petroleum, The Petroleum Tax System available at: https://www.norskpetroleum.no/en/economy/petroleum-tax/).
[35] Osmundsen, Tveterås, *Decommissioning of petroleum installations – major policy issues*, Energy Policy 31 (2003), p. 1584
[36]Osmundsen, *Decommissioning of petroleum installations* (2015) p. 1586
[37] Section 11-2, subsection 1 of the PA states that the commercial aspects in relation to the participating interests which the State owns or reserves for itself, shall be managed by a limited company owned by the State as a sole owner.
[38] Petoto, About us, available at: https://www.petoro.no/about-petoro/sdfi-facts

2.3 Cessation, decommissioning, and abandonment: clarifying the terms

Cessation, decommissioning, and abandonment are terms being used when discussing the last phase of a petroleum installation's life cycle. All fields producing oil and gas will eventually mature from active production fields to permanently obsolete installations. Which parts of this process the mentioned terms refer to will be clarified in the following, including how we will make use of them in the thesis.

Neither of the terms is legally defined in Norwegian legislation or public international law. The decommissioning rules are however included in chapter 5 of the Petroleum Act (PA) named "cessation of the petroleum activity." This implies that decommissioning makes out an integral part of shuttingdown petroleum activity. The definition of petroleum activity in para 1-6 letter c of the Petroleum Act, further includes the shut down and planning of these activities, hereby understood as decommissioning.[39]

Despite the fact that cessation and decommissioning are terms to partly overlap, they will not be used as synonyms in the following discussion. Cessation is often used in a wider term than decommissioning, involving the permanent termination of oil and gas production as well as the dismantling of the petroleum facility, including eventually getting rid of the material.[40] In short, it is accurate to describe the term cessation as the final termination of petroleum activities, more specifically related to the production of oil and gas. This broader cessation term will be used in the following discussion.

Without a legal definition of decommissioning in Norwegian legislation, it is crucial to specify the common understanding of the term. Going from production to a permanent shutdown of the facility, including the subsequent disposal of the material, multiple activities are involved.[41] This is the process we call decommissioning. Plugging of wells, dismantling the oil and gas platform, closing the well, and finally dealing with the material - including the planning for the operation - are central activities dealing with obsolete petroleum facilities that we link to the decommissioning term. In our perception, the main difference between the

[39] According to para 1-6(c) of the PA the definition of 'petroleum activity' involves all activities related to subsea petroleum deposits, however not including the transportation of petroleum by ship

[40] Anchustegui et al (2021) p. 10

[41] Eduardo G. Pereira et al, *The Regulation of Decommissioning, Abandonment and Reuse Initiatives in the Oil and Gas Industry. From Obligation to Opportunities*, volume 38, Wolters Kluwer (2020), p. 549

cessation and decommissioning term is the broader concept of cessation that includes decommissioning, however not limited to the decommissioning operations.

Abandonment is another term used related to the cessation of petroleum production. With abandonment, we refer to leaving the offshore facility in place without assessing for removal of the facility.[42]

As we have seen, extraction of petroleum resources only can take place over a certain period of time. The removal policy is based on an assumption that when production is ceasing and it's time to do something about the infrastructure, leaving the seabed at its original state is the way to minimize negative impacts on marine environments.[43] It is however worthy of mention that the decommissioning operation itself, having to remove tonnes of infrastructure, potentially could disturb the environment as much, as well as other users of the sea. These are aspects that have received little attention up to this day, and topics that could affect the development of the removal policies in the future.[44] Possible consequences will not be discussed further but is a key factor in understanding why the mentioned decommissioning activities are subject to regulations concerning health, safety, and environment (HSE) in the 1996 Petroleum Act. [45] The specific content of the HSE rules falls outside the scope of this thesis.

Before discussing the key aspects of decommissioning in Norwegian law, we will take a closer look at the different choices of methods for removal and disposal that are provided for in Norwegian law. Different decommissioning alternatives may lead to different obligations arising from decommissioning, affecting the financial liability attached to the responsible party. This relies on the disposal decision issued by the MPE. This is however not a relevant distinction to consider in the discussion of our research question.

2.4 The different decommissioning alternatives

[42] The definition used in our thesis must not be confused with the UK regulation, where the terms decommissioning and abandonment are used interchangeably, see Anchustegui (2021) p. 10.
[43] Ashley M. Fowler et al *Environmental benefits of leaving offshore infrastructure in the ocean* Front ecol environ (2018) p. 1
[44] Ashley M. Fowler et al *Environmental benefits of leaving offshore infrastructure in the ocean* Front ecol environ (2018) p. 1
[45] The HSE legislation is set out in Chapter 9 of the PA, as well as section 10-1 and 10-2

Decommissioning of petroleum installations can be conducted in several ways. Pursuant to para 5-1 first subsection of the Petroleum Act, the decommissioning plan shall contain proposals for the disposal of offshore infrastructure. Such disposal shall contain proposals for "continued production or shutdown of production and disposal of facilities" and could inter alia constitute "further use in the petroleum activities, other uses, complete or partial removal or abandonment", cf. third sentence. From a textual interpretation of the provision, it can be deducted that other alternatives than the mentioned ones apply. The listed alternatives however represent the basic decommissioning options to be reviewed in the following.

The decommissioning method is first of all determined by regulatory regimes and international obligations imposing rather restrictive regulations concerning the accepted decommissioning methods. Among these alternatives, states are left with a significant amount of discretion in assessing which method that will be used for the removal. In fact, selecting the most optimal decommissioning alternative is a complex decision-making problem.[46] The choice of method is inevitably one of the most decisive factors in determining the decommissioning costs as the process of removing an entire facility is complex and requires advanced engineering methods. The reason for emphasizing this is that the decommissioning alternative chosen by the State can lead to different liabilities and different ways to allocate them between responsible parties. Thus, the decommissioning option is crucial for the payment obligation.

The basic decommissioning options comprise (i) abandonment, meaning that the structure is left in place, (ii) complete removal and (iii) partial removal.[47] Many decommissioning options however apply between the extremes of complete removal of the installation and total abandonment of the installation. The design of the structure, and the location at sea – where decommissioning costs, and impacts on the environment and other sea users vary enormously –, makes each decommissioning scenario unique and flexible for decision-makers necessary.[48] Total removal of offshore facilities is rarely the most optimal solution in every individual case, taking into account a wide selection of considerations such as economic perspectives,

[46] A.M Fowler et al "A multi-criteria decision approach to decommissioning of offshore oil and gas infrastructure" (2014) p. 21
[47] Osmundsen & Tveterås (2015) p. 1580
[48] A.M Fowler et al "A multi-criteria decision approach to decommissioning of offshore oil and gas infrastructure" (2014) p. 21

environmental perspectives, health and safety concerns as well as socioeconomic perspectives.[49]

The majority of the decisions on disposal of oil and gas installations made by the MPE involve complete or partial removal.[50] The same goes for the majority of other jurisdictions, as complete removal is the preferred default option in general.[51] The reason is that removal of the entire facility typically is considered the best solution for an environmental-sound cessation and preservation of marine ecosystems. However, both partial removal and abandonment are decommissioning options accepted on certain criteria, cf. PA para 5-1 first subsection.[52] Permission for such disposal must be granted by the authorities, and a cost-benefit analysis could show that partial removal or total abandonment is the best solution due to e.g. the design of the structure resulting in prohibitive costs.[53]

Decommissioning options are rapidly developing as innovative technology emerges. Continuing to introduce new decommissioning methods is a highly effective way to reduce decommissioning costs. Stakeholders are influential in the development of modern technology by introducing innovative solutions for the dismantling and disposal of the structure.[54] This could concern both the ability to dismantle and remove large structures more effectively or introducing new methods.

Furthermore, an increasing focus is turned toward the re-use, repurposing, and recycling of offshore energy assets. Norwegian legislation is not posing requirements to reuse or recycle, nor mentioning this as an overarching subjective. However, para 5-1 of the PA and para 44 of the PR make it clear that the preparation of the disposal part of the decommissioning plan shall include a proposal for continued production or shutdown of production and disposal of the facility. Pursuant to § 5-1 third sentence, continued or other uses are mentioned as alternatives.

[49] A.M Fowler et al "A multi-criteria decision approach to decommissioning of offshore oil and gas infrastructure" (2014) p. 20
[50] Hammerson et al, Oil and Gas Decommissioning. Law Policy and Comparative Practice, p. 356
[51] Anchustegui et al (2021) p. 9
[52] Anchustegui et al (2021) p. 9
[53] Anchustegui et al (2021) p. 9
[54] Hunton, Andrews, Kurth LLP, *Decommissioning Hydrocarbon Assets: Finding Value in a Shifting Regulatory Landscape* (2018) p. 2

As we will see, dumping of offshore facilities in the sea is prohibited under public international law, meaning that petroleum installations that are not abandoned at sea or reused, must be transported onshore where the infrastructure is taken care of.[55] Up to this date, five different entities in Norway have permission to receive and take care of disused shelf infrastructure. Most of the structure ends up being recycled.[56] Undoubtedly, different decommissioning methods will continue to evolve and there are increasing efforts to find ways to reuse the offshore oil and gas facilities.[57]

3. International regulations of decommissioning

3.1 Introduction

The focus of this chapter is the international regulations concerning decommissioning. International requirements are important to discuss as Norway under public international law is obliged to implement certain minimum requirements. Reviewing the most important international instruments governing decommissioning that are ratified by the Norwegian State will allow us to understand the minimum standards that apply to Norwegian law. We will see that the current international framework mainly attempts to tackle two main challenges related to decommissioning: mitigating negative impacts on marine environments and conflicts with other sea users, notably the safety of navigation.[58] To what extent the international framework covers liabilities arising from decommissioning will be the topic under 3.5. These requirements lie the foundation of the Norwegian regulation of liabilities being discussed in detail in chapter 5.

3.2 Perspectives on public international law

[55] Pereira et al (2020), p. 545
[56] NPD, Responsible removal of old facilities, 14 March 2019, https://www.npd.no/en/facts/production/shutdown-and-removal/responsible-removal-of-old-facilities/
[57] Anchustegui et al (2021) p. 9
[58] Selina Trevisanut, Chapter 18 Decommissioning of Offshore Installations: a fragmented and ineffective International Regulatory Framework, in *The law of the seabed, BRILL* (2020) p. 432

For consenting states, international treaties represent the principal source of international law.[59] Obligations arising from international conventions are however not directly applicable under Norwegian law. The dualistic system in Norway demands an act of incorporation for the convention to apply further than the relationship between Norway and other states. For the provisions to be applicable between private and public entities they must either be directly incorporated through legislation stating that the convention applies as Norwegian law, or incorporated by transformation, meaning that Norwegian law is amended in conformity with the convention – assumption of compliance.[60]

Despite the many international treaties addressing and stipulating stringent requirements, an extensive degree of discretion is left to national legislation, relying on national governments to develop detailed and sufficient legal regimes.[61] Consequently, legal frameworks on decommissioning vary significantly from jurisdiction to jurisdiction.[62] As we will see, consenting states are obliged to decommission petroleum installations under public international law, leaving national energy laws with the major challenge of allocating the liability connected to this obligation.

3.3 International obligations

Before addressing the relevant soft-law instrument governing decommissioning, we will cover the most important hard-law obligations arising from international treaties. With hard-law, we mean legally binding rulesets, and with soft-law, we mean the non-binding rules applying as guidelines or recommendations.

Norway ratified the 1958 Geneva Convention on the Continental Shelf in 1971.[6364] The convention was the first to implement a removal obligation (art. 5 par. 5). The stringent removal obligation stipulated in the Convention is however modified in subsequent treaties, which we will come back to.

[59] William E. Hughes, *Fundamentals of International Oil & Gas Law*, first edition, PennWell Books (2016) p. 21
[60] Bustnesli et al, *Oil and Gas Activities in Norway* (2021), p. 122
[61] Osmundsen & Tveterås (2015), p. 1580
[62] Hunton, *Decommissioning Hydrocarbon Assets: Finding Value in a Shifting Regulatory Landscape*, (2018) p. 3
[63] The report to the Norwegian government, NOU 1993 No 25 p. 9
[64] The Geneva Convention on the Continental Shelf, 29 April 1958 (entered into force on 10 June 1964)

The 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter together with its Protocol adopted in 1996, prohibits dumping of offshore facilities in the sea no matter the form and condition, pursuant to Article IV(1) of the Convention.[6566] Exceptions apply for the dumping of wastes and other matter listed in Annex I of the Protocol (art. IV(1)(b)), requiring a prior special permit. Specific provisions will not be discussed further.

With the ratification of The 1982 United Nations Convention on the Law of the Sea (UNCLOS), a more flexible approach to the decommissioning obligation was introduced.[67] Article 60 (3) second sentence address decommissioning of disused offshore installations directly. The provision states that "[a]ny structures or installations which are abandoned or disused shall be removed to ensure safety of navigation, taking into account any generally accepted international standards established in this regard by the competent international organization." Furthermore, "[S]uch removal shall [also] have due regard to fishing, the protection of the marine environment and the rights and duties of other states. The last sentence of the subsection acknowledges the solution of partial removal, as "[A]ppropriate publicity shall be given to the depth, position and dimensions of any installations or structures not entirely removed". The natural interpretation of the requirement set out in art. 60(3) is to allow partial removal or abandonment unless safety of navigation and other sea users are endangered. This interpretation represents a breach of the absolute removal obligation set out in art. 5 of the Geneva Convention.

According to the report to the Norwegian government (NOU 1993 No 25 p. 9), the removal obligation in the Geneva Convention no longer applies as legally binding for contracting States party to subsequent conventions. The Geneva Convention is followed by international agreements adopted in time with developments safeguarding the freedom of navigation, petroleum activities and preservation of the environment.

[65] London Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, 29 Dec 1972 (entered into force on 30 August 1975)

[66] According to Article III(1)a(i) of the Convention, dumping is defined as "any deliberate disposal into the sea of vessels, aircraft, platforms or other man-made structures at the sea", and "any deliberate disposal at the sea of vessels, aircraft, platforms or other man-made structures at the sea", pursuant to letter a (ii)).

[67] The United Nations Convention on the Law of the Sea, 10 Dec 1982 (entered into force on 16 Nov 1994)

3.4 The 1989 International Maritime Organization Guidelines

The soft-law instrument governing decommissioning are the guidelines issued by the International Maritime Organization (IMO).[68] In terms of legal status, UNCLOS and the IMO guidelines differ significantly. The recommendations are not legally binding, meaning that the guidelines leave it to the States to decide on the removal. However, contracting States are obliged to take the recommendations into account when deciding on the disposal pursuant to UNCLOS art. 60 (3).

The soft-law instrument has proven to be quite influential due to the flexible approach to decommissioning. The IMO guidelines facilitate assessments regarding safety, navigation, effect on marine environments, costs and possible other use of the facility.[69]

Para 3.5 of the guidelines provides that "[...] where entire removal is not technically feasible or would involve extreme cost, or an unacceptable risk to personnel or the marine environment, the coastal state may determine that it need not to be entirely removed". The reasons for allowing exceptions from complete removal are alternative according to para 3.5,. Consequently, there's a risk for any coastal state or operator wishing to leave the installation wholly or partly in place to easily declare high costs related to the removal, resulting in legitimate other decommissioning outcomes even though the environment would pay the price.[70] The bottom line is that it is difficult to balance the conflicting interests within the decommissioning industry, and this is visible in the international instruments. The global community is facing a significant challenge regulating cessation and decommissioning, processes that could potentially pose great threats to adjacent environments and industries.

3.5 Regional obligations

[68] Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone, Resolution A.627(16), adopted on 19 Oct 1989
[69] Hughes (2016) p. 396
[70] Ngozi Ole, Hemen Philip Faga, *Assessing the Impact of the Brent Spar Incident on the Decommissioning Regime in the North-East Atlantic*, volume 3, issue 2, Hansunaddin Law Review 141 (2017), p. 143

Important in a regional context is the 1992 OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic.[71] Through strict standards and restrictions, the Convention's main objective is to protect the marine environment and prevent pollution within this area.

As a party to the convention, Norway is obliged to implement decisions and recommendations under the Convention.[72]

In addition to imposing a general obligation to take all possible steps and all necessary measures to prevent pollution and protect the marine area (Article 2.1(a)), Annex III on the prevention and elimination of pollution from offshore sources prohibits any dumping of wastes or other matter from offshore installations (Article 3.1). Furthermore, the OSPAR Convention is rigid concerning partial removal and the abandonment of facilities. Article 5.1 of Annex III requires authorization for offshore installations to be left wholly or partly in place, decided on a case-by-case basis by a contracting state (Article 5.1 Annex III). Furthermore, no such permit shall be issued if the disused offshore installation contains substances that are likely to threaten the safety and health of other legitimate sea users and living resources in marine ecosystems (Article 5.2 Annex III).

Dealing with decommissioning and the disposal of disused offshore installations, decision 98/3 issued under the OSPAR Convention provides for specific requirements on the topic.[73]

Dumping and leaving disused offshore installations wholly or partly in place is prohibited under the decision (para 2). The decision provides for exceptions from this rigid removal obligation in the OSPAR Convention and article 5.2 mentioned above. If the competent authority can show to significant reasons why alternative disposal is preferable to reuse, recycling or final disposal on land, specific exceptions are provided (para 3 of Annex I). This provision has been criticized in the literature as a "bad decision" due to this flexibility and lack of determining what a significant reason may be.[74] Instead, different considerations are listed in Annex II to be accounted for by the coastal state when assessing the disposal,

[71] OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic, 22 Sept 1992 (entered into force on 25 March 1998)
[72] Hammerson (2013), p. 350
[73] OSPAR decision 98/3 on the Disposal of Disused Offshore Installations (Sintra, Portugal) 22-23 July 1998
[74] Ngozi Ole, Hemen Philip Faga, *Assessing the Impact of the Brent Spar Incident on the Decommissioning Regime in the North-East Atlantic*, volume 3, issue 2, Hansunaddin Law Review 141 (2017), p. 145

meaning that the conflicting interests can be emphasized, in whichever way the coastal state may see fit. Another general criticism of the 98/3 decision is claimed to be the motivating factor for establishing the agreement, assumed to be reasoned by an anti-oil agenda following the brent spar controversy rather than minimizing environmental impacts.[75]

It remains clear that complete or partial removal of facilities is the generally accepted solution provided for in international and regional conventions. The benefits related to leaving offshore installations wholly or partly in place have however been acknowledged by international communities to a greater extent, visible in Conventions and decisions of newer date.

3.6 Governing liability for decommissioning in public international law

The previous section showed us how the many conflicting interests in relation to offshore installations make it challenging to regulate decommissioning sufficiently in public international law. This section will address the international regulations on the issue of liability for decommissioning, focusing on who is liable for financing the operation.

Public international law provides for provisions posing a general obligation to decommissioning offshore facilities. The decommissioning obligation lies the basis for regulations of decommissioning liabilities in national energy laws but are not interfering with which party ends up paying for the operation. To this date, there are no international obligations directly addressing who has to bear the financial burden.

Para 3.11 of the IMO guidelines is the nearest we come to an explicit mention of decommissioning costs. As previously reviewed, this is a soft-law instrument meaning that the provisions are not legally binding to the coastal state. Para 3.11 states that "[t]he coastal state should ensure that legal title to installations and structures which have not been entirely removed from the sea-bed is unambiguous and that responsibility for maintenance and the financial ability to assume liability for future damages are clearly established". The State is responsible for creating national regulations ensuring that the entity responsible for bearing costs related to future decommissioning costs has the financial strength to cover such

[75] David Bellamy et al, *OSPAR 98/3: An Environmental Turning Point or a Flawed Decision*, 42 Marine Pollution Bulletin (2001), p. 87

liabilities. According to a textual reading of the provision, this relates to liability for damage occurring in the future. Consequently, there is no general rule holding a particular party liable for decommissioning costs regardless of the situation that damage occurs.

Understanding that there is no particular regulation on liability for decommissioning costs provided for in public international law, the following discussion will focus on the Norwegian regulation governing decommissioning (chapter 4) and the regulation of the liability to cover the decommissioning costs (chapter 5).

4. The Norwegian legislation on decommissioning of oil and gas infrastructure

4.1 Introduction

In this chapter, we aim to identify and give an overview of the key features of the decommissioning framework within public Norwegian law. An adequate decommissioning framework requires several conceptual issues to be regulated in a satisfactory manner. Allocating liability for decommissioning is a key feature of the Norwegian regulation, but at the same time, part of a bigger regulatory scheme sought to balance various interests and conflicted industries. The main objective of the framework is ensuring that companies perform a thorough assessment regarding the disposal of offshore infrastructure.[76] We will see that this is done by posing comprehensive obligations on the licensee in this last phase of the petroleum activity.

We are discussing the key features of the Norwegian framework to understand how the public law liabilities and the private law liabilities connect and how both divisions can be traced back to the statutory requirements in chapter 5 of the Petroleum Act. Chapter 5 consists of rules on the shutdown, decommissioning, and the disposal of offshore facilities. The specific rules concerning liabilities in public Norwegian law will not be given in this chapter.

[76] Hammerson (2013), p. 349

The most important rules that we will present concern the requirement to submit a decommissioning plan, decide on the disposal of the facility, conduct the decommissioning, and finally control the way the decommissioning is carried out. We identify that responsibility related to decommissioning in chapter 5 of the Petroleum Act is tied to the license for conducting decommissioning activities, as well as ownership and control over the petroleum facility. The State is not involved as a responsible party, still heavily involved in the planning phase to ensure that the activities are carried out in a justifiable matter.

The system of requiring production licenses for companies operating on the NCS will be reviewed in the following, as this is the central control mechanism for the Norwegian administrative authorities.

4.2 The license requirement

To fully understand how the production license connects to the decommissioning obligation, it is crucial to clarify the rights and obligations following a license.[77] Awarding a production license can be described as a contractual element between the State and the operator, implying that offshore installations later installed must be decommissioned by the licensee.[78] The comprehensive obligations tied to the license is a key factor to understand the ruleset in chapter 5 of the PA.

The rationale behind a decommissioning obligation can be found in para 1-3 of the PA. The provision enshrines the State's exclusive right to govern petroleum activity by granting production licenses for the utilization of subsea resources. Through the licensing system, all phases of petroleum activity are subject to government control, imposing comprehensive obligations on the licensee given the authorization to utilize the natural resources belonging to the State.

Para 3-3 of the PA states that the operator through the license is given "exclusive rights to survey, exploration drilling and production of petroleum deposits in areas covered by the license". The Government is on the other hand free to stipulate conditions in exchange for granting an exclusive right to the operator, cf. para 11 of the Petroleum Regulations. Pursuant to para 10 of the Petroleum Regulations, the decision of granting a license is based on the

[77] For the meaning of the term "license" see the clarification under point 1.4
[78] Hammerson (2013), p. 351

"[…] applicant's technical competence, financial capacity and a plan for exploration and production in the area for which a production license is sought, so that the best possible resource management is promoted".

Nevertheless, para 3-3 fourth subsection states that the King (Government) "[…] may stipulate as a condition for granting a production license that the licensees shall enter into agreements with specified contents with one another". This means that being awarded a production license can be conditioned by participation in standardized contracts to ensure that the license is "carried out in a proper manner" (para 11 of the PR).

The government requires the participants under a production license to establish a joint venture under an agreement concerning petroleum activity. This condition is prescribed in Article 1 of the special provisions under the standard Joint Operating Agreement, see chapter 6. These contractual obligations represent the second main source of the decommissioning regulatory regime. The JOA's are closely connected to the production license and therefore an essential legal source governing decommissioning in the oil and gas sector.

The condition of participating in standardized contracts is one example of how the public legislation, with a basis in the Petroleum Act, directly and specifically sets requirements affecting the internal contractual relations between licensees, owners, and operators.[79] Private law perspectives are thus closely connected to legislative requirements in Norwegian law and the other way around. The law does open for a division between public and private law aspects, especially shared for the issue of allocating liabilities. This division will be discussed further in Chapters 5 and 6.

4.3 The decommissioning plan and the disposal decision

The most explicit obligation related to decommissioning is regulated in para 5-1 of the Petroleum Act. According to the provision, the licensee is required to submit a decommissioning plan to the MPE no earlier than five years but no later than two years prior to the excepted cessation of the facility, cf. § 5-1 second subsection of the act. This obligation implies that offshore facilities later installed must be decommissioned in accordance with the minimum international law requirements.

[79] Pereira et al (2020), p. 548

According to para 5-1 first subsection fourth sentence, "the plan shall contain the information and evaluations deemed necessary in order to make a decision according to section 5-3." The purpose of requiring a decommissioning plan is to make thorough assessments on the disposal of petroleum installations using the information and evaluations in the plan. This purpose is clearly stated in fourth sentence in para 5-1 fourth subsection.

Para 5-3 first subsection stipulates that the MPE shall make a decision on the disposal of the facility based on the decommissioning plan and generate a time limit for the implementation of it. According to para 5-3 second subsection, the "licensee and the owner" are the liable parties for the implementation of the decision unless the Ministry decides otherwise. This will be reviewed in closer detail in chapter 5.

As the decommissioning plan is important for the Governments final assessments on the disposal, it is crucial that the plan contains detailed information and evaluations on the different options occurring when production ceases.

Making the licensee responsible for preparing and submitting the decommissioning plan indicates that the licensee is heavily involved in the planning of the decommissioning activities. However, chapter 5 leaves no question to the matter that MPE has the final word in deciding on the disposal of the facility. They may choose to consider the decommissioning plan, refrain from doing so and even require the licensee to give further information or evaluations deemed necessary to make such a decision, cf. para 5-1 first subsection last sentence.

Para 5-3 first subsection stipulates that in the assessments on which the decision is based, the MPE shall take into account e.g. technical, financial, and safety considerations, as well as environmental impacts and, have due regard to other users of the sea. A textual interpretation of the provision does not exclude other relevant factors to be emphasized.[80]

We have seen that the main objective of regulating the cessation of petroleum and the decommissioning activities is to make thorough assessments on the disposal of the infrastructure. Additionally, the rules show that determining the disposal of the installation

[80] This is clearly stated in Ot.prp.nr.43 (1995-96) p. 51.

must happen on a case-by-case basis.[81] The considerations required to be made when determining the disposal must be made on scenarios in each individual case.

4.4 Remedies available to the State

The regulation of decommissioning liabilities must consider that the coastal state, through its taxpayers, doesn't end up paying for private-sector liabilities.[82] As previously mentioned, the overarching petroleum policy of the Norwegian State is to maximize the State revenues.

There would always be a risk that companies might not have the financial capability to bear the comprehensive costs related to decommissioning. Rules must be created to ensure that operators remain liable for financing the decommissioning when production ceases. Furthermore, the ruleset must prevent companies from simply just default their financial obligations.[83]The Norwegian legislation provides for different remedies available to the State to prevent this scenario, and in the following, we will give a brief review of the most practical ones.

Para 10-7 of the PA states that the MPE can require the licensee to provide security for the fulfillment of the obligations undertaken by the licensee and for possible liability connected to petroleum activity. According to a textual reading, such providence can be required at any time and can be related to any financial obligation pursuant to the PA. This is typically in connection with awarding a production license, but could also happen at a later stage if considered necessary by the MPE.[84] A standard parent company guarantee (PCG) is usually used by the MPE, meaning that the guarantor under the PCG would have to financially perform if the licensee fails to fulfill economic liabilities in connection with its petroleum activities.[85] Because the security can be required to be fulfilled at any time, the provision is a good example of a remedy the State can take advantage of to make sure the licensees carry out the obligations following the license.

The legislator found it necessary to stipulate that other responsible parties pursuant to chapter 5 can be required to provide security to the State pursuant to para 10-7 second subsection. As

[81] Bustnesli et al (2021), p. 123
[82] Pereira et al (2020), p. 151
[83] Anchustegui et al (2021), p. 30
[84] Hammerson et al (2013), p. 351
[85] Bustnesli et al (2021), p. 361

stated in the preparatory works, the possibility to require security from other participants than e.g. the owner of the facility is beneficial and necessary to cover all the situations pursuant to chapter 5 of the PA.[86]

Another solution that could be financially beneficial for all parties is provided for in para 5-6 of the PA. The State has a right to take over the fixed facility at the time when a license expires, is surrendered, or revoked, or when the use of such facility has been terminated permanently". By a State takeover, the licensees would be relieved from the obligation to decommission the facility as the new liable party would be the State. It is however no installation that has been taken over by the State up to this date, and it is uncertain if this is too expensive for it to be financially beneficial.[87]

5. Public law liability for decommissioning

5.1 Introduction

The previous chapter gave an overview of the Norwegian rules concerning cessation of petroleum activity. In the following, we will dive further into the specific rules governing liability for decommissioning.

Before we can review who is liable and what they are liable for, we must clarify what liability means in this context. There is an important division we must keep in mind when discussing liabilities. We have identified that we have liabilities originating from public law, and liabilities that are private law regulated. In this part, we aim to explain what type of liabilities originate from the public law and when they occur.

Norwegian public law has rules for liabilities relating to both current and future issues related to decommissioning. The focus of this presentation is the liability rules connected to installations subject to a decision of disposal, but we also have rules for liability that occur because of damage or inconvenience in connection with the actual removal. Additionally, we have residual liabilities for the case that the infrastructure has been left in place and

[86] Ot.prp.nr. 43 (1995-96) p. 62
[87] Bustnesli et al (2021) p. 131

circumstances in the future demand an economic compensation. As we will see, the liabilities for the latter can remain upon a licensee in perpetuity.[88] All of these issues are subject to the discussion in this chapter and falls under the umbrella of financial liabilities.

In the following presentation the division between the liability to *implement* a disposal decision, and the *financial* liability to cover the decommissioning is essential. The conceptual issues of implementing the decision and paying for it are closely connected but treated differently in the regulation. The two types of liability do not always coincide, partly because for the duty subject of implementation to consider the liability reasonable, and for the concerned to be able to effectively perform the task, it is favourable that he has a current affiliation with the subject. The affiliation condition is not as prominent when allocating financial obligations, and can remain with a party long after he has left the joint venture.

Before addressing decommissioning liabilities, we must discuss the *general rule* of joint and several liability for financial obligations originating from all petroleum activities under a production license.[89]

5.2 Who has to pay: the joint and several liability

Para 10-8 of the PA states that the licensees who jointly hold a license are "jointly and severally" responsible to the state for "financial obligations arising out of petroleum activities pursuant to the license". The paragraph stipulates a joint and several liability for all costs arising between licensees operating under the same license.

According to a textual reading, the liability concerns the financial liability arising out of the activity pursuant to the license. That means that the financial liability is limited to the obligations the licenses have by virtue of having been granted the license.

It is clear by the wording "financial liability" that payment obligations are covered within the scope of the paragraph. In our perception, there are few limitations to this expression, as it is difficult to imagine obligations arising from the joint venture that would be non-economic.

[88] Liability in perpetuity means that the owner of the facility is liable for damage occurring in the future without the possibility of transferring the liability to the State (owner-centered). The UK is an example of a country operating by this rule. On the contrary, The Norwegian Petroleum Act allows for the liability to be transferred to the State pursuant to para 5-4 fourth subsection. See Foorogh Torabi, *Legal Regime of residual liability: the importance of role of states* (2021) p. 4

[89] Para 1-3 of the PA

The obligation to present a decommissioning plan is mandatory under the license, which means that all costs originating from this practice are covered by the joint and several liability.

Stipulating joint and several liabilities between the licensees obliged to conduct the decommissioning is a legal measure within the Norwegian framework to prevent a situation where the State through its taxpayers is left with the financial burden. By expanding those liable for financing the decommissioning, the risk for the State bearing the liability eventually is sought to be minimized.[90] The rule is reflected in the JOA Article 7.1 stating that the members are principally pro-rata and alternatively joint and severally responsible for obligations arising over the course of the joint venture. More about this under point 6.2.5.

The cost of the implementation is covered in the same way as other costs the group of licensees incurs through the joint venture: after a request from the main operator, a "cash call", demanding that the members pay the accurate amount to cover the cost, cf. JOA Article 8.1. We will review the relationship between licensees thoroughly under chapter 6 of the thesis.

5.3 Asking who is responsible: who has to decommission?

The question in the following is who is liable for the implementation of the decommissioning decision**.**

As we have seen, para 5-3 first subsection of the PA gives the Ministry decisive competence in relation to the disposal. Para 5-3 second subsection states that the "licensee and the owner" are under obligation to make sure that MPE's decision relating to disposal is carried out.

The licensee is the "physical person or body corporate, or several such persons or bodies corporate, holding a license according to this Act", cf. para 1-6 letter j. The owner and licensee will be the same legal entity in most cases. Furthermore, a textual interpretation of "carried out" suggests that the paragraph covers the actual implementation of the decommissioning and not just the financial liability for the cost of implementation. The owner and the licensee are both pointed out as duty subjects, and therefore jointly liable for this responsibility. This is a practical rule. After the license has expired, there is no longer a

[90] Anchustegui et al (2021) p. 30

licensee with rights under the relevant permit. Therefore, the State need to include the owner of the facility as a duty subject.[91]

In most cases, the implementation of the disposal decision will happen after the license has expired. Following para 5-3 second subsection, it is clarified that the obligation to implement the disposal decision is maintained even if the implementation is planned to happen after the license has expired.

We must also address what happens with the *implementation* liability if the license, or shares in the license, is transferred. The license cannot be sold without the MPE`s consent, cf. para 10-12 first subsection. The central question is if the seller remains obligated for future liabilities related to facilities that were placed at the field pursuant to the license before he transferred his share.

General principles of contract law apply, and the clear primal rule is that the buyer will take over all of the rights and obligations connected to the assignors' share in relation to the facilities used in the petroleum activity. In most cases, this includes the property rights to the facility under the joint venture. Consequently, the seller is neither a licensee nor an owner anymore, cf. 5-3 second subsection first sentence. In conclusion, the assignor of a license will not be liable for the implementation of the MPE disposal decision.[92]

The seller and the licensee are free to regulate the liability for the future disposal between them as they wish in the purchase agreement, but this contract will only have effect between the parties. The State are free to approach whoever is liable under para 5-3 second subsection.

Para 5-3 fourth subsection applies in the case the licensee-group wants to transfer a "fixed facility" deployed under the license in accordance with PA para 3-3.[93] A textual reading implies that installations that are not fixed to the seabed, are not regulated under the paragraph.

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[91] Ulf Hammer mfl., *Petroleumsloven. Lovkommentar*, § 5-3. Vedtak om disponering, Juridika (kopiert 06. mai 2022

[92] As we will see under point 5.4, there is a substantial financial liability following the seller of a license even if he is no longer responsible for the actual implementation

[93] Se omtale av forholdet mellom faste og flyttbare innretninger i kommentarene til § 5-6 (punkt 3.2) og kommentarene til § 5-1 (punkt 5).
Ulf Hammer mfl., *Petroleumsloven. Lovkommentar*, § 5-3. Vedtak om disponering, Juridika (kopiert 07. mai 2022)

According to para 5-3 fourth subsection, the licensee and the owner are jointly liable to make sure the decision of disposal is implemented. A textual reading says that both the seller and the buyer are liable for implementation. The preparatory works are a little deviating from the wording of the paragraph, stating that "the new owner is liable for the implementation with the licensee or the former owner"[94]

The question arises if the former owner (that was not a licensee) is also liable for the implementation of decommissioning. However, it would coincide badly with the system in the Petroleum Act if the preparatory works were to be interpreted to put liability upon the former owner that was without rights under the license. When interpreting this statement, we have to consider the rule in para 10-12 second subsection, stating that it is only transfers of facilities owned by the licensee group (and not from an owner that is not a licensee) that need approval from the MPE.

In conclusion, a former owner, that was not a member of the licensee group is free of liability.

5.4 Allocating decommissioning costs: PA para 5-3 third subsection

In the following discussion, we will review the financial liability rules in relation to decommissioning.

Para 5-3 third subsection of the Petroleum Act states that if a license or a share in a license is transferred, the transferring licensee shall be alternatively financially responsible to the other right holders for the cost of the implementation of the decision on disposal.
When a license has been transferred, the buyer is the new owner of the license and entitled according to the license, cf. Petroleum Act § 1-6 letter j. Therefore, it is the buyer that is responsible for covering the decommissioning costs with the other licensees.
That is why the seller's liability is an alternative one, he can only be held responsible if the buyer himself is not capable of covering the cost. Before reviewing this paragraph closer, it is necessary to understand why the legislator thought it useful to implement such a rule.

[94] Ot.prp.nr. 43 (1995-96) s. 52

5.4.1 Background and purpose of para 5-3 third subsection

In the legal proposition putting forth the alternative financial commitment, the Ministry of Energy and Petroleum (MPE) points to the fact that the Norwegian petroleum business to a large extent has been dominated by right holders with solid financial strength. The MPE further states that there is a need for more players that could challenge and supplement the companies working within the already existing production licenses, to contribute to the area being used in a more efficiently. It was also assumed that this development would increase the competition in certain areas and contribute with new searching concepts and focus on areas that the established players did not prioritize.[95] This is because some of the smaller players were more specialized in prolonging the period of which a field could be run with a profit.

A license is normally awarded to multiple licensees jointly. All the licensees are committed to ensuring the implementation of the disposal decision, cf. PA § 5-3 second subsection. A term for being awarded such a license, is that the parties enter into an agreement called a Joint Operating Agreement (JOA), cf. § 3-3 (4). Even though the JOA is a general private law agreement, it is considered the main regulatory instrument among the group of licensees, as it constitutes the rights and obligations between the members of that specific oil and gas operation. After the JOA the licensees are principally responsible pro-rata, and secondarily jointly and severally responsible for commitments that originate from the licensee-group's activities, see article 7.1 of the JOA.

The right holders are obligated to put forth a closing plan and the cost of disposal can be significant. The new companies were thought to have lesser financial capacity and trouble accommodating termination obligations on a field. The combination of less solid companies and the remaining right holders being jointly and severally responsible decreases the probability that the remaining parties will have to cover a bigger part of the commitment than their share would imply, exposing them to a way bigger risk. Therefore, it was considered a good solution to implement into the legislation an alternative responsibility for the seller so

[95] (Ot.prp.nr. 48 (2008-2009) Om lov om endringer i lov 29. november 1996 nr. 72 om petroleumsvirksomhet p. 4

that the remaining right holders would not be exposed to a much larger risk than if the license had not been transferred.[96]

Based on this reasoning, the MPE found that the main principle should be that companies that have been right holders in licenses, should continue to be alternatively liable for their part of the cost of implementation of a future declaration of disposing, that is connected to the transferred share. By regulating the alternative liability into the PA, it became clear who was obliged to pay the disposal costs and in what order. The liability rule in § 5-3 third subsection could also have a preventive effect, by depriving the seller of any intensive to sell the license cheap in order to get out of an expensive disposal obligation.[97]

Today there is a wide range of oil companies on the NCS, all with different backgrounds and objectives, and with varying financial capacity and technical competence.[98]

5.4.2 Alternative liability: PA para 5-3 (3)

The wording in section 5-3 third subsection of the PA states that if a "license or participating interest in a license" has been transferred, "the assignor" shall be held "alternatively liable" for "financial obligations" towards the "remaining licensees" for the cost of carrying out the decision relating to disposal.

The seller is responsible to "the remaining licensees", cf. PA § 5-3 third subsection second sentence. The question arises whether the alternative liability can be invoked by the individual licensee, or if it can only be invoked by the group as an entity. This is not clear from the law or the preparatory works. The question arises if it could be assumed that the Operator acts on behalf of the licensees, cf.. JOA section 3.2.1.[99]

In our perception, the other licensees cannot be barred from requesting payment that is necessary to secure their rights according to the PA and the JOA. Especially considering the probability that the main Operator is the one defaulting the payment.

[96] (Ot.prp. nr. 48 (2008-2009) p. 4-5
[97] Ulf Hammer et al, *Petroleumsloven. Lovkommentar*, § 5-3. Ansvar, Juridika (kopiert 6. mai 2022)
[98] Norsk olje og gass. Anbefalte retningslinjer for finansiell sikkerhetsavtale for fjerningsforpliktelser – bruk av modellklausuler, no. 128, 2010, p 6
[99] About the role of the Operator see point 6.2

It is the seller that is the "assignor" and the one that can be held liable to the other licensees if the buyer defaults, cf. PA § 5-3 third subsection third sentence. If more licensees have transferred their shares to the same defaulting buyer, the remaining parties of the licensee-group can request payment parallelly from each of the sellers.[100]

The financial responsibility following from the first or second sentence, being the "financial obligations" is calculated based on the size of the transferred section and put towards the transferring licensee after deduction for the tax value of the costs incurred by implementing the disposal.[101]. That means that the alternative liability is limited to 22 % of a defaulted share of the removal costs. The remaining 78% will be covered through the taxation system for the right holder group that is executing the removal.[102]

This type of solution will contribute to keeping the security cost level down, to benefit both the state and the companies. It should also be mentioned that the responsibility is financial. It was not desirable to make the assignor do the actual implementation of the decision of disposal, as the seller may not be organized to conduct petroleum activities at the time of the disposal.[103] The responsibility is objective in the sense that the background or reason for the transfer is without relevance when deciding the scope of the liability, according to the preparatory works.

The commitment of the transferring licensee stays on despite later transfers of the share or parts of it, but the claim shall first be directed towards the company that last transferred the share, cf. § 5-3 third subsection fourth sentence.

5.4.2.1 What is covered by the alternative liability

According to the preparatory works, the alternative liability does not include a later joint and several liability pursuant to the JOA. Consequently, the seller cannot be held liable for costs incurred after the time of transfer that one or more of the other licensees should have covered in accordance with the joint and several liability. This rule fits well within the system. The seller is no longer a party to the agreement after the transfer and cannot be held jointly and severally liable for obligations that arise as a result of the licensee group`s activities. From the

[100] Ot.prp.nr 48 (2008-2009) s.12
[101] Bustnesli, (2021) s. 127
[102] Bustnesli, (2021) s. 130
[103] Ot.prp.nr. 48 (2008-2009) s. 12

time of the transfer, it is the buyer that is the new right holder, and the only one bound by the provisions in the JOA.[104]

This perspective is well in harmony with the rule in § 5-3 third subsection sixth sentence, stating that the financial obligations only apply to "costs related to the facilities, including wells, which existed at the time of the transfer".

It follows from the Petroleum Regulations section 45a that "facilities, including wells, that existed" as mentioned in § 5-3 third subsection are defined as facilities, including wells, that existed physically at the time of the transfer and that are located at the destination. The liability also comprises facilities commenced, including wells, in the process of being located within the area for the production license.

According to the Petroleum regulations, the wording "the time of the transfer" is defined as the day the transfer is registered pursuant to the Petroleum Register.[105]

As we have seen, alternative liability for financial obligations is defined in section 5-3 third subsection of the PA. The liability occurs when a licensee has breached the payment obligation for the costs of implementing the disposal decision, and the agreement between the parties does not warrant covering of the claim[106]. If an interest has been transferred several times, the other licensees must always direct their statutory demand for payment against the assignor companies in a successive sequence. That way the claim is directed against the company that last transferred the interest, and then against the next company if the first breached its payment obligation.

The licensee and assignor companies have breached their payment obligation if they have not covered their liability within three months of having received the statutory demand for payment, cf. para 45a of the petroleum regulations.

The assignor could also be held alternatively liable to the state, cf. 5-3 third subsection second sentence. According to 5-3 sixth subsection, the MPE can implement necessary measures on behalf of the licensee if the decision of disposal is not implemented within the deadline. All costs relating to the "necessary measures" is also subject to the alternative liability the

[104] Ot.prp. (2008-2009). nr. 48 s. 12
[105] Regulations of 19 june 1997 NO 628 relating to the petroleum register, section 4-2, section 4-2 second paragraph
[106] See point 6.3 about Decommissioning Security Agreements

assignor could have to answer for to the State.[107]
The claim shall be calculated based on the size of the participating interest assigned and shall be claimed from the assignor after deduction of the assessed value of the costs incurred by the implementation of the decision regarding disposal.[108]

5.4.3 Possible measures to safeguard against the alternative liability

In the following, we will review possible measures the seller can use to safeguard themselves from the alternative liability arising from para 5-3 third subsection.

According to the Petroleum Act and sales agreement (PSA) article 2, the basis is that the buyer assumes all rights and obligations related to the license, also the removal costs.[109] However, there is always a chance that the buyer will default this responsibility so that the seller's alternative financial liability arises.

The seller must decide if they should, and in that case, how, they will protect themselves against this potential liability. This assessment depends on the removal costs and how likely it is that they will be made applicable. Relevant factors are the buyer's current financial strength, and the probability of it changing in the time up to the removal obligation. The latter typically depends on the length of time until the removal and the seller's view of the development in the petroleum industry in general and in Norway.[110]

As we have reviewed before, the alternative liability is limited to the removal of the facilities that existed at the time of the transfer. Generally, it's easy for the seller to obtain an overview of which facilities this applies to. What could be trickier is creating an opinion of the total costs and the time of removal, as well as the likelihood of the liability being exercised.[111]

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[107] Ot.prp. nr 48 (2008-2009) s. 12
[108] Petroleum Regulations available at https://www.npd.no/en/regulations/regulations/petroleum-activities/#Section-45a
[109] Model Agreement 2 issued by NOROG available at: ,https://www.norskoljeoggass.no/globalassets/dokumenter/naringspolitikk/skatt-og-fiskalt/modellavtaler/02-sales-and-purchase-agreement-spa.pdf
[110] Model Agreement 5 issues by NOROG available at https://www.norskoljeoggass.no/globalassets/dokumenter/naringspolitikk/skatt-og-fiskalt/modellavtaler/norog-5--decomssioning-security-agreement-for-removal-obligations-engelsk-150517.pdf s. 20
[111] NOROG 5 p. 21

The seller could demand that the buyer issue a guarantee for the liability. If the seller wants the buyer to provide security, sections regarding this should be taken into the agreement.[112] The perception of NOROGs working group is however that a separate agreement regarding such security is made, contracts like these are called DSA, and are made after models in British law. We will go into further detail about this under point 5.2.

Still, the seller will likely get a much better price for the license if he waivers a requirement for security, of course entailing taking a calculated risk that the buyer will be able to carry the removal costs.[113]

Another opportunity is that the seller can reserve the right to buy back the license on agreed-upon terms if the buyer meets financial difficulties. This will allow seller the opportunity to exploit the rest value of the license to cover the removal obligation or at least reduce the cost of this. Another alternative is to make the buyer pay a removal contribution alongside the buying sum. When the installation is removed this is paid back, adjusted upwards with interest for the time the seller had the amount.[114]

When dealing with offshore operations, a lot of things can go wrong, and dealing with this can easily become costly affairs. The removal phase of the operation is not profitable for the companies, making it even more important for Norwegian legislation to have satisfactory rules regulating who is going to take the bill in case of damage.

5.5 Liability for damage at the disposal

Para 5-4 first subsection of the PA states that the party responsible for implementing a decision relating to disposal according to section 5-3 is "liable for damage or inconvenience caused wilfully or negligently in connection with disposal of the facility or other implementation of the decision." If there is more than one party liable pursuant to the first or second paragraph, they shall be jointly and severally liable for financial obligations, cf. para 5-4 third subsection.

[112] Hammerson et al (2013) s. 73
[113] Bustnesli et al (2021) s. 335
[114] According to the NOROG 5 model agreement p. 21

The same rule applies if the disposal decision is abandonment, according to para 5-4 second subsection. Furthermore, the licensee and owners are free to create an agreement with the State on the future maintenance, responsibility and liability for the facility. This can be taken over by the State, based on an agreed financial compensation, cf. para 5-4 fourth subsection. A closer look at these provisions will be given under 5.6.

This section of the Petroleum Act is partly based on the proposition put forth by the Petroleum selection in 1993.[115] The wording "in connection with disposal" however, suggests that the liability is directed more generally towards the process of shutting down the operations of the facility, and not limited to the actual removal as in the 1993-proposition from the Petroleum Selection.

5.5.1 Who is liable and when does the liability occur?

The paragraph state that it is the duty subject according to para 5-3 "the licensee and the owner" that is liable. If there is more than one subject responsible for the damage, they are jointly responsible for the economical obligations. Generally, the Norwegian rules governing decommissioning liabilities tie the responsibility to the right holder under the production license and owner of the assets, not involving the State as a responsible party.

Liability for damage and inconvenience is conditioned by a wilful or negligent act related to the implementation of the disposal decision.

When determining what falls under the scope wilful or negligent we must consider what can reasonably be expected of an insightful and normally sensible professional who acts within the relevant occupational area. An important element in this assessment is the action's damaging ability, entailing both the risk of damage occurring and the extent of any damage.[116]

In relation to petroleum activities, the extent of any damage will be of central importance. The assessment of negligence is sharpened because injuries can cause enormous damage, even if they occur infrequently. In addition, an element of great importance is to what degree the liable party has taken measures to prevent damage from occurring. Especially, if the legislator

[115]Petroleumsutvalget in NOU 1993:25 Avslutning av petroleumsproduksjon og fremtidig disponering av innretninger

[116] Ulf Hammer et al, *Petroleumsloven. Lovkommentar*, § 5-4. Ansvar, Juridika (kopiert 6. mai 2022)

has given provisions in the law or other regulation that are meant to decrease the damage potential of the activities.[117] A breach of such safety provisions will weigh heavily in the assessment, and often be decisive.[118]

5.5.2 How long does the liability prevail?

The liability includes damage or inconvenience that the facility may cause until the "disposition has been carried out."[119] The preparatory works state that to the extent that obligations are attached to abandoned facilities, this is also considered a part of the termination that is included in the concept of petroleum activities.[120]

That means that activities in all phases of the process of carrying out the disposal decision will fall within the timely scope of the liability pursuant to para 5-4. The time limit of the liability lasts all the way through the planning phase and throughout the closing stages with supervision and maintenance. A result of this interpretation is that the liability will prevail for a long time. Nor the wording of the law or the preparatory works gives any suggestion as to how long this liability could exist.[121]

The responsibility arising from para 5-4 is contrary to liability arising from pollution damage connected to petroleum facilities regulated in chapter 7 of the PA and compensation to Norwegian fishermen under chapter 8 of the PA.[122] Provisions regarding general pollution damage, that is not related exclusively to the removal obligations - falls outside the scope of this thesis.

This chapter has focused on liability for damage or inconvenience connected to the disposal of the facility. We have introduced para 5-4 second subsection and how a future liability connected to the decommissioned facility is created in public Norwegian law. Liability remaining *after* the installation has been decommissioned is what we refer to as residual liability. The following chapter will go deeper into the regulatory schemes dealing with

[117] Para 10-1, 10-6 of the PA, para 56-58 of the PR
[118] Ulf Hammer et al., *Petroleumsloven. Lovkommentar*, § 5-4. Ansvar, Juridika (kopiert 6. mai 2022)
[119] Ot.prp. nr. 43 (1995–96) s. 52
[120] (Ot.prp.nr. 43 (1995-1996) s. 29)
[121] Ulf Hammer et al., *Petroleumsloven. Lovkommentar*, § 5-4. Ansvar, Juridika (kopiert 07. mai 2022)
[122] Para 7-3 Section 7-3 stipulating liability for pollution damage without fault, para 8-3 accordingly making licensees and owners financially liable for pollution and disposal related to the petroleum facility inflicting with Norwegian fishermen without fault considerations

residual liability. Both the basic rule in para 5-4 second subsection and the more unique provision in para 5-4 fourth subsection providing for future liability to be transferred to the State will be discussed.

5.6 Residual liability

5.6.1. Governing residual liability in public Norwegian law

Another variation of financial liability is the one occurring after the decommissioning has been completed, lasting for an uncertain period. This is a responsibility that could last in perpetuity.[123] Public Norwegian law has rules governing the post-decommissioning liability in para 5-4 of the Petroleum Act. Such rules don't exist between the participants of a joint venture within their internal agreements. However, we have mentioned that in the case of several responsible parties, they are jointly and severally liable after para 5-4 third subsection. Before elaborating on the importance of discussing residual liability, we will take a closer look at the relevant provision.

Para 5-4 second subsection states that the "licensee and the owner are liable for damage or inconvenience caused wilfully or inadvertently in connection with the abandoned facility, unless otherwise decided by the Ministry". Like the first subsection, this rule is conditioned by fault. The Norwegian provision does not distinguish between the faulted act in para 5-4 first and second subsection.[124]

A condition for liability pursuant to the provision is that the government has decided on abandonment in the decision on disposal, cf. 5-3 first subsection. Stipulating that the provision addresses liability for abandoned facilities makes it clear that the liability prescribed concerns *future* liabilities that can be connected to the facility, the residual liability.

Liability pursuant to para 5-4 second subsection is, thus, closely connected to the decision on disposal in para 5-3. A central question is whether this excludes facilities left partly in place which is not mentioned in the provision. In our view, there are no good reasons for excluding

[123] Anchustegui et al (2021), p. 32

[124] The NPD's official translation of the Petroleum Act however differ at this point between "negligently" and "inadvertently". This difference will not be commented further, as the Norwegian text is the only relevant source, and that there is no reason why the English translation would differ between first and second subsection.

the situation of partial removal if we look at the background for having such a liability. Damage or inconvenience may be caused from parts of offshore facilities as well, making this division unnatural. Legal theory shares the view that rules on residual liability include the case of partial removal.[125]

The "licensee or the owner" are the liable parties pursuant to para 5-4 second subsection. The legislator has chosen to change the responsible subject in this section. If we look at para 5-4 first subsection, the "licensee and the owner" are stipulated as liable parties. The reason for going from these being liable together to only stipulating one of them as a liable party is not clear. The MPE are however free to decide that both the licensee and the owner will remain liable for the future, cf. last sentence.

Deciding if it is the licensee or the owner that should be liable for the future are according to the provision not subject to any limitations, according to a strict textual interpretation of the provision. As emphasized in the preparatory works, the MPE's decision must consider the IMO-guidelines art. 3.11.[126] The provision requires the coastal State to consider that liable parties have the financial strength to cover future damages in connection to the offshore facility, as discussed previously under chapter 3.[127] Thus, the MPE needs to consider that the party liable for future costs has the sufficient stability to cover those, cf. Preparatory works p. 22. The possible length of this liability makes stability a key factor.

According to a textual reading of para 5-4 second subsection, there are no limitations on the timely scope of the liability. As mentioned, the preparatory works state that this form of liability, due to its length, requires it to be sufficiently regulated.[128] The liability concerns future damage, meaning that the liability could last for an unlimited period.

However, Norwegian public law provides for the possibility of terminating the residual liability by transferring it to the State. Para 5-4 fourth subsection states that "in the event of decision for abandonment, it may be agreed between the licensees and the owners on one side and the State on the other side that future maintenance, responsibility and liability shall be taken over by the State based on an agreed financial compensation". This is a rule that

[125] Anchustegui et al (2021), p. 60
[126] Ot.prp.nr.43 (1995-96) p. 22
[127] Public international law does not address residual liability further, as discussed under point 3.6.
[128] Ot.prp.nr.43 (1995-1996) p. 22

provides for terminating the residual liability imposed on the licensee and owner of the facility. The liability is terminated is by transferring all future maintenance, responsibility and liability to the State. The flexible solution of transference differs from other North Sea countries, most importantly the UK which also provides detailed regulations on decommissioning-related liabilities.[129]

The result of the transfer provided for in the provision is that the State, through its taxpayers, eventually would end up paying for the private sector liabilities. The financial compensation must be kept in mind, possibly making the transfer less important financially. The licensee would have to pay a price for this to happen, meaning that this is not necessarily an easy way out for the licensee or the owner.

To whom the transfer should happen is not specified. The state operates through state bodies (the government through MPE) and is a direct participant in many licenses on the NCS through the SDFI, meaning that the transfer could be transferred either directly to the administrative body or an oil and gas company that is state-owned.[130]

What the amount of the fee should be is not specified in the PA or the preparatory works. The wording of the provision makes it clear that the scheme itself, including the size of the compensation, is subject to agreement between the participants - the State and the licensees.

Norwegian public law regulations on liabilities provide for predictable rules for all involved stakeholders. The financial liability related to decommissioning follows the operator from the obligation to submit a decommissioning plan to the MPE pursuant to section 5-1 of the PA, carrying out the disposal decision according to section 5-3, and finally being responsible for any damage or inconvenience connected to the operations, including subsequent claims. This is a key feature of public law liabilities in general.

5.6.2. Understanding residual liabilities

After the operation has been conducted by the licensee or license group obliged to do so, stakeholders may be tied by different obligations subsequently to the operation and disposing of the material. The term residual liability is not legally defined in Norwegian law nor

[129] Pereira et al (2020), p. 155
[130] Anchustegui et al (2021), p. 33

international treaties but is defined as "any liability or obligations imposed on the asset owner or operator after completion of the operation" in relevant literature.[131]

Damage or inconvenience may be caused when the operation has been conducted, either to the environment or to other industries. It is, therefore, safe to say that residual liability is regulated in consideration for third parties. Decommissioning tonnes of infrastructure is a complex engineering process. Pollution from abandoned facilities is the basic example of damage, including possible disturbances to the fishing industry.[132]

Residual liability is important to discuss because provisions addressing the residual liability prevent, or at least minimize, the risks that the State eventually would have to bear the liability for the costs.[133] This post-decommissioning liability typically involves a form of financial compensation but could just as easily comprise of other than financial duties. For instance, operators can be liable for supervising and maintaining installations left in place to safeguard the environment and general safety risks.[134]

Furthermore, residual liabilities surely would have the effect of preventing operators from taking 'the easy way out', meaning that operators liable for conducting the decommissioning carry out the processes thoroughly without cutting corners.[135] Secondly, the residual liability scheme may lead to stakeholders preferring complete removal of the installation instead of partial removal or abandonment. The reason for this is that public Norwegian law connects residual liability, as we will see shortly, to abandoned structures. For structures removed entirely, risks connected to the removed facility would naturally be more distant as the infrastructure is completely removed from the seabed and the water column. Damage can however be discovered in later years, also when the facility has been removed years earlier. This is why rules concerning future liability are important to discuss and should be further developed in the future.

[131] Legal regime of residual liability, p. 2
[132] Anchustegui et al (2021), p. 32
[133] Pereira et al (2020) s. 151.
[134] Foorogh Torabi et al, *Legal regime of residual liability in decommissioning: the importance of role of states*, Marine Policy 133 (2021) 104727 p. 2
[135] Anchustegui et al (2021), p. 32

6. Private law liability for decommissioning

6.1 Introduction

In this chapter, we aim to present the private law that deals with internal legal issues between private parties, both natural and legal persons. Questions on who should pay for the dismantling and closing of production wells are interesting to discuss as the legislative framework on liabilities is supplemented by standardized contracts making the rules operational for private operators.[136] The objective for the following analysis is the contracts entered into by the licensees, and how they allocate liabilities between the participants of a joint venture.

6.2 Joint Operating Agreements

If the Joint Operating Agreement *forms an alliance similar to a marriage, it is likely to have 16 parties: four richer, four poor, four better, and four worse. Operating committee meetings are likely to be more like a nightmare than a honeymoon. – D. Martyn, "Upstream Oil and Gas Agreements" (1996)*

What Martyn R. David describes here is a joint venture with several different operators with different needs and priorities, trying to perform together in an activity that will cost millions and potentially generate billions of dollars for the involved parties. The question arises of what can be done to make sure the operation runs as smoothly as possible, taking precautions to an infinite number of issues, the most prominent of which being an imbalance in economic strength between the companies.

The Joint Operation Agreement (JOA) constitutes the underlying framework of a joint venture (JV) to exploit and extract oil from a field. The contract is meant to address, and to a certain degree, regulate the issues that can occur from such a major cooperation. The price the members must pay is a significant incision to the contractual freedom, which usually applies in relationships between private entities.

[136] Pereira et al (2020), p. 548

To be awarded a license to extract oil and gas, it is a condition for the operators to establish a joint operating agreement, cf. Special Provisions Article 1. The purpose of this is to facilitate a strong and stable cooperation between the operators working on the oil and gas production within the joint venture. This duty is closely linked with the States responsibility to make sure the operators take close precautions, making sure the requirements concerning the environment and operational security (among other things) are complied with. The JOAs are an absolutely key factor when we aim to understand the question of which operator is responsible for the cost of decommissioning, and how the operators can adequately solve this question between themselves. But first, we must understand what type of agreement we are dealing with when talking about JOA.[137]

6.2.1 What is a joint operating agreement and how does it work?

The Joint Operating Agreement (JOA) in the oil and gas industry is an underlying contractual framework of a joint venture (JV). The purpose of a JV is to develop and produce oil and gas in an economically viable manner.[138] It also assists oil and gas companies to mitigate the risk existing in different stages of the lifecycle of a field. The main function of the JOA is that it stipulates mandatory rules for internal collaboration between licensees and forms an integral part of the rights and obligations associated with the production license. In general, the JOA governs financial cooperation, with detailed regulations on each participant's obligations and liabilities. Furthermore, it is a central tool that serves as a supplement to various provisions of the PA, in relation to the abandonment plan, the role of the Operator, and the development plan.[139]

The parties to the agreement can broadly be classified as Operators and Non-Operators. The Joint Operating Agreement requires an Operator to conduct operations on behalf of the Joint Venture. The most common approach in the petroleum industry is to elect one party of the consortium as the Operator, this is usually the single party with the highest interest in the

[137] Joint Operating Agreement, available at https://www.regjeringen.no/globalassets/upload/oed/vedlegg/konsesjonsverk/k-verk-vedlegg-1-2-eng.pdf
[138] Claude Duval et al, *International Petroleum and Exploration Agreements: Legal, Economic and Policy Aspects* Paperback (2009) p. 285
[139] Bustnesli, (2021) p. 175

agreement, but its not uncommon to have a designated Operator who is a minority to the agreement.[140] The other licensees make up the Non-Operators.

For example, the Operator on the Ekofisk field is ConocoPhillips, while the other licensees are Total E&P Norge AS, Vår Energi AS, Equinor Energy AS og Petoro AS. While ConocoPhillips, with their 35 percent holding, has the main responsibility to run the field, the biggest shareholder is in fact Total E&P with 39,9 percent.[141]

Each party's ownership interest in the joint ventures equals its participating interest in the production license, cf. article 2 of the Special Provisions.
The Operators task is to lead the consortium to conduct the licensed operation, on a day-to-day basis. This includes hiring any service required to perform the joint operation, proposing what work should be done internally between the Non-Operator members through the appropriate mechanisms and committees, and representing the consortium towards the government and third parties. They are also responsible for requesting financial resources from the Non-Operators through cash calls and bills. The most important task of the Non-Operators is answering all cash-calls the operation requires, so that delays and hold-ups are avoided, cf. article 3.2.

This type of arrangement is efficient because it allows one party to conduct and manage operations on behalf of the consortium, this way the entire operation is easier to keep track of.

The Agreement concerning Petroleum Activity consists of three parts: (i) Special Provisions (ii) JOA (Attachment A) and (iii) Accounting Agreement (Attachment B). Article 1 further stipulates that in the event of a discrepancy between the provisions, the Special Provisions shall take precedence over Attachment A and Attachment B, and Attachment A shall take precedence over Attachment B.[142] The provisions in these contracts are mandatory. Effective 1 January 2007 the JOA was standardized and even made applicable to production licenses awarded before 2007, all the way back to 1971. The JOA therefore now applies to all joint

[140] Eduardo G. Pereira, Keith Hall Joint *Operating Agreement: Operatorship role, options and concerns* University of Colombia and a research fellow at the Scandinavian Institute for Maritime Law – University of Oslo (2017) p. 4
[141] Våre norske operasjoner: Ekofisk området available at (https://www.conocophillips.no/nn/vare-norske-operasjoner/ekofisk-omradet/
[142] Bustnesli et al (2021) s. 175

ventures on the NCS, only excluding a very small number of active licenses, the ones there were provided in the first and second licensing rounds back in the 1960s.[143]

The content of the JOA is decided by the MPE with binding effect, and any amendments to or exceptions from the JOA, must be approved by the MPE, cf. Special Provisions article 7. The entire scope of the extraction and exploration operation is not defined in the JOA. The agreement only covers activities undertaken on behalf of the joint venture and falling within the factual geographical scope of the Petroleum Act, as it is defined in PA para 1-4. The activity of the joint venture is thereby limited by the scope pursuant production license.

6.2.2 Special Provisions and the JOA

The Special Provisions specify the geographical area of the production license, the various licensees and their participation interests, the specific work program applicable to the production license and the voting rules, including provisions applicable to the license on which Petoro is acting for SDFI.

In Norway, the Joint Operating Agreement article 1.1 decides that a "management committee shall be established" and that "each Party shall appoint one Member". Furthermore, Article 1.3 states that "the management committee is the supreme body of the joint venture". It shall have a "key role", focusing on "goals, the choice of direction and the monitoring of the activities", and "ensure the balance between strategic organization, monitoring, and control", cf. JOA Article 1.3 second subsection. The management committee is also in charge of the establishment of guidelines and exercise of control over the Operators activities, and they are entitled to issue specific and general directions for the Operators performance, cf. JOA Article 1.3 forth subsection.

This provision gives the Non-Operators some oversight and control but does not eliminate the imbalance in the role and perspective between Operator and Non-Operator. The Operator is leading and representing the consortium against the government and third parties, as well as internally for preparation and proposition of the work and actions to be done.

6.2.3 Accounting Agreement

[143] Bustnesli et al (2021) s. 175

The provisions of the Accounting Agreement do not include any particular mentions of decommissioning, but the content does apply to the cost arising from the cessation process. A presentation of the system of the agreement and the most important provisions is in order.

As mentioned above, all agreements concerning petroleum activity in joint ventures with production licenses on the NCS were standardized effective January 1. 2007, and given retroactive effect for Norwegian production licenses granted after 1971.

Today, the Accounting Agreement is standardized as an agreement for all production licenses.[144] The main purpose of the AA is to regulate the Operators obligations to submit estimates of cash requirements, cf. Article 1 of General Provisions within the AA. Upon request, parties shall pay their share of the cash advances on at least 15 days' notice.

Under article 1.4 general provisions for audit matters are addressed. The provisions aim to make the process more efficient and put pressure on the parties to resolve any outstanding audits matters.[145] Interests shall be credited or charged daily to the partners on their cash balance. The operator shall give their partners a statement showing the expenditure, payments and budget reports, and all the members have a right to audit the accounts and documents for the next 24 hours. The regulations reflect clearly that transparency in this kind of arrangement is of utmost importance, cf. Article 1.4.1 of the AA.

Article 2 addresses direct charges and indirect costs. To summarize the content in a simple way you can say that the charges aim to be "fair in relation to the nature and the extent of the Joint Operations and shall be adequately documented". Article 2.2. further permits the operator to charge costs related to general research and development to the JV.

6.2.4 Decommissioning under the JOA

The cessation of the operation is an important part of the joint venture. Still, decommissioning has only relatively recently come to be seen as a distinct operational phase within the JOA. The mandatory law of the relevant jurisdiction will shape the content of the JOA, given that decommissioning activities will have to be performed to a standard

[144] Available at https://regjeringen.no/contentassets/133274c0e30f4ad7abd475b6d2d46e63/standard-production-licence-apa.docx
[145] Bustnesli et al (2021) p. 219

prescribed by relevant national law.[146] Following Norwegian legislation, the main requirement is the duty to prepare and submit a decommissioning plan to the MPE, between two and five years prior to expected cassation of the use of an installation in place on the field. In addition to implementing the decommissioning plan as approved by the MPE.[147] The requirements and procedures applicable between the members of the joint venture are regulated in article 30-32.

The Operator is in charge of submitting a proposal to the management committee to prepare an abandonment plan according to the requirements in the PA, cf. article 30. The plan is normally prepared by the Operator in close cooperation with the other parties, and the MC is authorized to apply for an extension of the time limit for submitting the abandonment plan to the MPE, or even apply for an exemption from the obligation to submit such a plan.[148]

The management committee thereafter must adopt the proposal to prepare the abandonment plan, if they do not do this within a reasonable period of time, any part may do this themselves, with assistance from the Operator, cf. article 30.2. Each Party may propose alterations to the operators decommissioning plan or an alternative abandonment plan, or even submit a draft agreement for continued production to the management committee. If no decision is made based on the proposal for continued production, both the adopted decommissioning plan and the alternative proposal for continued production shall be submitted to the MPE and other relevant authorities.[149]

A relevant example of this is the decommissioning of the Statfjord A platform, a part of the Statfjord field in the Norwegian part of the North Sea, where oil production has been in action since 1979. The decommissioning of the field was planned from 2022 to 2027, but Operator Equinor and their partners decided to approve plans to extend production from the platform until 2040. Statfjord A is the oldest and most profitable platform on the NCS to date, and it has generated 600 billion NOK in revenues.[150]

[146] Bustnesli et al (2021) p. 62
[147] See chapter 4.
[148] Bustnesli et al (2021) s. 205
[149] Bustnesli et al (2021) s. 205
[150] Equinor, Statfjord Platform available at https://www.equinor.com/no/news/2020-01-09-statfjord.html

Issues relating to the abandonment plan are all decided by the MC in accordance with the ordinary voting rules. [151]

In the case of withdrawal of one party from the joint venture, Article 24.3 of the JOA states that the other Parties may require that a satisfactory guarantee be provided concerning a proportionate share of the joint ventures liability for decommissioning of facilities belonging to the joint venture at the time of withdrawal.

It is the remaining parties that get to decide what collateral support in respect of the parties decommissioning obligations is to be given. Such support usually takes the form of a parent company guarantee (PCG) or a letter of credit (LOC).[152] More about this under point 6.3.1.

The bottom line is that the JOA gives guidance to the members about what type of security the party must provide, for the financing of the decommissioning to be satisfactory. This is an example of how the JOA aims to prevent conflict and promote cooperation between the parties. The process of exploring and exploiting an area is complex, it can prolong for years, and many challenges can be met.

The JOA does not however say anything about how the financial liability is divided between the parties. The question in the following is who are responsible if one of the members cannot pay.

6.2.5 Financial liabilities for decommissioning

The JOA Article 7 states that parties are primarily liable to each other on a pro-rata basis and secondarily jointly and severally liable for all obligations arising out of the joint venture activities. This liability is not subject to any upper cap. The only exception is taxes, that are levied individually on a legal entity and are therefore excluded from such joint and several liability, cf. article 7.3. All taxes and excise duties levied collectively on the joint venture, such as CO2 and area fees are covered by the main rule in section 7.1, cf. Petroleum Regulations para 4-10.

As reviewed above, chapter 5 of the PA and chapter 6 of the petroleum regulations impose the relatively new regime of the assignor's secondary financial liability. The sellers of interests in

[151] See Article 3.2 special provisions.
[152] Bustnesli et al (2021) p. 62

fields under development or in production may be held liable for potential default by the buyer on the future costs of decommissioning and disposal of facilities and wells related to the assigned interest. Next up, we will review how this law-imposed obligation is solved in the contract-regulated joint venture between the operators. Once again, we turn to standardized contracts.

The most vital question is which legal remedies are available to protect the interests of the seller against such responsibility.

6.3 Decommissioning Security Agreements (DSA)

The seller and the buyer will normally have agreed in the sale and purchase agreement (SPA) that the buyer shall be liable for, and indemnify the seller against, all future decommissioning and abandonment costs related to the interest assigned.[153] The seller will need security from the buyer, and the terms of this security may be included directly in the SPA or constitute a separate agreement. This amendment is called a Decommissioning Security Agreement (DSA). The DSA stipulates the forms, amounts, and other terms of security. [154]

Normally, the seller requires the buyer to procure a guarantee in form of either letter of credit (LoC) or an affiliated company, called a parent company guarantee (PCG). We will go into further detail about such DSAs further down. It is worth mentioning that alternative set-ups do exist. For example, the parties can add a negotiated share of estimated future decommissioning costs to the purchase price. If the secondary liability of the seller does not arise, then the amount will be reimbursed to the seller.[155] The scope of the obligation, meaning whether the buyer is obliged to cover all, or just part of future decommissioning and disposal costs related to the facilities in question, is regulated in the SPA; and not in the DSA.

6.3.1 NOROG – model clauses

[153] Norsk olje og gass, Norwegian Oil and Gas Recommended Model Agreement for decommissioning security for removal obligations (2010) available at: https://www.norskoljeoggass.no/globalassets/dokumenter/naringspolitikk/skatt-og-fiskalt/modellavtaler/02-sales-and-purchase-agreement-spa.pdf

[154] Bustnesli et al (2021) p. 333

[155] Pereira et al, p. 555

In 2010, one year after section 5-3 third subsection was amended, NOROG issued a working group that was supposed to look at the practical consequences of PA section 5-3 third subsection. The group was also asked to make model clauses for decommissioning security to be used between parties to a transaction.[156]

NOROG has envisaged two situations and prepared two alternative models for decommissioning security agreements. These are known as agreement A and agreement B. Agreement A is limited to security in the form of a letter of credit (LoC). The maximum LoC amount is based on estimated decommissioning costs before tax. Agreement B includes a parent company guarantee (PCG) from a sufficiently rated guarantor. The PCG model is perceived as more comprehensive, and it includes a threshold limit that the parent company`s credit must not fall. If it does, the buyer will be required to provide a letter of credit.[157] In industry practice, agreement B is widely used and generally referred to as the "NOROG model DSA".[158]

In the reports prologue NOROG states that because of the conditions variating between sales, there isn't possible to prepare a "standard" agreement that is recommended for use with sales of production licenses. The report recommends that "The attached model clauses must not be used to the letter and uncritically but can serve as an inspiration for writing drafts of your own DSA". [159] Consequently, the DSA should be adapted to the specific circumstances of the transaction, with respect to both the interest sold and the buyer`s situation.

As we have seen, the model DSA (agreement B) regulates two forms of security. Primarily a PCG from an affiliate of the buyer with a sufficient credit rating, and secondarily a LOC from an acceptable bank. There are four schedules to the agreement; schedule 1 sets out the terms of a form of PCG, and 2 sets out the terms of a form of LOC, schedule 3 sets out important criteria for calculating the value of the remaining petroleum reserves and estimated decommissioning costs (which are necessary to calculate the maximum LOC amount) and

[156] Bustnesli et al (2021) p. 335
[157] Pereira et al (2020) p. 555
[158] The working groups report is now published on NOROGS websites as "05 - Norwegian Oil and Gas Recommended Model Agreement for decommissioning security for removal obligations"
[159] NOROG 5 p. 23

schedule 4 specifies the facilities, that fall within the scope of the seller`s secondary liability under section 5-3 of the PA.[160]

6.3.1.1 Parent Company Guarantee

To meet the criteria of a PCG the buyer needs an affiliate that meets the credit rating test agreed in the DSA and has sufficient financial strength to back the guaranteed obligation. The credit rating requirement is a commercial issue to be agreed upon by the parties, and there are no industry standards, except that only an investment-grade rating will qualify. [161] Once the credit rating has been agreed on, the negotiations will focus on possible modifications to the form of PCG set out in schedule 1 of the PCG.

The form of PCG is carefully and thoroughly regulated under point 2 of schedule 1 in Agreement B, and the seller has generally been quite restrictive about accepting attempts by buyers to soften the PCG model terms. From the assignor's perspective, the PCG term must provide adequate protection in a worst-case-scenario when the buyer is under severe financial stress.[162]

If the guarantor requires such a cap, the parties may either copy or adapt the LoC maximum amount calculation provisions or alternatively agree a fixed limit which is considered sufficiently high to cover any realistic cost contingency future inflation or other cost-escalating factors.[163]

6.3.1.2 Letter of credit

If a PCG isn't an applicable alternative, the buyer must provide an LoC from an acceptable bank. For the bank to be satisfying it has to meet a minimum credit rating. In addition, requirements related to location and identity may be made.

The model LoC has a term of 364 days and must be renewed annually. The maximum amount of the LoC is also re-calculated annually following the detailed provisions set out in the DSA. When determining the maximum amount of the LoC the most critical issue is tax-related. To

[160] See delimitations of alternative liability in point 5.4.3.1
[161] Bustnesli et al (2021) p. 336
[162] Bustnesli et al (2021) p. 336
[163] Bustnesli et al (2021) p. 336

understand the calculation of the LoC maximum amount, a term known as “Trigger Date” is crucial. The “Trigger Date” is the day when the estimated decommissioning costs exceed the value of remaining petroleum reserves. Before this day, the LoC is limited to the after-tax value of the decommissioning costs.[164]

From the “Trigger Date” and onwards, however, the LoC maximum amount must be for the full before-tax value of the decommissioning cost.[165] The current tax rate is 78 %, which means that the LoC amount must be increased nearly fivefold at a time when production revenues from the field may be in sharp decline. The Trigger Date-rule exposes the seller to a huge risk if the buyer is unable to procure an LoC for the increased amount. If the buyer does not manage to upper the cap to the new maximum, the seller`s only remedy is to draw on the expiring LoC, even though it is limited to the much lower after-tax decommissioning value. This exposure is a big concern for the seller and can be viewed as a defect with the current DSA model.

The seller is in a difficult dilemma in this regard. He must either risk having to cover the difference between the after-tax and before-tax cost of decommissioning, or demand that the buyer procure a before-tax LoC already at the closing of the transaction, which may result in a significant reduction of the purchase price for the asset. The bottom line is that the seller must perform a thorough commercial risk assessment of the alternatives available.[166]

Both the financial criteria for calculating decommissioning costs and the value of the remaining reserves shall be agreed and set out in the DSA. Schedule 4 of the DSA lists all the facilities and wells related to the assigned interest and existing at the time of the transfer. Because such facilities and wells are the only ones subject to the seller’s secondary financial liability for decommissioning costs, they are also the only ones exposed to the buyer’s potential default. Hence, LoC decommissioning costs are only calculated for these and do not include facilities and wells that were added later, cf. para 45a of the petroleum regulations.

6.4 Liability for default

[164] Bustnesli et al (2021) p. 337
[165] Bustnesli et al (2021) p. 337
[166] Bustnesli et al (2021) p. 337

6.4.1 The licensee's liability for default within the JV

As we have seen, the decommissioning activities, which apply to removing the redundant petroleum infrastructure, are extremely costly. In contrast to the cost associated with the production phase, there is no resultant revenue or benefit therefrom. Nonetheless, current international legal frameworks impose on states with petroleum activity to ensure decommissioning of disused infrastructure.

Thus, to this end, typically the JOAs spell out a wide range of rights and duties for Operators and Non-Operator parties. Among those are the obligation to make proportional contributions to expenses of decommissioning an emphasized duty that requires all parties to be responsible for it.

This obligation is regulated in Article 7 and 8 of the JOA, as reviewed under point 6.2.5. Consequently, any kind of failure to fulfil this commitment will constitute a default under the application JOA. There are clear lines to be directed to public decommissioning regulations here. Pursuant to article 7.1, the licensees are jointly and severally liable to each other for joint venture activities, which coincides well with the "joint and several" liability the licensees have towards the State, for financial responsibility arising from the petroleum activities pursuant to the license, cf. section 10-8 of the PA.

The background for the joint and several responsibilities painted out in the JOA is justified by the considerable difference in terms of financial strength between the companies that operate on the NCS.

According to article 8.1 of the JOA and the Accounting Agreement a licensee is obligated to provide sufficient funds to cover all expenses related to joint venture activities. Requests for these funds are called cash calls and are handled by the operator 6.2.1. This practice is in line with the Norwegian Petroleum policy, where a key factor is to make sure that unfortunate consequences of the oil production do not reflect badly on the State but rather are held by the parties conducting the production. The reasoning behind holding the big players responsible for the default of smaller and less financially strong members of the JV, is the same as the

arguments presented by NOROG in relation to the amendments of 5-3 third subsection.[167] The alternative liability extends to the associated and actual decommissioning costs, which means that the system creates alternative liability after the license has been transferred. The objective of the change seems to be to extend the liability to former owners and, in a way, prevent the issue of default by new owners/smaller firms taking over the structures near the end of their economic life.

Default regulations are found in Article 9 of the JOA. Article 9.1 states that if a party "does not comply with obligations to make payment pursuant to article 7 or 8, the amount which is not paid shall be advanced by the non-defaulting Parties in accordance with their Participating interests."
To cover the payment, the other licensees can acquire the defaulting party`s share of produced petroleum. The value of this petroleum should be determined in accordance with the so-called norm price.[168] or following actual sale prices obtained for such petroleum.

6.4.2 The non-defaulting licensees right to acquire the defaulting licensees participating interest

Furthermore, JOA Article 9.2 states that if the default has not been remedied within five working days of a demand (cash call), the defaulting party loses both its right to vote and its access to joint data and other information held by the joint venture until full payment has been made. However, they are still bound by the decisions made by the management committee and the Operator, making them that much more vulnerable to a decision with a strong financial impact on the part of its joint venture parties.

If the situation prevails for more than three months after the MPE, the Operator, and the management committee have been informed of the default, the non-defaulting parties to the license may demand that the participating interest be assigned to them, cf. article 9.3. Such assignment will take effect from the end of the calendar month in which the demand has been made. The only exception to the three-month rule is if the cause of the default is an intervention by the Norwegian authorities, cf. JOA article 9.5. The compensation for the

[167] See point 5.4.1
[168] calculation available at https://www.regjeringen.no/en/topics/energy/oil-and-gas/petroleum-price-board-and-the-norm-price/id661459/

defaulting licensees participating interests shall be agreed upon between the parties, but it cannot exceed the maximum value payable stipulated in article 9.3 third subsection of the JOA. The roof of the compensation is the book value of the defaulting licensee's share of investment in connection with activities under the license, deducting unpaid contributions, any mortgage as well as costs associated with the assignment, cf. Article 9.3 third subsection.

If more than one of the defaulting parties are interested in acquiring the participating interest, it will be appointed pro rata amongst the non-defaulting licensees, in proportion to their participating interests, cf. 9.4. These rules enable the licensees to take over the rights, as well as the responsibilities of the defaulting- licensee that is no longer financially capable to operate under the license. The assignment shall be improved by the MPE in accordance with section 10-2 of the PA.[169] The article enables the MPE to set special requirements regarding the licensee organization in Norway, if they find it necessary to ensure that the petroleum activity "safeguards good resource management, health, safety and the environment".[170]
The provision is another way for the state to exercise some level of control over how the activities pursuant to the license are performed.

Another part of the assignment is that any liability that the defaulting licensee may have for unpaid contributions or other unsecured obligations pursuant to the JOA shall be assumed by the non-defaulting licensees. If the defaulting licensee has additional liabilities independent of any decisions of the JV, those liabilities shall remain with the defaulting licensee, cf. article 9.4 second subsection.

It can be argued that giving the non-defaulting licensees a right of first refusal to the shares of the defaulting licensee, makes the operation more efficient and the joint and several responsibilities more "fair" to sustain towards the remaining licensees.
Reflecting on David Martyns' comparison of the joint venture to a marriage with many parties, it seems reasonable that the participants have to stay loyal to the joint venture, and be responsible for the default of their contracting partners. The buyer of the shares must assume all unpaid obligations of the defaulting licensee. This can be a heavy burden to carry, but it can be argued that it is a reasonable condition to accept in order to own a larger share of the

[169] Bustnesli et al (2021) p. 181
[170] See more about this under chapter 4.

license rights.

For the other members of the JOA, the obligation to cover the defaulting members cash call, is the result of a calculated risk they accepted when they entered the agreement with the said party. It is difficult to see how operations on the NCS could be conducted in a matter that is acceptable concerning sustainability if there was not a safety net for potential defaults.

7. Closing remarks

7.1. General conclusions

Over the course of this thesis, we have identified the issues relating to decommissioning liabilities. We wanted to inquire who has to pay for which costs, how their payments were ensured and what they accrue to in the Norwegian oil and gas regime.

Our analysis shows that the Norwegian decommissioning framework can be divided into public law liabilities and private law liabilities. Both sets or types of liabilities are thoroughly regulated in a complex manner in Norwegian law. Our main thesis finding concerning liabilities is the realization that the allocation of responsibilities interacts across both public and private legal mechanisms. We discuss this in detail below. We will first proceed to give a summary of the findings of each chapter of the thesis and then discuss more generally the issue of responsibility allocation as the general and key message of the study of this thesis.

In chapter 2 and 3 we learned that the State is obligated by international law to exercise significant control over the activities taking place on the NCS. To make sure the activities are in accordance with the line pained out in international conventions and Norwegian oil and gas strategy, all petroleum activities require a license. In chapter 4 we reviewed the decommissioning rules following this license and identified the obligation to submit a decommissioning plan to the MPE as the most important one.

In chapter 5 we identified the owner and the licensees as jointly liable for the implantation of the disposal decision issued by the MPE. We learned that all licensees are joint and severally

liable to the State for the financial obligations arising from activities pursuant to the license, hereunder the cost of decommissioning. Under two different circumstances, the financial liability stays on even after the licensee no longer have rights under the license; If a license is transferred, the assignor is alternatively liable for the cost of removing the facilities that were in place at the time of the transfer. In addition, he can be held responsible long after the license has expired, for damage caused wilfully or negligently in connection with the implementation of disposal.

In chapter 6 we found that the licensees are primarily liable to each other for a pro-rata share of their participating interest, and secondary jointly and severally liable for costs related to decommissioning. Furthermore, we learned that the most common approach for an assignor to safeguard himself from the alternative liability is to stipulate a Decommissioning Security Agreement as an attachment to the purchase agreement. The security could either consist of a Letter of Credit or a parent company guarantee.

7.2. Who is responsible for decommissioning costs: the public and private law split

What we have identified as the main characteristic of decommissioning liabilities in Norway, is that it to a large extent circulates around who should be responsible for carrying the payment obligations. There are rules connected to health and safety and to the environment, and the regulatory framework decreases the freedom of contract between the licensees, making sure the NCS operations are both safe, verifiable, and attentive to the environment. Especially important for the latter are the rules concerning residual liabilities, which is the responsibility in perpetuity. However, there is little doubt that the main focus of the Norwegian system is making sure that someone is financially responsible in relation to the State.

In our view, the Norwegian State has maximized the legislative mechanisms to make the licensee group pay for the decommissioning obligations. The joint and several liabilities pursuant to the PA and the JOA follows the licensee through all the decommissioning phases and any financial obligation arising therefrom. In addition, the JOA provides rules for when the main Operator can perform payment requests and expose a possible payment default. The

practice of the members of the agreement to have close control of each other economic statuses makes the entire operation more transparent and cooperation easier.

Even after the licensee has transferred all his rights pursuant to the license and no longer has participating interests in the joint venture, an alternative liability for decommissioning costs remains. This rule is of great practical importance and is one of the few that holds a legal entity that no longer has no rights under a license, liable for a cost originating from the joint venture. This rule is legitimised by the fact that the assignor only is liable for the costs relating to the facilities that were in place when he left the agreement. With the implementation of the alternative liability, companies can't pull out of the joint venture towards the end of an installation's lifecycle, without having to deal with the disposal costs.

The legislator has found it necessary to regulate the situation of damage or inconvenience when this is caused wilfully or negligently in connection with the implementation of the decision issued by the MPE. Even after the decommissioning operations have ended, traces of the liability can be connected to the remaining installation for an uncertain period. Potential harm to marine areas and other sea users will exist despite years passing.

This applies for abandoned facilities, as the potential harm posed on marine areas and disturbance of other sea users remain despite years passing. In accordance with State interests, this liability is posed on the licensee or the owner of the facility.

Furthermore, we have found that the Decommissioning Security Agreement (DSA) puts strict requirements upon the quality and rating of the banks that can stand as guarantor of the security for the alternative liability. This is to ensure that the payment is accounted for no matter what unpredictable circumstances may occur over the several decade long endeavour of a joint venture.

In our opinion, the Norwegian legal framework concerning decommissioning liabilities work relatively well. They are successful in their mission to spare the State from the removal costs derived from private sector liabilities, not intended a public burden. The State has a strong legal foundation at their disposal to protect the taxpayers and keep the licensees responsible.

Through the licensing system, the MPE has been able to develop the JOA over time. Over the course of the next decade more basins will cease to produce and provide a natural driver towards JOAs becoming increasingly sophisticated in their treatment of decommissioning.
In our view the JOA is becoming a permanent regulatory instrument that serves as a framework for ensuring that the activities and resource management consistent with Norwegian strategies. the JOA has developed over time. A direct effect thereof is that the initial legal position of the licensees is essentially determined by a combination of the provisions of the operating license and the JOA. The dynamic nature of this regulation, make it easier to administrate the activities on the NCS in line with Norwegian resource exploitation policy.

However, it has to be addressed that the ruleset has not been put under sufficient pressure to determine whether the rules work in a satisfactory manner. This remains to be seen, and the answers lay in the relatively near future.

7.3. Reflections for the future: decommissioning of renewables?

Fifty years after the first oil and gas platform was constructed on the North Sea, the oil and gas nations of the world enter a new era, where petroleum activity is the subject of increasing controversy.

Production of fossil energy is no longer a sustainable option. Inevitably, the focus shifts to developing solutions for renewable energy. For the big players in the North Sea, this has meant exploring the great potential of offshore wind.
Today, only three percent of Europe's power consumption is covered by offshore wind. However, the market is rapidly growing, and the North Sea is again the centre of attention, housing what is currently the biggest offshore wind farm on the planet.[171]

Earlier this year, the Norwegian Government put forth a comprehensive plan of how future offshore wind energy exploitation should take form in the North Sea. The plan is to announce

[171] Hornsea one, information available at: https://hornseaprojects.co.uk/

an offshore wind project of 4.5 gigawatts offshore wind, distributed on Utsira Nord and Sørlige Nordsjø. [172]

As renewable energy is scaling up, we are faced with a number of new regulatory challenges. Today there are hardly any Norwegian regulations concerning decommissioning liabilities of offshore wind turbines. One can ask why a multibillion industry that will have to perform comprehensive decommissioning, has not yet addressed these issues.

As the study in this thesis has shown, having clear and thorough rules for decommissioning-related liabilities are the absolute key to avoid that the State eventually have to cover the costs. We want to emphasize the importance of having a well-developed ruleset from the get-go, so that avoidance of financial liability is impossible for companies that want to invest in offshore energy exploitation on the NCS.

Furthermore, one can argue that it would conflict with the rule of law if the licensees were imposed a new and more comprehensive liability rule after they have accepted the terms of a production license. In our view, it would be beneficial to all parties of the State-regulated removal liabilities within an agreement equivalent to the JOA before, so that the extent of the liability is predictable for the participants. There is a lot to be gained from the experience earned from governing decommissioning liabilities within the oil and gas sector.

In our view, the ruleset could benefit from requiring the operators on the NCS to consider the preparation of the decommissioning plan at an earlier stage of the petroleum activities. The obligation to submit a decommissioning plan pursuant to para 5-1 is activated no earlier than five years but no later than two years prior to the expected termination of the facility. Five years is however not a long time in the context of offshore oil and gas assets' economic lifespan. The complex, interdisciplinary nature of the decommissioning obligations implies that the parties should have a conscious relationship to what such an obligation will entail, and how they aim to perform it from a much earlier stage. It can be argued that imposing the parties with these obligations sooner, would force the participants to view the activities

[172] Meld.St.11 (2021-2022) Melding til Stortinget, Tilleggsmelding til Meld. St. 36 (2020-2021) Energi til arbeid-langsiktig verdiskapning fra norske energiressurser.

pursuant to the license as a more wholesome endeavor, making the decommissioning an integrated part of the operation on the field.

As a concluding remark, we note that offshore wind is an area that will likely pose great challenges for legislative powers in the future. Offshore wind decommissioning will undoubtedly require a lot of research. In our opinion, there is a lot of inspiration to be earned from the well-developed oil and gas regulatory framework.

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