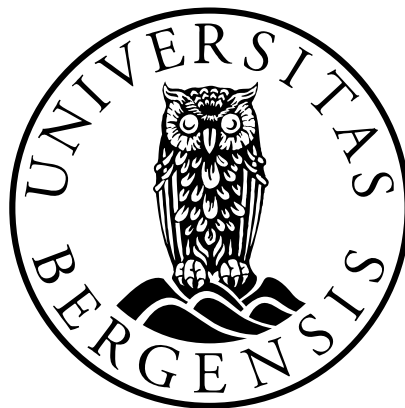


# Governance in the EU Energy Union: Is the proposed Governance regulation EEA relevant?

Kandidatnummer: 101

Antall ord: 12 832



JUS399 Masteroppgave  
Det juridiske fakultet

UNIVERSITETET I BERGEN

1. Juni 2017



## **Abstract**

*This thesis sets out to assess whether the EU's proposed new Governance regulation under the Energy Union is "EEA relevant", meaning within or outside the scope of the European Economic Area (EEA) Agreement. Based on a review of the proposal, wider EU policy, the foundation for energy and climate cooperation, and a relevance assessment based on geographical and substantive criteria, the thesis finds that the governance regulation is EEA relevant.*

*The thesis also places this case within a wider debate about the expanding scope of the EEA Agreement. While the Agreement has remained unchanged since its signing 25 years ago, treaty changes and increased integration on the EU side have eroded the borders between internal market legislation and cooperation in other fields – complicating determinations of EEA relevance and stretching the intended legal limits for political and economic reasons.*

*Note that the Governance regulation is currently being processed by the European Parliament and the European Council and may be subject to changes in the legislative process.*

## Table of Contents

1. Introduction – Presentation of the Issue.....	4
1.1 A reservation and legal sources .....	7
2. The EU Energy Union and Governance .....	8
2.1 The Energy Union.....	8
2.2 Changes in the energy and climate fields for the period after 2020 .....	9
2.3 The term “Governance” .....	11
2.4 “Governance” and the proposed Governance regulation.....	12
3. Energy and Climate in the EEA Agreement .....	12
3.1 Energy Policy in the EEA Agreement .....	12
3.2 Climate Policy in the EEA Agreement .....	15
3.3 Final remarks .....	16
4. The proposed Governance Regulation under the EU Energy Union .....	16
4.1 The choice of a Regulation .....	17
4.2 Overview of the regulation .....	18
4.3 Implications for EU Member States and the EEA EFTA States .....	19
4.4 Enforcement methods for the European Commission and possible consequences for Member States and EEA EFTA States .....	20
5. The assessment of EEA relevance of the proposed Governance regulation.....	22
5.1 Interpretation of the EEA Agreement and relevant legal sources in an EEA relevance assessment.....	22
5.2 Geographical issues .....	25
5.3 Substantive issues .....	29
5.3.1 Legal basis of the proposed Governance regulation in the EU treaties .....	32
5.3.2 The nature of the proposed Governance regulation: “Support function” .....	32
5.3.3 The intention of the proposed Governance regulation.....	34
5.3.4 The comprehensiveness of the proposed Governance regulation.....	35
5.3.5 Effect of the Commissions Enforcement Methods .....	37
6. Conclusion and Outlook .....	39
7. Reference list .....	40

## 1. Introduction – Presentation of the Issue

2017 marks the 25<sup>th</sup> anniversary of the signing of the EEA Agreement.<sup>1</sup> Doomed to fail by critics<sup>2</sup> and seen as a step towards full EU membership by others<sup>3</sup>, the Agreement's core has prevailed in its original form until today.<sup>4</sup> Considering the development on the EU side of the two-pillar structure<sup>5</sup>, the EEA Agreement's sustainability does not seem to have happened without some kind of adjustment over time.<sup>6</sup> The EU treaties have seen several amendments,<sup>7</sup> resulting in further cooperation and increased integration. As the initial pillar structure of the EU<sup>8</sup> steadily erodes, the clear borders between internal market legislation *stricto sensu* and cooperation in other fields<sup>9</sup> gets increasingly harder to detect. This complicates the assessment of "EEA relevance" (whether an EU legal act is within or outside the scope of the EEA Agreement). To keep up with the development on the EU side, the EEA EFTA States have employed considerable pragmatism<sup>10</sup> when evaluating possible integration of new EU legal acts, which, in reality, expand cooperation and further integration beyond the initial limits of the EEA Agreement's scope. The intended legal limits<sup>11</sup> for finding an EU legal act EEA relevant have been stretched for political and economic reasons<sup>12</sup>, paving the way for an understanding at the EU side<sup>13</sup> of a wider scope of cooperation whilst limiting EEA EFTA

---

<sup>1</sup> O.J. 1994, L 1/3. The EEA Agreement was signed in Porto on 2 May in 1992 and entered into force 1 January

<sup>2</sup> Schermers' prognosis in his annotation of the ECJ's Opinions 1/91 and 1/92 in 29 CML Rev. (1992), 1005: "It is unlikely that the compromises found will lead to a system which remains workable in the long term".

Similarly Cremona, "The "dynamic and homogeneous" EEA: Byzantine structures and various geometry", 19 EL Rev. (1994), 524.

<sup>3</sup> NOU 2012:2, "Utenfor og innenfor – Norges avtaler med EU", part 1, point 4.3: "EØS-prosessen 1987-1994".

<sup>4</sup> The Main Text of the Agreement has remained unchanged since its signing.

<sup>5</sup> "Institutional aspect/The two-pillar Structure", Point 7: <http://www.efta.int/eea/eea-agreement/eea-basic-features>: "The EEA EFTA States have not transferred any legislative competences to the joint EEA bodies and they are also unable, constitutionally, to accept decisions made by the EU institutions directly. To cater for this situation, the EEA Agreement established EEA EFTA bodies to match those on the EU side. The EEA EFTA institutions and EU institutions form the two pillars, whereas the joint EEA bodies are situated in-between."

<sup>6</sup> Fredriksen and Franklin (2015) "Of Pragmatism and Principles: The EEA Agreement 20 Years On", CML Rev. 52; 629-684.

<sup>7</sup> Overview of the Treaties and amendments: [https://europa.eu/european-union/law/treaties\\_en](https://europa.eu/european-union/law/treaties_en)

<sup>8</sup> European Parliament on "The Maastricht and Amsterdam Treaties":

[http://www.europarl.europa.eu/ftu/pdf/en/FTU\\_1.1.3.pdf](http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.1.3.pdf)

<sup>9</sup> Commission Staff Working Document "A review of the functioning of the European Economic Area", Brussels, 7.12.2012, page 4.

<sup>10</sup> See footnote 6.

<sup>11</sup> EEA Agreement, Articles 1 and 126.

<sup>12</sup> See Footnote 6.

<sup>13</sup> See Footnote 9.

States' political, and, to some extent, legal ability to take a firm stand on the limits of the EEA Agreement.<sup>14</sup>

The newly proposed Governance regulation,<sup>15</sup> under the EU Energy Union,<sup>16</sup> can be seen as a perfect example of a regulation challenging the scope of the EEA Agreement in this fundamental way. The regulation puts in place a planning and reporting regime, covering every aspect of the EU's energy and climate policy, which is designed to steer efforts and ensure that the objectives and targets in these two policy fields are reached.<sup>17</sup>

In an EU context, comprehensive and cross-sectorial legislation is considered advantageous<sup>18</sup> as the risk of overlapping or conflicting provisions is reduced, and the potential for more coherent and comprehensive regulation is increased. Furthermore, long-term regulations in sectors like climate and energy, where certainty for the sizeable investments needed and clear incentives for private actors to make decisions in line with the climate ambitions, are necessary.<sup>19</sup> Finally, given the changes in the climate and energy sectors, it is clear that the Commission needs tools to enforce the provisions of the sectors' legal acts, to achieve the targets and objectives of the Energy Union and ensure that the energy transition needed in light of climate change occurs.<sup>20</sup>

---

<sup>14</sup> Jonsdottir, (2013): "Europeanization and the European Economic Area", Chapter 9, "An evolving EU versus a static EEA", page 165.

<sup>15</sup> Proposal for a Regulation of the European Parliament and of the Council on the Governance of the Energy Union, 30.11.2016 – 23.02.2017 COM(2016) 759 final/2.

<sup>16</sup> EU Energy Union and Climate: [https://ec.europa.eu/commission/priorities/energy-union-and-climate\\_en](https://ec.europa.eu/commission/priorities/energy-union-and-climate_en) (all legal acts under the Energy Union).

<sup>17</sup> Commission Staff Working Document (2016), 394 Final, "Impact Assessment accompanying the document 'Proposal for a regulation of the European Parliament and of the Council on the Governance of the Energy Union'".

<sup>18</sup> In line with the aims of the REFIT program and "Better regulation" under the Commission.

<sup>19</sup> EU Climate and Energy Strategy 2030: <https://ec.europa.eu/energy/en/topics/energy-strategy-and-energy-union/2030-energy-strategy>.

<sup>20</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: "A policy framework for climate and energy in the period from 2020 to 2030": <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52014DC0015>.

Nonetheless, while the advantages in an EU context are many, the raising legislative tradition of comprehensive and cross-sectorial legislation with possible relevance for the EEA Agreement challenges the EEA EFTA States and the limits of the EEA Agreement.

The Commission has marked the proposed Governance regulation as a “Text with EEA relevance”. Even though this is not decisive for the outcome of an EEA relevance assessment<sup>21</sup>, it does give an indication of the EU’s stand in the matter and the need for the EEA EFTA States to make an assessment. With its comprehensiveness and cross-sectorial scope, the Governance regulation raises both big and small questions in an EEA relevance assessment;

- Firstly, its comprehensiveness, together with the fact that the regulation in itself does not directly concern internal market provisions, is a point for debate,<sup>22</sup>
- Secondly, its comprehensiveness and “support function” for the other legal acts giving more specific provisions for the energy market and climate cooperation is another issue.<sup>23</sup> Full implementation of the proposed Governance regulation into the EEA Agreement means that the EEA EFTA States would take on responsibility to plan and report on issues that separately lie outside of the EEA Agreement’s scope, as some of the “underlying”<sup>24</sup> legal acts containing the more specific aims in these areas have not been implemented into the Agreement,<sup>25</sup>
- Thirdly, the comprehensiveness of the regulation is combined with vague formulations.<sup>26</sup> The determination of its exact scope is challenging, leading to the question of what future developments in these fields might bring; and
- Finally, there is the question of how to handle the enforcement methods given to the Commission by the proposal.<sup>27</sup>

---

<sup>21</sup> Baudenbacher(2016) ”The Handbook of EEA Law”, page 53.

<sup>22</sup> See page 16, ”The proposed Governance regulation” and onwards.

<sup>23</sup> See page 22, ”The assessment of EEA relevance of the proposed Governance regulation” and onwards.

<sup>24</sup> Reference to all the other legal acts in the climate and energy sector containing the more specific targets and objectives of the Energy Union. See Footnote 16 (all legal acts under the Energy Union).

<sup>25</sup> See for example Directive 2009/119/EC, Regulation no. 994/2010 and Directive 2013/30/EU.

<sup>26</sup> See footnote 23.

<sup>27</sup> See page 20: ”Enforcement methods for the European Commission and possible consequences for Member States and EEA EFTA States” and page 22: ”The assessment of EEA relevance of the proposed Governance regulation” and onwards.

With these elements, the regulation exemplifies the challenges faced in an EEA assessment, and even more important, the fundamental challenges of the EEA cooperation with the EU's continuous developments and an EEA Agreement standing still but aiming at a "dynamic and homogeneous"<sup>28</sup> EEA. For the EEA Agreement's legitimacy as a well-functioning and democratic tool for the EEA EFTA States' cooperation with the EU to prevail, these issues cannot be minimized even though politically undesirable.

To answer the question of the proposed Governance regulation's EEA relevance, we will first explore the EU Energy Union and its objectives and targets, along with a short introduction to the term "Governance" and its legal meaning. Next, some key information on energy and climate cooperation under the EEA Agreement will be presented. The paper will then move on to describe the proposed Governance regulation and the "rights and obligations" it imposes on Member States and the Commission. With this background information, an assessment of the proposed Governance regulation's EEA relevance will be attempted, bearing in mind that the aim is to create a homogeneous economic area and the fact that the EEA agreement is not a "pick and choose"<sup>29</sup> arrangement.

## **1.1 A reservation and legal sources**

It should be noted that the proposed Governance regulation is formulated in a way that leaves room for adjustments by the European Parliament (the Parliament) and the European Council (the Council), throughout the legislative process. For the sake of this paper's discussion, the proposal's text, as currently written, will be assumed.

The main legal source is the EEA Agreement's main text, consisting of its articles, protocols and annexes. Further, the Norwegian Government's White Paper to the Norwegian Parliament, Meld. St. 5 (2012-2013) "The EEA Agreement and other agreements between

---

<sup>28</sup> EEA Agreement, Preamble fourth paragraph, see also Article 1(1) EEA.

<sup>29</sup> EEA Agreement Article 7 and Protocol 37. Graver, "The EFTA Court: Ten years on", page 94 – 95.



Norway and the EU”<sup>30</sup>, provides some insight as to what the Norwegian Government considers important in the assessment, as well as previous EEA relevance assessments of EU legal acts from the EEA Joint Committee.<sup>31</sup> Additionally, the Commission’s Staff working document; “A review of the functioning of the European Economic Area”<sup>32</sup> provides input from the EU perspective to the assessment of EEA relevance. Finally, literature with input to the relevance assessment will also be considered.

## 2. The EU Energy Union and Governance

### 2.1 The Energy Union

A top priority of the “Juncker Commission” is the Energy Union.<sup>33</sup> The overarching objective of the Energy Union is to regulate the energy and climate field in coherence, in order to achieve the three main aims of the EUs climate and energy policy<sup>34</sup>. These three aims are secure, affordable and climate-friendly energy. In energy policy and energy law theory, these three aims form what is commonly referred to as “the Energy Trilemma”.<sup>35</sup> The name reflects the difficulties encountered when trying to combine policy (energy security), economics (affordable energy) and sustainability (climate change). Nevertheless, energy poverty, the potential fatal consequences of energy supply disruptions and the threat of climate change force policy makers to attempt to find a balanced solution to these three goals.

When the newly elected European Commission began on the Energy Union project in the fall of 2014, the European Council had just agreed on the climate and energy targets for the

---

<sup>30</sup> Meld. St. 5 (2012-2013): <https://www.regjeringen.no/contentassets/fc5aa7428fd04f23af2a251d1c8c6710/en-gb/pdfs/stm201220130005000engpdfs.pdf>.

<sup>31</sup> Adopted Joint Committee Decisions; <http://www.efta.int/legal-texts/eea/adopted-joint-committee-decisions>.

<sup>32</sup> See Footnote 9; Commission staff working document.

<sup>33</sup> ”A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change”, Commission President Jean-Claude Juncker: [https://ec.europa.eu/commission/sites/beta-political/files/juncker-political-guidelines-speech\\_en\\_0.pdf](https://ec.europa.eu/commission/sites/beta-political/files/juncker-political-guidelines-speech_en_0.pdf).

<sup>34</sup> TFEU art. 194, see press release from the Commission on the “Energy Union”, 25 February 2015: [http://europa.eu/rapid/press-release\\_IP-15-4497\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4497_en.htm).

<sup>35</sup> Heffron, (2015) *Energy Law: An introduction*, Springer Law.

period after 2020.<sup>36</sup> One key objective of having targets, not only for greenhouse gas emissions, but also for energy specific matters such as renewable energy shares and energy efficiency, is that the energy-specific targets will function as “tools” for the achievement of the climate target. To accelerate the energy transition needed in light of climate change, experience<sup>37</sup> shows that a greenhouse gas emission reduction target, on its own, regulated through the Emission Trading System<sup>38</sup> (EU ETS), does not give enough incentive to put sufficient efforts into new renewable energy and energy efficiency. The Commission has held on to this thinking when forming its new and revised legal proposals for the period after 2020.

## 2.2 Changes in the energy and climate fields for the period after 2020

By recognizing the need for changes in the energy and climate fields, the Council increased ambitions for the 2021–2030 period and agreed that the following targets would be achieved:

- An EU-wide emission reduction target of 40%, consisting of a 43% reduction under the EU Emission Trading System (ETS), and a 30% reduction in emissions (from a 2005 baseline), under the Effort Sharing Regulation<sup>39</sup> for sectors not covered by the EU ETS;
- A renewables target of 27%;
- A 27% increase in energy use efficiency, further increased to 30% in the Commission’s proposal for a repealed Energy Efficiency Directive<sup>40</sup> of November 2016; and
- An increase of 15% of interconnection for infrastructure in the power sector.<sup>41</sup>

The EU also bound itself to the 40% emission reduction target at the 2015 Paris Agreement.<sup>42</sup>

---

<sup>36</sup> European Council Conclusions on “2030 Climate and Energy Policy Framework”;

<http://data.consilium.europa.eu/doc/document/ST-169-2014-INIT/en/pdf>

<sup>37</sup> Communication from the Commission: “A policy framework for climate and energy in the period from 2020 to 2030”, see Introduction, third paragraph: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52014DC0015>.

<sup>38</sup> EU ETS (2021-2030): [https://ec.europa.eu/clima/policies/ets/revision\\_en](https://ec.europa.eu/clima/policies/ets/revision_en).

<sup>39</sup> Proposed Effort Sharing regulation (2021-2030): [https://ec.europa.eu/clima/policies/effort/proposal\\_en](https://ec.europa.eu/clima/policies/effort/proposal_en).

<sup>40</sup> Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/27/EU on energy efficiency: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1485938766830&uri=CELEX:52016PC0761>.

<sup>41</sup> Electricity interconnection target: <https://ec.europa.eu/energy/en/topics/infrastructure/projects-common-interest/electricity-interconnection-targets>.

In addition to the increased targets for the period after 2020, some targets also changed form. Whilst the proposal for the Effort Sharing Regulation still contains percentage-targets for each Member State, beginning in 2021, the renewable energy target and the energy efficiency target will no longer be binding on a national level. Currently, each EU Member State has its own target in percentage for renewables and increased efficient use of energy. From 2021, the EU as a whole is bound by one common target for renewables and energy efficiency. The very clear notion of responsibility for national efforts gets lost with the new EU-wide targets. To monitor efforts made by Member States to secure that the EU targets are met, a new way to control efforts made by Member States, and whether ambitions are sufficient, is necessary. The new targets also require new tools to make sure that the efforts are shared fairly and in the most cost efficient way amongst Member States, previously provided for by calculating an individual percentage target based on various factors to find a fair balance amongst Member States.<sup>43</sup>

Finally, to achieve the 2030-targets, most of the existing legislation in the energy and climate field needed to be revised or renewed. To accomplish these changes, the Commission launched “The Energy Union” in the winter of 2015.<sup>44</sup> They divided the Energy Union into “five dimensions” making the revision and renewing undertaking more manageable, whilst securing the achievement of the main aims of the Energy Union and the energy and climate targets. These five dimensions, overlapping to some extent, are:

- secure energy deliveries,
- integration of the internal energy market,
- climate change,
- energy efficiency,

---

<sup>42</sup> Paris Agreement full text:

[https://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/paris\\_agreement\\_english\\_.pdf](https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf)

<sup>43</sup> Basis for calculation of individual Renewable Energy targets: Renewable Energy Directive (Dir. 2009/28/EC), recital 15.

<sup>44</sup> Communication from the Commission: “A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy”: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2015:80:FIN>.

- research, innovation and competitiveness.

By November 2016, the Commission had put forward most of the new and revised legislation. The European Parliament and the European Council are now processing the proposals. Some have been adopted, however, most are still in the legislative process.<sup>45</sup>

## 2.3 The term “Governance”

The most common use of the term “Governance” is to describe how a society organises itself in order to make decisions, covering the questions of who has the power, who makes the decisions, how other players can make their voice heard and who is accountable.<sup>46</sup> In general, “Governance” is descriptive of the exercise of authority or power in order to manage a country’s economic, political and administrative affairs.<sup>47</sup>

In an EU context, “Governance” – in the sense of these wide definitions – has been on the agenda for a long time.<sup>48</sup> In its 2001 White Paper on European Governance, the Commission defined “governance” as “rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence”.<sup>49</sup> This wide definition is difficult to illustrate in a legal context, as it covers every aspect of an authority’s decision-making process. However, the Commission’s definition, especially in pointing out the principles of openness, participation, accountability, effectiveness and coherence, does give some relevant input to the further assessment of this paper’s topic. The proposed Governance regulation under the Energy Union is built upon these principles; therefore, the definition forms a good background for understanding the intentions behind the Governance regulation.

---

<sup>45</sup> IGA: Provisional agreement reached between the Council and the European Parliament: <http://www.consilium.europa.eu/en/press/press-releases/2016/12/09-intergovernmental-agreements-energy/>, The rest of the proposals, see footnote 16, are in process in both EP and Council.

<sup>46</sup> See Institute on Governance’s (IGO) definition: <http://iog.ca/defining-governance/>.

<sup>47</sup> See UNESCO on “Concept of Governance”: <http://www.unesco.org/new/en/education/themes/strengthening-education-systems/quality-framework/technical-notes/concept-of-governance/>.

<sup>48</sup> Commission’s White paper on “European Governance” (2001/C 287/01) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0428&from=en>.

<sup>49</sup> See footnote 48 – page 5, footnote (1).

## **2.4 “Governance” and the proposed Governance regulation**

The legal meaning of the term “Governance” in relation to the Governance regulation is limited to the process of overseeing that the EU meets its energy and climate targets and objectives. The Commission stated, when presenting the regulation, that it is intended to form the legal foundation for the governance of the Energy Union. To ensure “good governance”, it will be supplemented with further non-legislative measures. A more detailed discussion of the Governance regulation will be elaborated on later in this paper.<sup>50</sup>

The obligations to plan and report on policy, measures taken and efforts made within the climate and energy fields are directly linked to the new renewable and energy efficiency targets and the overarching aims of the Energy Union. To ensure that Member States take responsibility for reaching the EU’s common climate and energy targets, accountability for their efforts – or lack of efforts, will be visible and enforced through the planning and reporting regime of the proposed Governance regulation. The Governance regulation does not address the level of ambition required, nor when the efforts made, will be considered insufficient. This is, to some degree, left up to the provisions contained in other legal acts within the climate and energy field, as well as to the Commission’s discretion.<sup>51</sup> The goal of the Governance regulation is to put in place a regime that holds Member States accountable for their actions in relation to other legal acts. The consequences of a Member States’ actions will be further discussed under the assessment of the Governance regulation’s EEA relevance.

## **3. Energy and Climate in the EEA Agreement**

### **3.1 Energy Policy in the EEA Agreement**

---

<sup>50</sup> See page 16: “The proposed Governance regulation” and onwards.

<sup>51</sup> See footnote 16 (all legal acts under the Energy Union) and page 18: “Enforcement methods for the European Commission and possible consequences for Member States and EEA EFTA States”.

The EEA Agreement did not initially cover cooperation on energy policy.<sup>52</sup> Under the Lisbon treaty, and the amendment of TFEU Article 194,<sup>53</sup> cooperation on energy policy gained a stronger legal foundation in the EU.<sup>54</sup> When aiming for a homogeneous and dynamic EEA, such changes to the EU treaties might affect the limits of the EEA Agreement's scope. Provisions concerning security of supply are specifically mentioned in TFEU Article 194. Nevertheless, EU legal acts concerning the offshore sector and security of supply have not been included in the EEA Agreement. Where EU law on the energy field has an effect on the internal market, the solution is not necessarily this black and white.<sup>55</sup>

The assessment of whether or not energy related regulations fall within the scope of the EEA Agreement, is based on the provisions set out in the EEA Agreement's preamble and its Article 1(2) and Article 126. Articles 1(1) and 1(2) of the EEA Agreement set out the substantive scope of the cooperation. For the purpose of strengthening trade and economic relations between the parties, Article 1 includes association on the four freedoms;<sup>56</sup> free movement of goods, persons, services and capital, as well as, common provisions on competition and closer cooperation in other fields of importance for sustainable development of trade and economic relations. Energy is a tradable commodity, including energy-driven goods and electric tools, and is, therefore, covered by the scope of the EEA Agreement when traded across borders in the European Economic Area.<sup>57</sup> The special feature of energy is the need for energy specific infrastructure in order to make trade with energy, especially in the power sector, possible. Provisions concerning opening up the internal energy market are often directed at ensuring equal access to such infrastructure. Having a direct effect on trade with a commodity in the EEA, such market provisions are considered EEA relevant as long as they stay within the terms set forth in Article 126. Article 126 of the EEA provides that the

---

<sup>52</sup> Proposition No. 100 (1991-92) to the Stortinget, see Box 2.2 "Security of energy supply"; <https://www.regjeringen.no/contentassets/fc5aa7428fd04f23af2a251d1c8c6710/en-gb/pdfs/stm201220130005000engpdfs.pdf>.

<sup>53</sup> Lisbon treaty full text: [http://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC\\_2&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_2&format=PDF).

<sup>54</sup> ClientEarth legal briefing, January 2010, "The impact of the Lisbon Treaty on climate and energy policy – an environmental perspective": <https://www.clientearth.org/reports/clientearth-briefing-lisbon-treaty-impact-on-climate-and-energy-policy.pdf>.

<sup>55</sup> Meld. St 5 (2012-13), point 2.3.1: "Assessment of EEA relevance", Box 2.3 "Security of energy supply", page 13.

<sup>56</sup> Baudenbacher (2016) "The Handbook of EEA Law", Part 2; Fredriksen, "The Substantive Rules of the Main Agreement: An Overview", page 96.

<sup>57</sup> EEA Agreement, Annex II (electric equipment and energy equipment) and Annex IV.

Agreement shall apply to “the territories” of the EU, as provided for in TEU, and to the “territories” of the EEA EFTA States. As will be further examined in this paper, the assessment of the limits to these two Articles, and hence the scope of the EEA Agreement, leaves some room for interpretation. For now, the starting point will be when a regulation is relevant for the functioning of the internal market and lies within the geographical scope of the EEA Agreement, it will be considered EEA relevant regardless of whether it touches upon the energy field or not.

In reality, the exclusion of security of supply regulations for the offshore sector seems to be the exception rather than the rule when determining whether or not energy regulations are covered by the EEA Agreement. The explanation for this, in both an EEA context and for the EU Member States, is that security of energy supply is considered a question of national security and solely a matter for the sovereign states to decide upon, which does not, at least until now, have obvious connections to the functioning of the internal market.<sup>58</sup> Challenges with EU interference on security of supply matters in the energy field are not unique to the EEA EFTA States. The policy debate amongst EU Member States also highlights that this is a sensitive issue even with Article 194 of the Lisbon Treaty, which excludes EU competencies from regulating how Member States set up the general structure of their energy supply and their choice between energy sources.<sup>59</sup>

Nevertheless, most EU Member States, as well as Norway, have long-standing cooperation on security of supply matters, specifically to oil reserves, through the International Energy Agency (IEA).<sup>60</sup> The EU has its own provisions<sup>61</sup> for this as well, largely in line with the IEA’s energy program. Having such common standards for oil reserves with the aim of security of supply is well founded from a geopolitical point of view, with regard to the unbalanced distribution amongst producing and consuming countries.

---

<sup>58</sup> Commission: “Explaining the treaty of Lisbon”, see b) Climate change and energy: [http://europa.eu/rapid/press-release\\_MEMO-09-531\\_en.htm](http://europa.eu/rapid/press-release_MEMO-09-531_en.htm).

<sup>59</sup> See Council discussion on security of supply proposal for gas (Feb. 2016) in June 2016: <http://www.consilium.europa.eu/en/meetings/tte/2016/06/06-07/> and December 2016: <http://www.consilium.europa.eu/en/meetings/tte/2016/12/01-02/>.

<sup>60</sup> IEA <http://www.iea.org/>.

<sup>61</sup> Council Directive 2009/119/EC “imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products”: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32009L0119>.

Apart from the security of supply regulations concerning the offshore energy sector, most of the EU's energy related regulations have an impact on the functioning and harmonisation of the internal market. The 2009 Renewables Energy Directive is implemented, as it puts in place common standards for the share of renewable energy in the energy mix and in transport fuels. Furthermore, implementation of the 2012 Energy Efficiency Directive and the 2010 Energy Performance of Buildings Directive<sup>62</sup> is currently being processed, and will provide common standards in the energy use and building sector. Internal market regulations for both electricity and gas are mostly EEA relevant, as they seek to harmonise a market that is becoming increasingly connected under the electricity interconnection target.<sup>63</sup>

The process of implementing the so called "Third Energy Package"<sup>64</sup> is proceeding. On 5 May 2017, the EEA Joint Committee adopted a Decision<sup>65</sup> for implementation, after the draft Joint Decision was forwarded to the European Council in March 2017.<sup>66</sup> This is quite important, as it shows that the EEA EFTA States are getting closer to implementation of the "last generation" of legal acts, currently undergoing revision or renewal by the EU system to form the Energy Union. Once adopted, they will follow the planning and reporting regime of the Governance regulation. Whether the previous legislative acts on an issue are considered EEA relevant is a factor to be considered when assessing the EEA relevance of the "follow-up" acts. This will be elaborated further in the assessment.

### 3.2 Climate Policy in the EEA Agreement

---

<sup>62</sup> Directive 2012/27/EU and Directive 2010/31/EU.

<sup>63</sup> Electricity interconnection target: <https://ec.europa.eu/energy/en/topics/infrastructure/projects-common-interest/electricity-interconnection-targets>

<sup>64</sup> Commission on "Third Energy Package": <https://ec.europa.eu/energy/en/topics/markets-and-consumers/market-legislation>

<sup>65</sup> Norwegian Governments press release (only in Norwegian): <https://www.regjeringen.no/no/aktuelt/tredje-energimarkedspakke--beslutning-i-eos-komiteen-om-innlemmelse-i-eos-avtalen/id2552136/>

<sup>66</sup> Draft Decision of the EEA Joint Committee concerning an amendment to Annex IV (Energy) to the EEA Agreement (Third Energy Package): [http://eur-lex.europa.eu/resource.html?uri=cellar:665847fd-fff9-11e6-8a35-01aa75ed71a1.0006.02/DOC\\_1&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:665847fd-fff9-11e6-8a35-01aa75ed71a1.0006.02/DOC_1&format=PDF)



For the climate field, the question is somewhat different. There is a provision in the EEA Agreement's Article 78 on cooperation outside the four freedoms that includes strengthening and broadening cooperation within the environmental field.<sup>67</sup> Common environmental and climate policy and regulations are not mandatory within the EEA, but there are some mechanisms in the EEA Agreement to facilitate cooperation in these fields. Cooperation within the EEA on climate might be done voluntarily through Protocol 31 of the EEA Agreement, through "ordinary" incorporation into Annex XX (as for example the EU ETS), or through bilateral agreements that each EEA EFTA State must decide, for themselves, to conclude with the EU. Climate cooperation with the EU, both through mechanics of the EEA Agreement and bilateral agreements, is therefore largely based on political will. As we will see later on, the political will to be a part of the EU's ambitious climate regime does not always coincide with the interests, either political or economic, in the energy sector within the EEA EFTA States.

### **3.3 Final remarks**

In summary, legal acts concerning energy in any form, which have an effect on the internal energy market adopted in the EU, are usually EEA relevant. Therefore, the EEA EFTA States are, after an EEA relevance assessment and considerations for possible amendments or exceptions, legally obliged to implement these acts into the EEA Agreement. Cooperation in the climate field is, to a much larger extent, based on voluntary cooperation founded on common political ambitions.

## **4. The proposed Governance Regulation under the EU Energy Union**

The new renewable and energy efficiency targets require a new form of administration by the EU to oversee that the Member States, even without binding national targets, contribute their share. In addition, the EU would also need a way to monitor the progress made along the five

---

<sup>67</sup> EEA Agreement, Article 78.

dimensions in order to achieve the three overarching aims of its energy policy. Therefore, by February 2015, the Commission announced that the scope of the Governance regulation would include not only the progress made towards reaching the targets, but also the progress made within each of the five dimensions. The idea behind the new proposal was that it should result in a stable, predictable and transparent foundation for the administration of the process in the EU and its Member States on the way to achieving the 2030 targets.<sup>68</sup>

#### 4.1 The choice of a Regulation

The question of what shape the Governance of the Energy Union should take, in terms of regulatory firmness, was thoroughly debated with Member States and other stakeholders.<sup>69</sup>

The proposal was put forward in November 2016. In the proposal, the form of a regulation is chosen for three reasons:

- A regulation ensures direct applicability;
- A regulation ensures comparability of the various national energy and climate plans and reports;
- A regulation allows the plans to be in place before 2021, in compliance with the Paris Agreement.

The Commission stated that the Governance regulation is meant to be the legislative foundation for the governance of the Energy Union, whilst further, non-legislative measures are needed to ensure good governance. The regulation is based on the TFEU<sup>70</sup> chapter on Environment (Title XX) and Energy (Title XXI), with specific authority in Articles 192(1)

---

<sup>68</sup> Commission Staff Working Document, "Impact Assessment accompanying the document 'Proposal for a Regulation of the European Parliament and of the Council on the Governance of the Energy Union'": <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1490879747545&uri=CELEX:52016SC0394>.

<sup>69</sup> Public consultation on streamlining of planning and reporting obligations as part of the Energy Union Governance, <https://ec.europa.eu/energy/en/consultations/consultation-streamlining-planning-and-reporting-obligations-part-energy-union>. See also the Norwegian Government's reply to the consultation here: <https://www.regjeringen.no/contentassets/596a81e60cbc43a89774156197d82802/norwegian-views-on-governance.pdf>.

<sup>70</sup> TFEU Consolidated Version C326/47 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=en>.

and 194(2) which state that the adaptation follows the ordinary legislative procedure provided for in Article 294 of the TFEU.

For the EEA EFTA States, an EU regulation with EEA relevance is to be made part of the internal legal order “as such”<sup>71</sup>, corresponding to the act being “binding in its entirety” as in the EU.<sup>72</sup> However, where an EU regulation will have “general application” and be “directly applicable in all Member States” in the EU, the regulation might need to be implemented into the “internal legal order of the Contracting Parties” to be applicable in the EEA EFTA States.<sup>73</sup>

## 4.2 Overview of the regulation

As mentioned above, the Governance regulation ties all the other components of the Energy Union together in a coherent and comprehensive planning and reporting system. In the existing legislation, in force until 2020, each directive and regulation has its own planning and/or reporting obligations where necessary. For example, in the Renewables Directive (2009/28/EC), the reporting obligations for the Member States can be found in Article 22. Likewise, Article 24 of the 2012/27/EU Directive on Energy Efficiency, provides its reporting obligations.

With the Governance regulation, every planning and/or reporting obligation that previously followed individually from each regulation or directive on a specific matter is now redesigned and put together into one regulation. From an EU perspective, the reasoning behind the Governance regulation is well founded, as it will lead to less administrative burden due to less redundancy, overlaps and incoherence. The obligation to plan and report for all five dimensions together will force Member States to realize the different challenges and initiatives under each of the five dimensions in context with each other. Additionally, the element of regional cooperation between Member States contributes to achieving these aims.

---

<sup>71</sup> EEA Agreement Article 7 (a).

<sup>72</sup> TFEU Article 288 (2).

<sup>73</sup> See EEA Agreement Article 7 (a) and TFEU Article 288 (2).

This will, at least according to the Commission's theory, lead to reduced costs, both for Member States and the Commission.<sup>74</sup> Finally, the planning and reporting obligations under the proposed regulation are harmonized with the EU's obligations under the Paris Agreement.

### **4.3 Implications for EU Member States and the EEA EFTA States**

The Governance regulation obliges EU Member States to plan and report on every aspect of the Energy Union. The regulation does not give the Member States any rights; it only defines their obligations to make climate and energy plans and then report on those plans under the system of the regulation.

Firstly, the Governance regulation imposes upon Member States to make an "Integrated National Energy and Climate plan" for the next ten-year period (2020 – 2030), and successively every ten years thereafter. This integrated national energy and climate plan shall include an overview of status quo, the policy and measures planned, their impact, and the main objectives, targets and contributions under each of the five dimensions of the Energy Union, see Articles 3 and 4 with further detailed provisions in Articles 5 to 11 and Annex 1.

The regulation also requires that Member States put forward a "Long-term low emission strategy", with a fiftyyears perspective, see article 14. This strategy is meant to secure compliance with the EU's international commitments within the UNFCCC and the Paris Agreement, as well as the EU's own target of 80 – 95% emissions reduction by 2050.

Secondly, the regulation sets reporting obligations. Reporting is divided into biennial progress reports and their follow up, and annual reporting. The biennial progress reports cover all the factors included in the ten-years plan. The annual reports are less comprehensive, consisting of reporting on approximated greenhouse gas inventories for each year, minimum stocks of

---

<sup>74</sup> See footnote 17, Commission Staff Working Document; "Impact Assessment".

crude oil/petroleum products (Dir. 2009/119/EC) and safety of offshore oil and gas operations (Dir. 2013/30/EU).

The “good Governance” directives mentioned above<sup>75</sup> are followed up by the proposed regulation giving “additional” obligations for the Member States throughout the planning and reporting processes. These additional obligations includes holding public consultations<sup>76</sup> and a strong urging to cooperate and coordinate efforts between neighbouring countries<sup>77</sup> during the planning process.

To ensure coherence as to what Member States plan for within the limits of the overarching EU objectives and targets, “Integrated” is the key word in the “Integrated National Energy and Climate plans”. They are to be formed along the Energy Union’s five dimensions, but with great regard to how the content of the different dimensions interact and influence each other. For example, if high ambitions on energy efficiency are met, less energy is consumed, which not only leads to less greenhouse gas emissions, but also to increased energy security, as import dependency is reduced. Additionally, high efficiency might have an adverse effect on a renewable energy target, as lower total energy consumption requires less renewable energy to reach the same target percentages. These kinds of interactions between the five dimensions are meant to be revealed, or at least clarified, when making the Integrated National Energy and Climate Plans. Member States become aware of the “positive” and “negative” consequences an action in one dimensions might have on others. This knowledge should be used to achieve the best possible interaction, and thus integration amongst the different objectives and targets of the Energy Union.

#### **4.4 Enforcement methods for the European Commission and possible consequences for Member States and EEA EFTA States**

---

<sup>75</sup> Commission White Paper (2001) “A European Governance”, (2001/C 287/01).

<sup>76</sup> Proposed Governance regulation Article 10.

<sup>77</sup> Proposed Governance regulation Article 11.

The obligations placed upon the Commission in the regulation are firmly formulated. It “shall” issue recommendations, “shall” assess the integrated national plans and the progress reports of the Member States, and it “shall” take measures at Union level to ensure collective achievement of objectives and targets, see Articles 25 to 27.

However, to what extent the recommendations given to Member States, measures taken at Union level or the assessment of the national integrated plans are legally binding, is formulated with more ambiguity. When the Commission presents a recommendation to a Member State, the Member State is obliged to “take utmost account of the recommendation in a spirit of solidarity...” and they “shall set out (...) how it has taken utmost account of the recommendation and how it has implemented or intends to implement it”, see Article 28. The words chosen, “shall take utmost account”, calls for Member States to consider the recommendation and follow it, but it does not make the latter mandatory. It is not clear what affect potential “negative” recommendations, for example encouraging Member States to increase ambition, really has. Politically, there is no question that a “negative” recommendation is unwanted in such fields as energy and climate, as they carry so much prestige. Nevertheless, as proposed, the Governance regulation does not legally bind Member States to follow the Commission’s recommendations.

It is unclear what measures Article 27 of the regulation requires when it calls for the possibility to take “measures at Union level” where the Commission “concludes that the targets, objectives and contributions of the national plans or their updates are insufficient for the collective achievement of the Energy Union objectives...”. In the case of the Renewables target, Article 27, paragraph 4 a) to d) gives additional guidance, however, besides point d) about a possible “financial contribution” to a financing platform, the enforcement methods do not seem very harsh, much less incentivising. The uncertainty which these unclear formulations leave to the question of consequences are of great importance throughout the EEA relevance assessment.

Another right for the Commission following from the proposed regulation is to adopt delegated acts. In accordance with Article 36, the Commission will have delegated competences to make changes mainly to the Annexes setting standards for planning and reporting. This is, as will be pursued later on, another factor of uncertainty in the EEA relevance assessment of the Governance regulation.

## **5. The assessment of EEA relevance of the proposed Governance regulation**

### **5.1 Interpretation of the EEA Agreement and relevant legal sources in an EEA relevance assessment**

When interpreting the EEA Agreement, one has to bear in mind the circumstances of the Agreement's inception.<sup>78</sup> The EEA Agreement was an alternative to full EU membership, as this was turned down by some of the EFTA States.<sup>79</sup> The EEA Agreement would still allow full access to the internal market, but without giving up, in theory, any sovereignty, which is what a full EU membership would require. Officially, upon the signing of the Agreement in 1992 and when it became effective in 1994, there was no formal transfer of legislative authority, no changes to the EEA EFTA States' constitutions and no changes in internal decision making processes.<sup>80</sup> Since early 1990, the cooperation in the EU has expanded and the treaties have been amended several times.<sup>81</sup> The EEA Agreement has not followed the same development.<sup>82</sup> However, with the overarching aim of creating a dynamic and

---

<sup>78</sup> Commission Staff Working Document "A review of the functioning of the European Economic Area", page 3 "General Background and objectives of the review".

<sup>79</sup> Baudenbacher (2016) "The Handbook of EEA Law", Part 1, Norberg and Johansson, page 32.

<sup>80</sup> St. Prp. Nr. 100(1991-1992) "Samtykke til ratifikasjon av Avtale om Det europeiske økonomiske samarbeidsområdet (EØS), undertegnet i Oporto 2. Mai 1992", see chapter 1, page 37:

[https://www.regjeringen.no/no/dokumenter/stprp100\\_1991/id627296/](https://www.regjeringen.no/no/dokumenter/stprp100_1991/id627296/)

<sup>81</sup> Overview of the Treaties and other amendments to the Treaties: [https://europa.eu/european-union/law/treaties\\_en](https://europa.eu/european-union/law/treaties_en)

<sup>82</sup> Fredriksen and Franklin (2015); "Of Pragmatism and Principles: The EEA Agreement 20 Years On", Common market law review 52, page 635, point 2: "The widening gap between the EEA Agreement and the EU Treaties".

homogeneous<sup>83</sup> European Economic Area, expansions and enforced cooperation following the development in the EU is the practical result.<sup>84</sup>

The aim of a dynamic and homogeneous European Economic Area is important when interpreting the EEA Agreement. Access on equal terms with market players from other Nations to the EEA EFTA States' most important market is crucial, and in this regard the EEA Agreement is serving its purpose.<sup>85</sup> On the other hand, there is the intention of safeguarding national sovereignty.<sup>86</sup> As the EU moved towards increased integration after the EEA Agreement came into effect, it is necessary to have in mind that this integration was not the intention behind the EEA Agreement.

Some guidelines for the interpretation of the EEA Agreement, specific to the question of EEA relevance can be found in the Norwegian Government's White Paper to the Norwegian Parliament from 2012-2013, Meld. St. 5 (2012-2013). It is necessary to stress that this White Paper only expresses the Norwegian Government's view of the question. It is not a legal document as such, but it does give some valuable input as to the factors of interest in an EEA relevance assessment. To balance the view, the Commission's Staff Working Document from 2012<sup>87</sup> will also be considered, in addition to several Draft Joint Committee Decisions from the EEA Joint Committee and relevant literature.

In an EEA relevance assessment, the legal act's relation to the EEA Agreement must be clarified through two parameters, namely the geographical and substantive scopes. This paper

---

<sup>83</sup> Fredrik Sejersted, EØS-rett, 3. Utgave 2011, Chapter 4 "Hovedtrekk ved EØS-avtalen", page 86.

<sup>84</sup> Commission Staff Working Document (2012) "A review of the functioning of the European Economic Area", page 5, point 2.2:

[http://www.europarl.europa.eu/RegData/docs\\_autres\\_institutions/commission\\_europeenne/swd/2012/0425/COM\\_SWD\(2012\)0425\\_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/swd/2012/0425/COM_SWD(2012)0425_EN.pdf).

<sup>85</sup> Conclusions of the 46<sup>th</sup> meeting of the EEA Council (Brussels, 15 Nov. 2016), para 3. Council conclusions on a homogeneous extended single market and EU relations with non-EU western European countries, Brussels, 13 Dec. 2016, para 40. See also Baudenbacher "The Handbook of EEA Law" (2016), Nordberg and Johansson, Part 1, point 3; "The Future of the EEA Agreement", page 41.

<sup>86</sup> See footnote 80; St.prp. Nr. 100(1991-1992).

<sup>87</sup> Commission Staff Working Document (2012) "A review of the functioning of the European Economic Area": [http://www.europarl.europa.eu/RegData/docs\\_autres\\_institutions/commission\\_europeenne/swd/2012/0425/COM\\_SWD\(2012\)0425\\_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/swd/2012/0425/COM_SWD(2012)0425_EN.pdf).



will start with the question of whether the proposed Governance regulation lies within the EEA Agreement's geographical scope, before moving on to the question of whether the proposed regulation concerns the EEA Agreement's substantive scope.

Before taking on the specific discussions on geographical and substantive scopes, a few points of importance for these two parameters following the Norwegian Government's White Paper, the Commission's Staff Working Document and the literature will be presented.

The White Paper states that the assessment of EEA relevance is based on "objective and legal criteria", however, relevance assessments are "to a certain extent discretionary" as the "criteria set out in the Agreement are not precise".<sup>88</sup> Thus, the Norwegian Government opens up the possibility to take other factors into consideration in challenging cases. This goes for both geographical and substantive challenging cases. The literature also expresses this, where Carl Baudenbacher, President of the EFTA Court, assisted by Georges Baur, Assistant Secretary-General at the EFTA secretariat in Brussels, writes that the "decision about EEA relevance may, in reality, sometimes have a political side to it".<sup>89</sup>

The Commission's Staff Working Document focuses more on the general evolution of the "EEA relevance scope" rather than specific factors in the assessment for the geographical and substantive scopes. It emphasizes that the general scope, which has evolved during the past 20 years, will likely continue to do so, and moves towards a substantially increased inter-linkage between the four freedoms of the internal market and the flanking sectors.<sup>90</sup> The Commission also points out the fact that the EFTA side regularly has decided to incorporate a number of acts not identified as EEA relevant by the EU during the legislative drafting phase.<sup>91</sup> This is important, as it shows that the EEA EFTA States, by incorporating acts not identified as EEA relevant by the EU, leave an impression of willingness to further integrate and cooperate,

---

<sup>88</sup> Meld. St. 5 (2012-13), Point 2.3.1: "Assessment of EEA relevance", page 12.

<sup>89</sup> Baudenbacher, "The Handbook of EEA Law", Baur, Part 1, point 2.1.1 "Scope of EEA as Point of Departure", page 53.

<sup>90</sup> Commission's Staff Working Document "A review of the functioning of the European Economic Area" Point 2.1: "The scope of the EEA Agreement".

<sup>91</sup> See Footnote 90.

even if the adaptation text underlines that the act is implemented “without prejudice to the scope of the EEA Agreement”.<sup>92</sup> The adoption of the “Third Energy Package”<sup>93</sup> illustrates such involvement well, as it shows how EU acts, for example on the gas market, previously considered non-EEA relevant<sup>94</sup>, are now being implemented into the Agreement.

With these general observations on the EEA relevance assessment, the paper now moves on to the specific issues concerning the two parameters; geographical and substantive scope.

## 5.2 Geographical issues

Article 126 of the EEA Agreement sets out its geographical scope stating, “[T]he Agreement shall apply to the territories to which the Treaty establishing the European Economic Community is applied and under the conditions laid down in that Treaty, and to the territories of Iceland, the Principality of Liechtenstein and the Kingdom of Norway”. The geographical scope of the EU is provided for in Articles 52 of the TEU and 355 of the TFEU; it is further elaborated upon in the ECJ’s case law.<sup>95</sup>

When assessing EEA relevance of an EU act, the geographical scope of the EEA Agreement is rarely the core issue. However, in the energy field, especially where a legal act concerns the offshore sector, the geographical scope of the EEA Agreement has often been the Norwegian Government’s main argument for non-relevance.<sup>96</sup>

---

<sup>92</sup> See for example the Joint Declaration by the Contracting Parties to Decision of the EEA Joint Committee No 191/2015 of 10 July 2015: <http://www.efta.int/sites/default/files/documents/legal-texts/eea/other-legal-documents/adopted-joint-committee-decisions/2015%20-%20English/191-2015.pdf>.

<sup>93</sup> EEA Joint Committee adopted the “Third Energy package” 05.05.2017: <http://www.efta.int/EEA/news/EEA-Joint-Committee-adopts-Third-Energy-Package-503191>. Directive 2003/55/EC was considered non-EEA relevant, the follow-up act on “common rules for the internal market in natural gas”, Directive 2009/73/EC, is considered EEA relevant.

<sup>94</sup> Meld. St. nr. 5 (2012-13), ”Box 2.3 Security of energy supply”, page 12: <https://www.regjeringen.no/contentassets/fc5aa7428fd04f23af2a251d1c8c6710/en-gb/pdfs/stm201220130005000engpdfs.pdf>.

<sup>95</sup> Case C-347/10, *Salemink*, EU:C:2012:17, para 36.

<sup>96</sup> See discussion on Directive 2013/30/EU below as an example.

The Norwegian Government's understanding of the EEA Agreement's Article 126, is that the term "... the *territories*", is to be interpreted in accordance with established international law.<sup>97</sup> This means that the EEA Agreement's geographical scope is consistent with the definition of "territories" in the United Nations Convention on the Law of the Sea (UNCLOS), where "territories" is defined to cover land and sea out to the territorial line, 12 nautical miles beyond the costal baseline, ref. UNCLOS Articles 3, 5 and 7.<sup>98</sup> This must be considered as the starting point. The EU, however, argues that where a legal act substantively is within the EEA Agreement's scope, the geographical lines cannot outweigh the importance of the act for the functioning of the internal market.<sup>99</sup> Their approach to the question of geographical scope is functional, in line with ECJ case law on the territorial scope of EU law.<sup>100</sup>

To some extent in line with the EU's functional approach, the Norwegian Government, in its White Paper, opens up to incorporation of legal acts "whose scope encompasses the exclusive economic zone or the continental shelf" in cases where there is a "strong thematic or economic link between parts of a specific activity that take[s] place within Norway's territory and parts that take place outside Norway's territory".<sup>101</sup> That said, such incorporation only happens under the condition that the "principle on which interpretation of the geographical scope of the EEA Agreement is based", is not changed.<sup>102</sup>

This condition can seem confusing, as the Norwegian Government nevertheless is willing to open up to consider factual circumstances where they desire to incorporate EU acts that are in line with their interests. However, they do not give up on the possibility to use the

---

<sup>97</sup> Meld. St. 5 (2012-13), Point 2.3.1. "Assessment of EEA relevance", *The Geographical Scope of the EEA Agreement*, page 13.

<sup>98</sup> United Nations Convention on the Law Of the Sea, full text: [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf)

<sup>99</sup> Fredriksen and Franklin (2015) "Of Pragmatism and Principles; the EEA Agreement 20 Years On", CML, page 655-656: "... the ECJ held that a Member State which takes advantages of the economic rights to prospect and/or exploit natural resources on the continental shelf cannot avoid the application of EU law provisions designed to ensure the free movement of persons working on fixed or floating installations positioned on the continental shelf".

<sup>100</sup> Fredriksen and Franklin (2015) "Of Pragmatism and Principles; the EEA Agreement 20 Years On", Common Market Law Review 52; page 655, point 4.2: "The geographical scope of the EEA Agreement".

<sup>101</sup> See Footnote 97.

<sup>102</sup> See Footnote 97.

geographical scope as a shield whenever suitable.<sup>103</sup> For the time being, there is no consensus on the question of the geographical scope of the EEA Agreement.

The disagreement on the EEA Agreement's geographical scope and whether it is the geographical scope or the substantive scope, in line with a functional approach, that defines the outer boundaries of the EEA Agreement is very well illustrated by the discussion on the 2013 Directive on safety of offshore oil and gas operations.<sup>104</sup> The EU argues that the Directive is linked to the substantive scope of the EEA Agreement as it provides common security standards in the offshore oil and gas sector, and thus, for common provisions for production standards and for persons working on the offshore installations.<sup>105</sup> However, the EEA EFTA States, in particular Norway, argue primarily that this Directive, concerning offshore installations, lies outside the geographical scope of the EEA Agreement since it relates to installations outside of the "territories".<sup>106</sup> Additionally, they argue that provisions concerning common safety standards do not interfere with the functioning of the internal market as it has nothing to do with the commodities produced and traded, and therefore cannot be considered to be EEA relevant for substantive reasons either. The parties have not yet reached an understanding on this issue, nor whether it is the geographical or the substantive scope that will have the final say. The issue does, nonetheless, exemplify the fact that in a case where one could argue strictly with the geographical scope of the EEA Agreement, the substantive issue of the regulation still gets included in the argument. This can probably be related to the fact that both the EU and the EEA EFTA States are aware that acts of areas considered outside of the geographical scope of the EEA Agreement have been implemented on the basis of their substantive scopes.<sup>107</sup>

For the time being, there is no clarification as to where the geographical limit of the cooperation under the EEA Agreement is. For challenging legal acts like the Directive on

---

<sup>103</sup> EEA Agreement Article 7 and Protocol 37. Graver, "The EFTA Court: Ten years on", page 94 – 95.

<sup>104</sup> Directive 2013/30/EU, on Safety of Offshore Oil and Gas Operations.

<sup>105</sup> Article 1(2)(b): "the free movement of persons".

<sup>106</sup> See also Fredriksen and Franklin's comments on the matter: "Of Principles and Pragmatism: the EEA Agreement 20 Years On", page 656, para 3.

<sup>107</sup> Commission Staff Working Document "A review of the functioning of the European Economic Area" see point 2.2 "The relevance of new EU acquis to the EEA Agreement";

[http://www.europarl.europa.eu/RegData/docs\\_autres\\_institutions/commission\\_europeenne/swd/2012/0425/COM\\_SWD\(2012\)0425\\_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/swd/2012/0425/COM_SWD(2012)0425_EN.pdf)

safety of oil and gas operations, the parties would need to agree on which approach to take when considering the geographical scope of the EEA Agreement. With regard to the discussion above, this does not seem to be happening anytime soon. This paper will not provide a comprehensive discussion on this matter. However, what is interesting to note, is that a regulation like the Governance regulation will put increased pressure on finding a solution to this challenging question. Considering the outcome of previous situations of this kind, it is not wise to believe that the EU would not put pressure on outstanding issues with an aim for implementation. Arguments based on a functional approach to the geographical scope of the EEA Agreement in line with the approach taken in the EU could very well support implementation of challenging acts with regard to the proposed Governance regulation, as it aims at forming National plans and reports that are comparable<sup>108</sup> and hence have a similar content. This is an important point, as it shows how the discussion on where the geographical scope of the EEA Agreement ends, suddenly looks a lot like the discussion on its substantive scope, with explicit acceptance of taking political and economic arguments into consideration.<sup>109</sup>

Furthermore, this is worth noting because most of the proposed Governance regulation concerns issues which are not challenging in a geographic perspective. Therefore, there is a risk that the challenging discussion on geographical scope gets “lost” in the bigger assessment of the proposed regulation’s substantive scope.<sup>110</sup>

A solution for planning and reporting obligations following from the proposed Governance regulation for underlying legal acts, which have not been incorporated into the EEA Agreement for geographical reasons, can be to ask for amendments or exceptions at the implementation stage.<sup>111</sup> This should not be controversial since planning and reporting on provisions found in legal acts which are not part of the EEA Agreement, do not make much sense.

---

<sup>108</sup> See Footnote 17; Commission Staff Working Document “Impact Assessment”.

<sup>109</sup> Meld. St. 5 (2012-13), Point 2.3.1. “Assessment of EEA relevance”, Page 12-13.

<sup>110</sup> Meld. St. 5 (2012-13), Point 2.3.1. “Assessment of EEA relevance”, Page 13 *The geographical scope of the EEA Agreement*.

<sup>111</sup> Meld. St. 5 (2012-13), Point 2.3.1. “Assessment of EEA relevance”, Page 12, last Paragraph.

For those legal acts still under consideration and where the parties have not yet agreed on EEA relevance because of their different approaches to the geographical scope, the EEA EFTA States will either have to take a firm stand with the possible consequences this might lead to or continue on the path of “pragmatic” solutions risking further undermining of the EEA Agreements legal limits.

For the further assessment of EEA relevance, the substantive scope of the EEA Agreement will be decisive.

### 5.3 Substantive issues

The substantive scope of the EEA Agreement must be considered with a view to the Agreement’s Preamble, as well as, to its Articles, in particular Article 1. Of particular importance in the Agreement’s Preamble is the “objective of establishing a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition”<sup>112</sup>, the intention of providing for the “fullest possible realization of the free movement of goods, persons, services and capital (..), as well as, for strengthened and broadened cooperation in flanking and horizontal policies”.<sup>113</sup> The intention of creating a homogeneous and dynamic<sup>114</sup> European Economic Area represents the fundamental approach to new EU legislation concerning the four freedoms and the functioning of the internal market.<sup>115</sup> The purpose of creating a homogeneous European Economic Area will, in any assessment of EEA relevance, weigh in favour of implementation of new legal acts from the EU with relevance for the functioning of the internal market. This is often called the principle of homogeneity<sup>116</sup>, and referred to as the “key principles in the EEA”.<sup>117</sup> The aim of the EEA

---

<sup>112</sup> EEA Agreement, Preamble, fourth paragraph.

<sup>113</sup> EEA Agreement, Preamble, fifth paragraph.

<sup>114</sup> Fredriksen and Franklin (2015), ”Of Pragmatism and Principles: The EEA Agreement 20 Years On”, Common Market Law Review 52, page 631 first paragraph.

<sup>115</sup> Baudenbacher and Baur (2016) “The Handbook of EEA Law”, Part 2, point 1.3 “Homogeneity”.

<sup>116</sup> See also Sejersted and Arnesen, EØS-rett, Utgave 2011. Chapter 4.1, page 86 and Chapter 9.2, page 223 on homogeneity.

<sup>117</sup> Baudenbacher, (2016) ”The Handbook of EEA Law”, part 2, point 1.3 ”Homogeneity”, page 51.

Agreement is further underlined in Article 1(1) EEA; “creating a homogeneous European Economic Area”.<sup>118</sup>

Article 1(2) EEA provides what the association in the EEA shall entail in order to reach the objective of a homogeneous European Economic Area. These are the so-called “four freedoms”; 1) free movement of goods, 2) free movement of persons, 3) free movement of services and 4) free movement of capital. In addition, Article 1(2)(e) and (f) sets up a common system to ensure that “competition is not distorted and that the rules thereon are equally respected; as well as closer cooperation in other fields” is necessary to attain the objectives of the EEA Agreement.

In light of these provisions, the substantive scope of the EEA Agreement may seem easy to determine. As long as a legal act from the EU sets standards within the four freedoms and therefore the functioning of the internal market, or is decisive for how fair competition is attained, it is EEA relevant. However, the development of a legal tradition in the EU of more and more cross-sectorial regulations blurs the line between inside and outside the EEA Agreement’s scope.<sup>119</sup> Adding the explicitly accepted<sup>120</sup> pragmatic approach of the parties to the question does not make the assessment any easier.<sup>121</sup>

This emphasises the importance of being specific and actually draw a line, because the consideration of the EEA EFTA States’ sovereignty depends on it, as does the credibility of the EEA Agreement as a well-functioning tool for international cooperation.

---

<sup>118</sup> Fredriksen and Franklin (2015), “Of Pragmatism and Principles: The EEA Agreement 20 Years On”, *Common Market Law Review* 52, page 631 second paragraph.

<sup>119</sup> Commission Staff Working Document “A review of the functioning of the European Economic Area”, Point 2.1, page 4.

<sup>120</sup> Meld. St 5 (2012-13), Point 2.3.1. “Assessment of EEA relevance”, See also Box 2.3 “Security of energy supply”, page 13.

<sup>121</sup> Fredriksen and Franklin (2015) “Of Principles and Pragmatism: The EEA Agreement 20 Years On”, Point 4.1 “The substantive scope of the EEA Agreement”, page 652-653.

After stating that the assessment of EEA relevance to some extent might be discretionary<sup>122</sup>, the Norwegian Government's White Paper moves on to the factors to be included in the assessment of the substantive scope of the EEA Agreement. The assessment is first and foremost based "on an overall consideration of the provisions and intentions of the Agreement".<sup>123</sup> The following factors are also of considerable importance<sup>124</sup>:

- What is the purpose of the legal act? Does it ease the functioning of the internal market or is it aimed at cooperation outside the core scope of the agreement?
- Does the legal act in question lie within the EEA Agreement's Main Part, Protocols or Annexes?
- Does the legal act establish guidelines of importance for the four freedoms and competition across borders? The basis of the legal act in question in the EU treaties, as well as its intentions, can give some guidance on this question.
- Does the legal act place economic obligations on market players?
- Is the legal act a revision, follow-up or supplement to acts already incorporated into the EEA Agreement, or have related legal acts previously been incorporated into the EEA Agreement? Baudenbacher and Baur<sup>125</sup> also point out this factor as important in the Assessment of EEA relevance.

With the proposed Governance regulation, the issues of cross-sectorial regulation is elevated to the next level as the regulation covers both the climate and energy sector. Further, the regulation itself does not directly concern trade in energy, nor in climate (EU ETS, trade in emission allowances). The more specific rights and obligations for Member State's room of manoeuvre in the energy and climate fields are provided for in other regulations.<sup>126</sup>

---

<sup>122</sup> Meld. St. 5 (2012-13), Point 2.3.1: "Assessment of EEA relevance", page 12. See elaboration at point 5.1 on page 24 in this paper as well.

<sup>123</sup> Meld. St. 5 (2012-13) Page 13, point 2.3.1 "Assessment of EEA relevance", *The substantive scope of the EEA Agreement*.

<sup>124</sup> See Footnote 123, list of factors to be included in the assessment at page 13.

<sup>125</sup> See Footnote 89.

<sup>126</sup> See footnote 16 (all legal proposals under the Energy Union).



Other factors of importance for the practical outcome of an EEA assessment are economics and policies. It is important to consider that the pressure from the EU and the lack, or concerns for the outcome, of practical mechanisms to sort out disagreements<sup>127</sup> between the two sides in the EEA Agreement does not really provide much room to the EEA EFTA States to assert their point of view.<sup>128</sup>

### **5.3.1 Legal basis of the proposed Governance regulation in the EU treaties**

As discussed above, cooperation on energy and climate is not necessarily rooted in the same legal basis. For the EEA relevance assessment of the proposed Governance regulation, the problematic question does not primarily relate to the sector differentiation between energy and climate. In fact, as cooperation in the climate field is politically desired, the EU ETS system has already been incorporated to the EEA Agreement through Annex XX and there is explicit political will to implement the effort sharing regulation, as well as the LULUCF decision.<sup>129</sup> For this paper's topic continued cooperation in climate matters will be assumed.

Regulations intended to facilitate and harmonize rules governing energy trade in the EEA, are as important to the functioning of the internal market as trade with any other goods. Legal acts based on TFEU Article 194(2) are therefore just as likely to have EEA relevance as other legal acts from the EU concerning the four freedoms. The Norwegian Government's White Paper points out that the EEA Agreement was "not to encompass the development of common energy policy". However, it states that "if the substance of an act is considered to affect the functioning of the internal market, a different decision may be reached".<sup>130</sup>

### **5.3.2 The nature of the proposed Governance regulation: "Support function"**

---

<sup>127</sup> Art. 102(5) EEA, the dispute resolution procedure. The procedure has been initiated by the EU on a few occasions, but it has never been carried through to its conclusions. See footnote 116.

<sup>128</sup> Jonsdottir, (2014), "Europeanization and the European Economic Area", Routledge, page 107.

<sup>129</sup> Climate policy and the EEA Agreement; <http://www.efta.int/EEA/news/Climate-policy-and-EEA-Agreement-63341>. See also proposal for a Climate act (only in Norwegian): <https://www.regjeringen.no/no/aktuelt/ny-klimalov/id2547098/>.

<sup>130</sup> Meld. St. 5 (2912-13), Box 2.3 "Security of energy supply", page 12.

The proposed Governance regulation does not directly affect trade in energy. Rather, it concerns overlooking the process of implementing and achieving the goals of other legal acts with more or less direct effect on trade in energy as a commodity or market provisions to facilitate trade in energy. Nevertheless, having such a “support function” to other more market specific legal acts does not automatically exclude the Governance regulation from being EEA relevant. On the contrary, this might be a factor pointing towards EEA relevance of the regulation.<sup>131</sup>

A regulation like the proposed Governance regulation is unprecedented in the climate and energy fields. It has a clear “support function” (or follow up function) to various other legal acts in these two fields. Looking at the different legal acts which the Governance regulation ties together on the energy side and their EEA relevance, is a natural starting point for determining whether the Governance regulation is EEA relevant or not. As the discussion of the geographical scope of the EEA Agreement showed, the planning and reporting obligations concerning underlying legal acts, which have not been incorporated into the EEA Agreement, can find a solution in adaptations or exclusions upon implementation. This includes the Directive 2009/119/EC imposing obligations on Member States to maintain minimum stocks of crude oil and/or petroleum products and Regulation No 994/2010<sup>132</sup> concerning measures to safeguard security of gas supply, which have not been incorporated into the EEA Agreement, consequently making planning and reporting on these legal acts irrelevant. Concerning the other legal acts subject to the planning and reporting regime of the proposed Governance regulation, their EEA relevance gives an indication on whether the rest, or in fact main part, of the Governance regulation is EEA relevant.<sup>133</sup>

---

<sup>131</sup> Meld. St. 5 (2012-13), Point 2.3.1. “Assessment of EEA relevance”, *The substantive scope of the EEA Agreement*, page 13. See also Baudenbacher, (2016) “The Handbook of EEA Law”, part 2, point 2.1 “Scope of the EEA as Point of Departure”, page 53.

<sup>132</sup> Europalov on security of gas supply (in Norwegian): <http://europalov.no/rettsakt/forsyningssikkerhet-for-naturgass/id-8907>.

<sup>133</sup> Meld. St. 5 (2012-13) Page 13, point 2.3.1 “Assessment of EEA relevance”, *The substantive scope of the EEA Agreement*. See also Baudenbacher, “The Handbook of EEA Law”, Baur, Part 1, point 2.1.1 “Scope of EEA as Point of Departure”, page 53.

Currently, new or revised proposals for almost every legal act of the energy field are being processed by the European Parliament and the Council.<sup>134</sup> The EEA relevance of previous proposals give a good indication of what the outcome of the EEA relevance assessment of the new and revised proposals will be once they're adopted by the EU. The previous generation of internal market provisions for energy, including ACER<sup>135</sup> and the Renewables directive from 2009<sup>136</sup> are implemented<sup>137</sup> into the EEA Agreement, and the provisions for Energy Efficiency and Energy Performance of Buildings are being discussed with an aim to implement it into the EEA Agreement. These EU legal acts' EEA relevance indicate that the planning and reporting obligations now proposed in the Governance regulation, are EEA relevant because they are necessary in order to safeguard a well-functioning internal energy market.

The fact that most of the legal acts subject to the planning and reporting regime of the proposed Governance regulations are EEA relevant, points towards EEA relevance for the parts of the proposed Governance regulation concerning planning and reporting obligations for the underlying EEA relevant legal acts, as well.

### **5.3.3 The intention of the proposed Governance regulation**

To the question of whether the Governance regulation's intention is within the scope of the EEA Agreement, one has to consider if the regulation is necessary for the well-functioning of the internal market. The overall intention of the Governance regulation is to monitor and control efforts made in the climate and energy field in a coherent and comprehensive manner. This control is related to other legal acts containing provisions meant to facilitate market access or trade with energy, which are relevant for the functioning of the internal market. The "underlying" legal acts aim to harmonize rules for trade and cooperation in the fields of

---

<sup>134</sup> See footnote 16 (all legal proposals under the Energy Union).

<sup>135</sup> Draft Decision of the EEA Joint Committee concerning an amendment to Annex IV (Energy) to the EEA Agreement (Third Energy Package): [http://eur-lex.europa.eu/resource.html?uri=cellar:665847fd-fff9-11e6-8a35-01aa75ed71a1.0006.02/DOC\\_1&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:665847fd-fff9-11e6-8a35-01aa75ed71a1.0006.02/DOC_1&format=PDF).

<sup>136</sup> The Norwegian Government's fact sheet on Directive 2009/28/EC, in Norwegian only:

<https://www.regjeringen.no/no/sub/eos-notatbasen/notatene/2008/apr/fornybardirektiv-2/id2432192/>.

<sup>137</sup> "EEA Joint Committee adopts Third Energy Package" (5.5.2017); <http://www.efta.int/EEA/news/EEA-Joint-Committee-adopts-Third-Energy-Package-503191>.

energy and climate. The Governance regulation is supposed to oversee correct implementation and enforcement of the underlying legal acts provisions. Furthermore, planning and reporting obligations are not something new. Until now, they have followed individually from each legal act where deemed necessary. This alternative, to have planning and reporting obligations in each specific legal act, as it is today, might facilitate the assessment of EEA relevance as this is done in relation to the specific topic of a legal act, but it does not change the intentions behind current planning and reporting obligations. Planning and reporting obligations are therefore in and of themselves, not controversial, and remain necessary to achieve the intention of creating a dynamic and homogeneous EEA even though not included in each subject specific legal act.

The intention of the proposed Governance regulation is in line with the EEA Agreement, as its planning and reporting regime is necessary to achieve homogeneity in this area concerning a tradable good. This implies that the proposed Governance regulation is EEA relevant.

#### **5.3.4 The comprehensiveness of the proposed Governance regulation**

A challenge to the question of the proposed Governance regulations EEA relevance is the comprehensiveness of the regulation. Even with adaptations to or exemptions from the planning and reporting obligations related to legal acts considered non-EEA relevant, the scope of the regulation is still extensive in both timeframe and obligations. The planning and reporting obligations for the 10-years plan covers the five dimensions of the Energy Union, including other elements besides security of supply, like the research and innovation dimension, that are not of clear EEA relevance. Additionally, Member States are required to report on their current status and future targets, as well as plan and report on foreseen policy measures.<sup>138</sup> There is a “mid-way” clause for updates to the integrated national energy and climate plan, and the long-term low emission strategy<sup>139</sup> shall be consistent with the 10-years plans. This allows for some flexibility, but, to a large extent, it binds future governments to maintain political measures chosen by a government with possibly differing political

---

<sup>138</sup> Proposed Governance regulation Article 3: ”Integrated national energy and climate plans”.

<sup>139</sup> Proposed Governance regulation Article 14: “Long-term low emission strategies”.

ideology. Furthermore, amendments and changes are expected in the underlying legal acts containing the more specific targets and objectives supposed to be reflected in the plans and reports following from the Governance regulation.<sup>140</sup> Finally, if the Commission is granted the right of adopting delegated acts<sup>141</sup> concerning the planning and reporting standards set in the Governance regulation's Annexes, for the plans and reports, the scope might be further enlarged without any possibility for the EEA EFTA States to have their voices heard.

Therefore, a decision made today as to whether or not to incorporate the proposed Governance regulation into the EEA Agreement, may lead to future enlargement of the cooperation in the climate and energy fields that was not supported, nor intended, at the time. With the presumption of "follow up"-acts being just as relevant as the ones previously found relevant, the growing "grey zone" between strictly internal market legislation and other policies,<sup>142</sup> and the increasing use of cross-sectorial legislation and packages by the EU, is a legitimate point for discussion and debate.

The literature has pointed out the issue of inconsistent incorporation or exclusion of EU legal acts from the EEA Agreement.<sup>143</sup> However, the governments of the EEA EFTA States do not seem very keen on having the discussion on these issues because of the EEA Agreement's importance for the three small countries and because the potential result might be unwanted.<sup>144</sup> From a legal perspective, the question about future development is nevertheless secondary. In keeping in line with the aim of a dynamic and homogeneous EEA, it would be impossible to practice a legal cooperation, while excluding future developments. The legal solution to this is to tackle those developments as they occur. However, the time to make the political decision to maintain, and most probably increase cooperation on energy and climate

---

<sup>140</sup> See footnote 16 (all legal proposals under the Energy Union).

<sup>141</sup> Proposed Governance regulation Article 36, legal basis for delegated competences to the Commission follows the provisions in Article 290 TFEU.

<sup>142</sup> Commission Staff Working Document (2012) "A review of the functioning of the European Economic Area", point 2.1 "The scope of the EEA Agreement", page 4, para 1.

<sup>143</sup> Fredriksen and Franklin (2015) "Of Principles and Pragmatism: The EEA Agreement 20 Years On", point 4 "The question of "EEA relevance": Definining the scope of the EEA Agreement post Lisbon", page 652. See also reference 93 to Jonsdottir (2014), "Europeanization and the European Economic Area", p. 107.

<sup>144</sup> Dispute resolution procedure; Article 102(5) EEA. Fredriksen and Franklin: "So fare solutions have been found without any party pursuing the procedure under Article 102 EEA to its conclusion, but sometimes only after prolonged negotiations and not always with an outcome which is predictable to outside observers", p. 652.

matters with the EU, within the framework of the EEA Agreement, is now. There are many good economic and political arguments for a long-term cooperation in these fields;

- in light of climate change, the energy transition must happen;
- predictability for market players is essential for determining the investments needed leading to a stable and well-functioning market; and
- the obligations of the Governance proposal are only directed at the Governments.<sup>145</sup>

The comprehensiveness and the question of what possible future developments the cooperation in the energy and climate fields might bring can politically be both wanted and unwanted. Legally however, such political arguments of future issues cannot be decisive for the outcome of the assessment today.

### 5.3.5 Effect of the Commission's Enforcement Methods

Another challenge, much in line with the issue of the proposed regulation's comprehensiveness, is the vague formulations of consequences or "sanctions".<sup>146</sup> When the plans and/or reports do not satisfy the provisions in the Governance regulation or those following from the "underlying" legal acts, the regulation's enforcement provisions leave some questions unanswered. For example, in cases of underachievement, the Commission can "give recommendations"<sup>147</sup> to a Member State's unsatisfying plans or reports. It can also take "action at Union level"<sup>148</sup> if reaching the targets and objectives of the Energy Union may be jeopardised. For the renewables target and the energy efficiency provisions the Commission has some more specific tools for underachievement, including demanding a financial contribution to a "financing mechanism".<sup>149</sup> All of these reactions or sanctions are directed at Member States, not at market players.

---

<sup>145</sup> The Governance regulation does not entail any economic obligations for market players, see Article 27.

<sup>146</sup> Proposal for a Governance regulation, Chapter 5: "Aggregate Assessment of National Plans and Union Target Achievement – Commission Monitoring".

<sup>147</sup> Articles 26 and 28.

<sup>148</sup> Article 27.

<sup>149</sup> Article 27 (4).

What the Commission's recommendations and actions might consist of, however, is far from clear. To some extent, the same can be said of Member State's obligation to follow up on them. A Commission's recommendation may require Member States to take "utmost account" of them in a "spirit of solidarity between Member States and the Union and between Member States".<sup>150</sup> The Commission's proposal does not make it legally binding to follow their recommendations. However, the text, by demanding that Member States "shall" take "utmost account" of recommendations, as well as show "how it has taken utmost account of the recommendation and how it has implemented or intends to implement it", does not leave much room to disregard the recommendations.<sup>151</sup> This situation would be the same for the EEA EFTA States if the proposed Governance regulation is adopted and found EEA relevant and implemented into the EEA Agreement.

The other option for the Commission if it concludes, after its assessment of the integrated national energy and climate plans, that the "targets, objectives and contributions of the national plans or their updates are insufficient for the collective achievement of the Energy Union objectives (...) it shall take measures at Union level in order to ensure the collective achievement of those objectives and targets".<sup>152</sup> What these measures might consist of is not yet very clear. But that they will also include the EEA EFTA States in some way when the Governance regulation is adopted, found to be EEA relevant and implemented into the EEA Agreement is certain.

For underachievement in the renewables energy area Article 27(4)(a – d) gives to some extent more specific "measures" to cover an emerging gap in the linear Union trajectory following Article 25(2). The measures consist of: (i) adjusting shares of renewable energy in the heating and cooling sector, (ii) adjusting shares of renewables in the transport sector, (iii) making a financial contribution to a financing platform, and (iv) other measures likely to increase deployment of renewable energy. The third measure; "making a financial contribution to a

---

<sup>150</sup> Article 28(2)(a).

<sup>151</sup> Article 28(2)(b).

<sup>152</sup> Article 27(1).

financing platform” demands some clarification in an EEA context. The Commission proposes that this financing platform be managed directly or indirectly by the Commission. What such a “financial contribution” might amount to is not indicated. The purpose of the financing platform is to fund renewable energy projects. This financial “sanction” for underachievement of the renewables target is directed at EU Member States, and consequently at EEA EFTA States, with no repercussions to private actors. Therefore, the suggestion that the financial platform be managed by the Commission, and measured at “Union level” does raise the question of the EEA EFTA States’ role.

The uncertainty of the proposed Governance regulations’ formulations on possible sanctions are problematic because the EEA EFTA States would not know to what extent the Commission can lay down guidelines for their internal measures in the climate and energy fields. However, as the sanctions are only directed at the States or governments, there is no legal barrier for them to take on the obligation to follow up on the Commission’s recommendations, to take part in Union measures, or to contribute to the “financing platform”. Again, this is a question of how much uncertainty the political leadership is willing to take on.

## **6. Conclusion and Outlook**

The overall conclusion to the question of whether the proposed Governance regulation under the Energy Union is EEA relevant is yes. As we have seen, some provisions will require adaptations or exclusions as the legal acts, which the planning and reporting obligations refers back to, have not been incorporated into the EEA Agreement. For the rest of the regulation’s provisions, relating to other legal acts already implemented into the EEA Agreement or legal acts on the steps of being implemented, the EEA EFTA States will not be able to denounce the obligations to plan and report. The proposed Governance regulation’s intention to supervise and ensure the common market provisions and political targets, which the EEA EFTA States are very willing to take part in, at least on the climate side, is crucial for the well-functioning of trade with energy within the European Economic Area.



However, the uncertainties of the proposal's comprehensiveness and enforcement methods do raise some questions of a political nature. Will incorporation of this regulation tie the EEA EFTA States politically in future discussions on EEA relevance of legal acts expanding the cooperation even further? Is it possible to get acceptance for all the adaptations needed in order to maintain the Norwegian Government's view on the geographical scope of the EEA Agreement? Does incorporation of the Governance regulation include that the scope, both geographical and substantive, of the EEA Agreement will need to be resolved? Or may the Governance regulation be incorporated with a continuous use of pragmatic solutions without taking on the difficult discussion of the EEA Agreement's future?

Since this paper discusses a proposal for a regulation not yet processed by the legislating institutions in the EU, we can expect modifications and clarifications before a final EEA relevance assessment will be made by the EEA EFTA States. It is nevertheless interesting to note that even as it stands now, the proposed Governance regulation is found to be EEA relevant on a legal basis.

On one hand, the EEA relevance assessment of the proposed Governance regulation shows how political aspects interfere in the legal assessment in cases where the conclusion is not obvious. On the other hand, the relevance assessment of this cross-sectorial regulation also forms a good example of how the limits of the EEA Agreement's scope are challenged by the structural changes within the EU. The result is an expansion without the possibility for the EEA EFTA States to influence it.

## **7. Reference list**

Literature:

Sejersted, Fredrik, Arnesen, Finn, Rognstad, Ole-Andreas and Kolstad, Olav (2011), “EØS-Rett”, 2. Utgave, Universitetsforlaget.

Heffron, Raphael J. (2015), “Energy Law: An introduction”, Springer Law.

Jonsdottir, Johanna (2013), “Europeanization and the European Economic Area – Iceland’s participation in the EU’s policy process”, UACES, Routledge.

Baudenbacher, Carl (2016), “The Handbook of EEA Law”, Springer International Publishing.

Baudenbacher, Carl, Tresselt, Per and Orlygsson, Thorgeir (2005), “The EFTA Court: Ten years on”, Hart Publishing Oxford and Portland; Oregon.

Fredriksen, Halvard Haukeland and Franklin, Christian N.K. (2015) “*Of Pragmatism and Principles: The EEA Agreement 20 years on*”, Common Market Law Review 52: 629-684, Kluwer Law International. Printed in the United Kingdom.

#### Official publications:

Commission Staff Working Document (2012) “*A review of the functioning of the European Economic Area*”.

Draft Joint Committee Decision, (2017), “*Proposal for a Council Decision on the position to be adopted, on behalf of the European Union, within the EEA Joint Committee concerning an amendment to Annex IV (Energy) to the EEA Agreement (Third Energy Package)*”. Brussels, 3.3.2017, 2017/0046 (NLE).

Council Conclusions on a homogeneous extended single market and EU relations with Non-EU Western European countries, Brussels, 13 Dec. 2016.

Conclusions of the 46<sup>th</sup> meeting of the EEA Council (Brussels, 15 Nov. 2016).

#### Official publications from the Norwegian Government:

Meld. St. 5 (2012-2013) Report to the Storting (White Paper) “*The EEA Agreement and Norway’s other agreements with the EU*”, Norwegian Ministry of Foreign Affairs.

St.prp. nr. 100 (1991-92) Om samtykke til ratifikasjon av Avtale om Det europeiske økonomiske samarbeidsområde (EØS) undertegnet i Oporto 2. Mai 1992.

Treaties and Agreements:

Agreement on the European Economic Area, (EEA Agreement), 1.1.1994.

Treaty on European Union (Consolidated version 2016)

Treaty on the Functioning of the European Union (Consolidated version 2016)

Paris Agreement, 4.11.2016

United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS).

Legal acts:

Proposal for a regulation of the European Parliament and of the Council on the Governance of the Energy Union, 30.11.2016, COM(2016) 759 final.

Regulation No 713/2009 (ACER)

Directive 2009/72/EC (Internal market in electricity)

Directive 2009/73/EC (Internal market in natural gas)

Directive 2009/28/EC (Renewables directive)

Directive 2009/119/EC (Stocks of crude oil/petroleum products)

Directive 2012/27/EU (Energy Efficiency)

Directive 2013/30/EU (Offshore safety)

