

## ZAWIADOMIENIA DOTYCZĄCE EUROPEJSKIEGO OBSZARU GOSPODARCZEGO

### URZĄD NADZORU EFTA

#### **Zaproszenie do zgłaszania uwag zgodnie z art. 1 ust. 2 w części I protokołu 3 do Porozumienia pomiędzy państwami EFTA w sprawie ustanowienia Urzędu Nadzoru i Trybunału Sprawiedliwości w odniesieniu do reorganizacji Norweskiego Zarządu Dróg oraz ustanowienia Mesta AS**

(2007/C 310/06)

Na mocy decyzji nr 350/07/COL z dnia 18 lipca 2007 r., zamieszczonej w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Urząd Nadzoru EFTA wszczął postępowanie zgodnie z art. 1 ust. 2 w części I protokołu 3 do Porozumienia pomiędzy państwami EFTA w sprawie ustanowienia Urzędu Nadzoru i Trybunału Sprawiedliwości (Porozumienie o Nadzorze i Trybunale). Władze norweskie zostały poinformowane o tym fakcie w drodze przekazania kopii decyzji.

Urząd Nadzoru EFTA niniejszym wzywa państwa EFTA, państwa członkowskie UE i zainteresowane strony do zgłaszania uwag w sprawie środka, o którym mowa, w ciągu jednego miesiąca od publikacji niniejszego zawiadomienia, na adres Urzędu Nadzoru EFTA w Brukseli:

EFTA Surveillance Authority  
Registry  
35, Rue Belliard  
B-1040 Brussels

Uwagi zostaną przekazane władzom norweskim. Zainteresowane strony przedstawiające uwagi mogą wystąpić z odpowiednio umotywowanym, pisemnym wnioskiem o objęcie ich tożsamości poufnością.

#### STRESZCZENIE

Urząd Nadzoru EFTA („Urząd”) podjął decyzję o wszczęciu formalnego postępowania wyjaśniającego w wyniku skargi dotyczącej założenia spółki Mesta AS. Mesta AS jest w całości państwową, norweską spółką zajmującą się budową dróg, utworzoną dnia 1 stycznia 2003 r. w celu przejęcia działalności w zakresie budowy dróg, które uprzednio były prowadzone w ramach „działu produkcji” Zarządu Dróg Publicznych w Norwegii. Strona skarżąca podniosła zarzut, że spółka Mesta AS otrzymała pomoc państwa w drodze publicznego finansowania kosztów związanych z restrukturyzacją, zbyt niskiej wyceny majątku, zbyt wysokiej ceny umów przejściowych przeniesionych na spółkę Mesta AS oraz, wreszcie, w drodze zwolnienia z opłat związanych z dokumentami i opłat rejestracyjnych związanych z przeniesieniem własności nieruchomości.

#### I. FAKTY

##### A. Środki restrukturyzacji

W ramach finansowania środków restrukturyzacji mających na celu zmniejszenie dotychczasowego zatrudnienia działu produkcji przeniesionego do Mesta AS, państwo zapłaciło spółce Mesta AS 993,6 mln NOK w celu sfinansowania trzech rodzajów pakietów emerytalnych, w tym (i) kosztów pakietów wcześniejszych emerytur oferowanych w okresie od 1 stycznia 2003 r. do końca 2005 r.; (ii) dodatkowych kosztów opłacania emerytur urzędników służby cywilnej (wykraczających poza zwykły program emerytalny) w okresie od 1 stycznia 2003 r. do końca 2007 r.; i (iii) kosztów związanych z utrzymaniem uprawnień pracowników do przejścia na specjalną (wcześniejszą) emeryturę. Państwo finansowało również koszty związane z przenosinami, dojazdami, przeniesieniem archiwów i renowacją maszyn.

Poza tym państwo wniosło do spółki Mesta AS 512 mln NOK w formie kapitału własnego w celu sfinansowania kosztów związanych z oferowaną „rekompensatą z tytułu wynagrodzenia” (wynagrodzenie oferowane zwalnianym urzędnikom służy cywilnej do czasu zaoferowania im innego stanowisko w administracji publicznej). Pomimo że część tego kapitału została przeznaczona na rekompensaty z tytułu wynagrodzenia (i na niektóre tańsze rozwiązania alternatywne), nie jest pewne, czy rezerwa w wysokości 158 mln NOK, odłożona na poczet przyszłych zobowiązań, została faktycznie wykorzystana. W każdym razie oczywiście jest, że pozostaje wciąż kwota 211 mln NOK, która stanowi część kapitału własnego spółki.

## B. Wycena

### (i) Wycena poszczególnych aktywów

Jeżeli chodzi o wycenę maszyn, sprawozdanie Ernst & Young z maja 2002 r. zatytułowane „Bilans otwarcia” („Opening balance”) pokazuje, że wartość księgowa maszyn wynosząca 1 111 mln NOK na dzień 1 stycznia 2002 r. zmniejszyła się do szacunkowej wartości 866 mln NOK, którą to kwotę następnie skorygowano do 747 mln NOK na dzień 1 stycznia 2003 r. Późniejsze sprawozdanie z grudnia 2002 r. zatytułowane „Dodatek do bilansu otwarcia: Wycena aktywów” zawierało nową szacunkową wartość maszyn równą 572 mln NOK, wyliczoną przy użyciu dwóch punktów odniesienia, tj. szacunkowej wartości maszyn w wysokości 747 mln NOK i wartości księgowej w wysokości 1 035 mln NOK.

W odniesieniu do nieruchomości sprawozdanie z grudnia 2002 r. zatytułowane „Dodatek do bilansu otwarcia: Wycena aktywów” („Opening balance Supplement: Value assessment of assets”) pokazuje, jak wartość księgowa nieruchomości wynosząca 596 mln NOK została zmniejszona do wartości rzeczywistej 331 mln NOK na podstawie (i) sprzedaży oraz (ii) wyceny dokonanej przez niezależnego eksperta — firmę OPAK. W sprawozdaniu z dnia 28 lutego 2002 r. Firma OPAK oszacowała wartość 375 nieruchomości w przybliżeniu na 336 mln NOK. W sprawozdaniu uzupełniającym z dnia 21 października 2002 r. Firma OPAK oszacowała tę wartość w przybliżeniu na sumę 395 mln NOK.

### (ii) Zdyskontowane przepływy pieniężne i kontrola jakości

Oddzielną wycenę przeprowadzono i streszczono w sprawozdaniu z października 2002 r. zatytułowanym „Wycena”, w którym firma Ernst & Young ustaliła, że zastosowanie metody zdyskontowanych przepływów pieniężnych oznacza, że kapitał zaangażowany w Mesta AS wynosi 600 mln NOK (w przedziale +/- 25 %). Wskaźnik zwrotu na kapitale (wyliczony na podstawie „modelu wyceny aktywów kapitałowych”) został ustalony na poziomie nominalnego zwrotu na całkowitych aktywach po opodatkowaniu 6,7 %.

W sprawozdaniu z kontroli jakości z dnia 12 grudnia 2002 r. zatytułowanym „Ocena propozycji wyceny i bilansu otwarcia”, firma Deloitte & Touche ustaliła, że zmniejszenia o 200 mln NOK powinno się dokonać w ramach poprzedniej wyceny całkowitej wartości majątku trwałego w wysokości 1 137 mln NOK.

### (iii) Ostateczny bilans otwarcia

W ostatecznej wersji bilansu otwarcia na dzień 1 stycznia 2003 r. całkowita wartość majątku trwałego wynosi 977 mln NOK, z czego (i) wartość maszyn wynosi 594 mln NOK, a (ii) wartość nieruchomości 281 mln NOK. Wartość maszyn została obniżona o 200 mln NOK z 747 mln NOK do 547 mln NOK. Uzupełnienie o dalsze inwestycje i drobne korekty spowodowało, że ostateczna wartość maszyn wyniosła 594 mln NOK. Jeżeli chodzi o nieruchomości, ostateczny bilans otwarcia na dzień 1 stycznia 2003 r. pokazuje, jak wartość 331 mln NOK (określoną w sprawozdaniu z grudnia 2002 r.) zmniejszono do ostatecznej wartości 281 mln NOK. Ostateczny bilans otwarcia pokazuje również znaczną kwotę płynności, w wysokości 1 600 mln NOK, na pokrycie oczekiwanych ujemnych przepływów pieniężnych.

### C. Umowy przejściowe

#### (i) Cena transferu

Wszystkie umowy na roboty budowlane oraz umowy na prowadzenie i konserwację dotyczące prowadzenia prac w imieniu Zarządu Dróg Publicznych, które wygaszały po 1 stycznia 2003 r., zostały sformalizowane jako „umowy przejściowe” i zostały przeniesione na Mesta AS <sup>(1)</sup>. W czasie tego przeniesienia, okazało się, że umowy na roboty budowlane oraz umowy na obsługę i konserwację miały wartość, odpowiednio, około 2 960 mln NOK i 5 750 mln NOK, w sumie około 8 710 mln NOK. <sup>(2)</sup>

Władze wyjaśniły, że pierwotne ceny umów na roboty budowlane wynikały z cen „negocjowanych”, a zostały ustalone na podstawie poziomu cen uzyskanych w wyniku przetargów publicznych na inne umowy na roboty budowlane. Władze stwierdziły również, że cena umów na roboty budowlane podlegała mechanizmowi korekty ex-post w celu uwzględnienia wymogów fiskalnych. Wydaje się, że ten mechanizm wiązał się z dostosowaniem cen w taki sposób, aby zapewnić deficyt, jeżeli w poprzednich latach osiągnięto zyski (i na odwrót). Wreszcie umowy skorygowano tak, aby uwzględnić nowe wymogi fiskalne i regulacyjne spółki Mesta AS.

Władze norweskie wyjaśniły, że wartość wszystkich umów na prowadzenie i eksploatację została oparta na kosztach i cenach ustalonych w ramach umów z działem produkcji. Zarząd Dróg Publicznych organizował przetargi publiczne dotyczące wspomnianych umów na dzień 1 września każdego roku, aż do 2006 r. Spośród 108 umów spółka Mesta AS zdobyła 68, co daje około 62,7 %. Analiza porównawcza przedstawiona przez firmę Veidekke ASA pokazuje, że w odniesieniu do umów zleconych w drodze przetargu w latach 2003–2006 ceny zwycięskich ofert były niższe niż ceny, po których umowy były uprzednio przeniesione na Mesta AS. Analiza pokazuje również, że ceny przedstawione w ofertach przedstawionych przez (samą) spółkę Mesta AS w kolejnych przetargach są niższe niż ceny, po których umowy były przenoszone na Mesta AS. Sprawozdanie zlecone i opublikowane przez, między innymi, firmę ViaNova Plan stwierdza, że w odniesieniu do wielu umów na prowadzenie i konserwację, przeniesionych na Mesta AS, a następnie będących przedmiotem publicznych przetargów w styczniu 2003, poziom kosztów jest o 32 % poniżej pierwotnego poziomu kosztów odpowiednich umów przejściowych przenoszonych na Mesta AS.

Przed utworzeniem Mesta AS norweski parlament poparł 5 testowych/pilotażowych zamówień, które Zarząd Dróg Publicznych planował wystawić do publicznego przetargu. Uzyskane ceny nie zostały wykorzystane jako podstawa do ustalenia cen umów przejściowych. W grudniu 2000 r. Zarząd Dróg Publicznych opublikował sprawozdanie pokazujące, że w przypadku umów działu produkcji koszty stanowią 94 % ceny, podczas gdy w przypadku umów przedsiębiorców prywatnych koszty stanowią 71 % ceny. Podstawą takiego wniosku były niektóre przypadki testowe/pilotażowe. Ponadto kwestie podnoszone w parlamencie w latach 1999–2000 ujawniły, iż poprzednia analiza wykazała, że poziom cen umów na prowadzenie i konserwację był o 20–25 % wyższy niż w przypadku umów prywatnych. <sup>(3)</sup> Wreszcie komunikat prasowy z dnia 17 kwietnia 2001 r. wyjaśniał, że analiza porównawcza ujawniła, iż najniższa cena oferowana spośród usługodawców prywatnych była o około 15–20 % niższa cena oferowana przez dział produkcji.

#### (ii) Umowy przejściowe w bilansie otwarcia

Władze norweskie stwierdzają, że „umowy przejściowe zostały ujęte w bilansie otwarcia Mesta AS poprzez ich uwzględnienie w przyszłych przepływach pieniężnych jako elementu wyceny firmy kontynuującej działalność”, ale również, że umowy przejściowe stanowiły tylko niewielką część tej wartości. W tym kontekście odniesiono się do poprzedniego stwierdzenia mówiącego, że „bieżące operacje spółki Mesta zostały wycenione w oparciu o zdyskontowane przeszłe przepływy pieniężne i stopę procentową w wysokości 6,7 %. Wartość rzeczywista operacji została ustalona na 600 mln NOK. Szacowana wartość rzeczywista została przypisana do aktywów, a wycena aktywów określona w propozycji do bilansu otwarcia odzwierciedla ich wartość rzeczywistą” <sup>(4)</sup>.

<sup>(1)</sup> Nie zawarto umów przejściowych w odniesieniu do asfaltu i oznaczeń drogowych.

<sup>(2)</sup> Dane liczbowe przedstawiają wartości aktualne w momencie przenoszenia kontraktów z działu produkcji do Mesta AS.

<sup>(3)</sup> „Spørsmål fra Samferdselskomiteen om St.meld. nr. 46 (1999–2000) Nasjonal transportplan 2002–2011”.

<sup>(4)</sup> Pismo z dnia 1 listopada 2004 r. od władz norweskich do Urzędu.

#### D. Opłata związana z dokumentami i opłata rejestracyjna

Zgodnie z sekcją 3 ust. 2 ustawy o spółce Mesta, przeniesienie własności nieruchomości na Mesta AS zostało przeprowadzone w drodze zmiany nazwy i dlatego też zostało zwolnione z obowiązku wniesienia opłaty związanej z dokumentami i opłaty rejestracyjnej, które w normalnym trybie są naliczane w przypadkach przeniesienia własności nieruchomości. Zwolnienie z opłaty związanej z dokumentami i opłaty rejestracyjnej może być udzielone poprzez odniesienie się do zasady ciągłości, która jest pojęciem obejmującym sytuacje, w których spółka nabywająca przejmując prawa i zobowiązania spółki przekazującej. Dwa okólniki określają reguły stosowania zasady ciągłości, z których pierwszy datowany na 25 maja 1990 r. został zastąpiony drugim z dnia 21 czerwca 2005 r. Na mocy pierwszego okólnika zwolnienie z opłaty związanej z dokumentami i opłaty rejestracyjnej mogło być udzielone poprzez odniesienie się do zasady ciągłości, jedynie jeżeli prawo własności miało być przeniesione w kontekście połączenia spółek z ograniczoną odpowiedzialnością. Jednakże drugi okólnik rozszerzył zakres, obejmując połączenia, podziały i przekształcenia prowadzone na podstawie prawodawstwa korporacyjnego dotyczącego zasady ciągłości.

#### II. OCENA

Urząd ma wątpliwości dotyczące tego, czy opisane powyżej środki obejmują pomoc państwa.

#### A. Środki restrukturyzacji

Urząd nie przyjął ostatecznego stanowiska w sprawie zaangażowania pomocy państwa. W szczególności Urząd ma wątpliwości, czy w odniesieniu do środków restrukturyzacji spełnione jest kryterium korzyści gospodarczej.

Jeżeli uznaje się, że zobowiązania finansowe wynikające z prawodawstwa pracy lub umów zbiorowych gwarantujących świadczenia dla bezrobotnych lub programy emerytalne stanowią zwykłe koszty spółki, można uznać, że zobowiązania emerytalne w przypadku spółki Mesta <sup>(1)</sup> stanowią „zwykłe koszty”, a zwolnienie z takich kosztów byłoby równorzędne z korzyścią gospodarczą. Jednakże podejście to nie uwzględnia warunków, na jakich poprzedni pracodawca, tj. państwo, zatrudniał odnośnych pracowników, ani zobowiązań państwa wynikających z tych uwarunkowań. Ponieważ finansowanie państwa ogranicza się do różnicy między kosztami zwykłego programu emerytalnego a kosztami programu dla urzędników służby cywilnej, państwo płaci jedynie za swoje zobowiązania i dlatego finansowanie przez państwo tych kosztów nie stanowi korzyści gospodarczej. Podobny argument można przywołać w odniesieniu do finansowania przez państwo specjalnych pakietów emerytalnych, ponieważ uprawnienie do specjalnego (wcześniejszego) przejścia na emeryturę oferowano w ramach zatrudnienia przez państwo i dlatego uprawnienie to jest zobowiązaniem podjętym przez państwo. Ponadto uwagi te mają również zastosowanie do finansowania przez państwo rekompensat z tytułu wynagrodzeń, ponieważ są one jednym z praw wynikających ze statusu urzędnika służby cywilnej, posiadanego wcześniej przez odnośnych pracowników.

Urząd przyjął wstępne stanowisko, że zwrot przez państwo na rzecz Mesta AS kosztów poniesionych w ramach pozycji zatytułowanych „przenosiny” i „ekwiwalenty pieniężne” stanowi korzyść gospodarczą, której spółka Mesta AS nie osiągnęłaby w normalnym trybie prowadzenia działalności. Ponadto koszty związane z przeniesieniem biur (w tym biur wsparcia i utrzymania), jak również z przeniesieniem archiwów są kosztami, które powinny być poniesione częściowo przez państwo i częściowo przez samą nową spółkę. Jeżeli chodzi o pozycję kosztową „renowacja maszyn”, to właściciel, w tym przypadku państwo, jest odpowiedzialny za pokrycie kosztów pozbycia się maszyn, które nie nadają się już do użytku. Jednakże jeżeli włączenie nienadających się do użytku maszyn do aktywów przenoszonych do spółki Mesta AS ma negatywny wpływ na wycenę całkowitej wartości aktywów, to taki sposób utylizacji nienadających się do użytku maszyn może skutkować udzieleniem pomocy państwa poprzez stopę zwrotu wymaganego przez państwo.

#### B. Wniesienie aktywów

Urząd ustalił, że brak jest pewności, czy wartość majątku trwałego wykazana w ostatecznym bilansie otwarcia spółki Mesta AS obejmuje korzyść gospodarczą. Pomimo istnienia znacznej niepewności w odniesieniu do wartości majątku trwałego do zapisania w bilansie otwarcia, Urząd ustalił, że wartość majątku trwałego, przeniesionego przez władze norweskie na spółkę Mesta AS, została znacząco zmniejszona w porównaniu z poprzednimi szacunkami oraz że obniżenia wartości maszyn dokonano na podstawie 747 mln NOK, która to wartość była jedynie wstępną wartością szacunkową.

<sup>(1)</sup> Patrz na przykład: ust. 62 sekcji 3.2.6 Wytycznych w sprawie pomocy państwa dotyczących pomocy w celu ratowania i restrukturyzacji zagrożonych przedsiębiorstw oraz sprawa C-251/97 *Francja przeciwko Komisji* [1999] Zb.Orz. I- 6639, ust. 40.

Jeżeli chodzi o nieruchomości, nie jest dla Urzędu jasne, jak ustalono ich wartość, mając na względzie fakt, że w ostatniej ekspertyzie, z października 2002 r., wskazano wartość 395 mln NOK, którą następnie zmniejszono do 331 mln NOK w grudniu 2002 r. i do 281 mln NOK w ostatecznym bilansie otwarcia. Ponadto nie jest jasna logika zmniejszenia wartości maszyn o 200 mln NOK do 547 mln NOK, podczas gdy analiza przepływów pieniężnych wskazała, że szacowana wartość zaangażowanego kapitału wynosi 600 mln NOK.

### C. Przeniesienie umów przejściowych

Urząd kwestionuje, czy ceny określone w umowach na roboty budowlane przeniesionych do spółki Mesta AS odzwierciedlały cenę rynkową.

Ponadto oprócz faktu, że cena przeniesienia umów na obsługę i konserwację nie jest oczywista, Urząd uznaje, że wyniki sprawozdania firmy ViaNova i porównania przedstawionego przez firmę Veidekke ASA mogą wskazywać, że ceny umów na obsługę i konserwację nie zostały ustalone na poziomie cen rynkowych.

Wobec wyników uzyskanych w ramach projektów pilotażowych oraz sprawozdań porównawczych wykazujących, że cena umów działu produkcji była ponad 20 % punktów wyższa niż w przypadku umów prywatnych, Urząd kwestionuje również argument władz norweskich, że rynek nie był rozwinięty lub że ceny podobnych umów nie były rozpoznane przez rynek. Fakt iż Mesta AS wygrała później większość przetargów publicznych wydaje się wskazywać na to, że spółka stosuje inną strukturę cen niż struktura, jaką zastosowała na potrzeby ustalenia cen przeniesienia umów.

### D. Opłata związana z dokumentami i opłata rejestracyjna

Zgodnie z wnioskiem Urzędu wyrażonym w decyzji z dnia 14 grudnia 2005 r., wstępne stanowisko Urzędu zakłada, że zwolnienie spółki Mesta AS z płacenia opłaty związanej z dokumentami i opłaty rejestracyjnej w odniesieniu do przeniesienia własności nieruchomości wiąże się z pomocą państwa. <sup>(1)</sup>

### E. Zakłócenie konkurencji i wpływ na wymianę handlową pomiędzy Umawiającymi się Stronami

Ze względu na międzynarodowy charakter rynku budowlanego, Urząd uznaje, że jakkolwiek pomoc państwa w postaci wsparcia finansowego dla Mesta AS (czy to w formie dotacji czy w formie zwolnienia z opłat) zakłóci konkurencję i będzie miała wpływ na wymianę handlową.

### F. Zgodność pomocy

Mając na względzie, że wszystkie związane z emeryturami środki restrukturyzacji wiążą się bezpośrednio lub pośrednio z faktem, że wcześniejsi pracownicy Zarządu Dróg Publicznych posiadali status urzędników służby cywilnej, wydaje się, że ten specjalny status pracowników Zarządu Dróg Publicznych przyznano w ramach systemu, który nie podlegał konkurencji. Dlatego też można było uznać, że koszty restrukturyzacji nałożone na Mesta AS mogą mieć wpływ na jej pozycję konkurencyjną na rynku otwartym na konkurencję, a to z kolei mogło być powodem uznania potencjalnej pomocy państwa służącej pokryciu stosownych kosztów za zgodną.

Jeżeli chodzi o finansowanie przez państwo pozostałych kosztów restrukturyzacji lub potencjalną pomoc uwzględnioną w wycenie aktywów i umów przejściowych oraz w udzielonym zwolnieniu z opłaty związanej z dokumentami i opłaty rejestracyjnej, Urząd nie był w stanie zidentyfikować elementów wskazujących na to, aby takie finansowanie było zgodne na podstawie art. 61 ust. 3 Porozumienia EOG.

<sup>(1)</sup> Decyzja nr 318/05/COL.

**„EFTA SURVEILLANCE AUTHORITY DECISION****of 18 July 2007****to initiate the procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement with regard to the reorganisation of the Norwegian Public Road Administration and the establishment of Mesta AS****(Norway)**

THE EFTA SURVEILLANCE AUTHORITY <sup>(1)</sup>,

Having regard to the Agreement on the European Economic Area <sup>(2)</sup>, in particular to Articles 61 to 63 and Protocol 26 thereof,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice <sup>(3)</sup>, in particular to Article 24 thereof,

Having regard to Article 1(2) of Part I and Articles 4(4) and 6 of Part II of Protocol 3 to the Surveillance and Court Agreement,

Having regard to the Authority's Guidelines <sup>(4)</sup> on the application and interpretation of Articles 61 and 62 of the EEA Agreement,

Whereas:

**I. FACTS****1. PROCEDURE**

By letter dated 30 August 2004, the Authority received a complaint against the Norwegian authorities in relation to the establishment of Mesta AS which was created to take over the production activities carried out within the Public Road Administration in Norway <sup>(5)</sup>. The letter was received and registered by the Authority on 2 September 2004 (Event No: 291537).

By letter dated 15 September 2004 (Event No: 291631), the Authority requested information from the Norwegian authorities. By letter dated 24 September 2004 from the Norwegian authorities, both received and registered by the Authority on 24 September 2004 (Event No: 293749) the Norwegian authorities requested an extension of the deadline within which it had to reply <sup>(6)</sup>. The Authority granted the request by letter dated 28 September 2004 (Event No: 294074).

<sup>(1)</sup> Hereinafter referred to as "the Authority".

<sup>(2)</sup> Hereinafter referred to as "the EEA Agreement".

<sup>(3)</sup> Hereinafter referred to as "the Surveillance and Court Agreement".

<sup>(4)</sup> Procedural and Substantive Rules in the Field of State Aid — Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in OJ L 231, 3.9.1994, p. 1, EEA Supplement No 32, 3.9.94, p. 1, last amended by the Authority's Decision No 388/06/COL of 13 December 2006 for purposes of prolonging Chapter 14 on Aid for research and development, hereinafter referred to as the "State Aid Guidelines".

<sup>(5)</sup> Translation from "Statens vegvesen".

<sup>(6)</sup> The request for an extension of the time limit was officially confirmed by letter dated 28 September 2004 from the Norwegian Mission to the European Union, forwarding the letter dated 24 September 2004 from the Norwegian authorities, both received and registered by the Authority on 29 September 2004 (Event No 294279).

By letter dated 4 November 2004 from the Norwegian Mission to the European Union, forwarding a letter from the Norwegian authorities dated 1 November 2004, both received and registered by the Authority on 4 November 2004 (Event No: 298076), the Norwegian authorities replied to the information request.

The Authority considered that further information was necessary and sent another request for information dated 8 September 2005 (Event No: 306025). By letter dated 17 October 2005 the Norwegian authorities requested an extension of the deadline within which it had to respond, both received and registered by the Authority on 19 October 2005 (Event No: 346953) <sup>(7)</sup>. The Authority granted the request by letter dated 20 October 2005 (Event No: 347051).

By letter dated 15 November 2005 from the Norwegian Mission to the European Union, forwarding a letter dated 10 November 2005 from the Norwegian authorities, including appendixes, both received and registered by the Authority on 17 November 2005 (Event No: 350245) the Norwegian authorities replied to the information request.

The Authority requested yet further information by letter dated 14 August 2006 (Event No: 383867). By letter dated 28 September 2006 from the Norwegian Mission to the European Union, forwarding a letter from the Norwegian authorities dated 26 September 2006, the Norwegian authorities requested an extension of the deadline within which it had to reply, both received and registered by the Authority on 28 September 2006 (Event No: 390099). By letter dated 2 October 2006 the Authority granted the request (Event No: 390486).

By letter dated 11 October 2006 from the Norwegian Mission to the European Union, enclosing a letter from the Norwegian authorities dated 6 October 2006, both received and registered by the Authority on 11 October 2006 (Event No: 392699) the Norwegian authorities replied to the information request.

In addition hereto, during the autumn of 2006 and the beginning of 2007 the Authority and the Norwegian authorities have had informal contact both via telephone and electronic mail. Information received by the Authority in this context has been consolidated by the Norwegian authorities in a letter dated 18 June 2007 received and registered by the Authority on 21 June 2007 (Event No: 426240).

<sup>(7)</sup> The request for an extension of the time limit was officially confirmed by letter dated 21 October 2005 from the Norwegian Mission to the European Union, forwarding the letter dated 17 October 2005 from the Norwegian authorities, both received and registered by the Authority on 21 October 2005 (Event No 347285).

## 2. BACKGROUND FOR THE EXISTENCE OF THE ALLEGED AID

### 2.1. *The complaint alleging the involvement of State aid*

The Public Road Administration in Norway is in charge of the construction and maintenance of national and county municipality roads, bridges and tunnels. Prior to 1 January 2003 the Norwegian Road Administration operated in-house production departments (hereinafter collectively referred to as the "Production Department") via district offices which carried out the construction work on behalf of the Public Road Administration. However, in 2001-2002 the Norwegian authorities decided to carry out an overall restructuring of the in-house production activities. In this regard the Government proposed that the Parliament should separate the production activities from the Public Road Administration and transfer them to a limited liability company owned by the State<sup>(1)</sup>. The administrative functions consisting of planning future construction activities, including the organisation of public tenders, remained within the State administration.

As a result, on 1 January 2003, the production activities of the Production Department within the Public Road Administration was separated from the State and transferred to a newly established company, Mesta AS. All assets, rights and obligations pertaining to the Production Department were transferred to Mesta AS as contributions in kind<sup>(2)</sup>. The assets included machinery and equipment as well as service contracts entered into between the Production Department and the Public Road Administration. In return the State received shares in the new company. Currently, Mesta AS carries out construction and maintenance activities in competition with other operators active on this market.

The complainant has argued that Mesta AS has received State aid contrary to Article 61(1) of the EEA Agreement on four accounts: (i) the State has financed the restructuring costs; (ii) the fixed assets transferred to Mesta AS have been assessed at below market value in the opening balance; (iii) Mesta AS has been cross-subsidized as a result of the takeover by the company of the Production Department's previous contract portfolio; and (iv) Mesta AS has not paid document and registration duties normally falling due in the case of transfer of ownership of real estate.

The following describes the facts relevant for assessing whether each of these alleged measures involve State aid.

### 2.2. *Restructuring and other reorganisation measures*

It appears from preparatory legislative work that all employees (about 5 000) previously employed in the Production Department were to be transferred to the newly established company. However, in order to ensure the establishment of an efficient company it was considered necessary to take measures for purposes of reducing the workforce (to about 3 600)<sup>(3)</sup>. The

various restructuring measures undertaken to achieve this goal consisted of (i) early pension packages; (ii) temporary maintenance of civil servant pension<sup>(4)</sup>; (iii) maintenance of the right to a special retirement age<sup>(5)</sup>; and (iv) various measures involving moving, commuting, the maintenance of wage and the renovation of machines<sup>(6)</sup>.

The total costs for carrying out the restructuring measures were initially estimated to an amount of NOK 1 468 million (discounted to present values) and foreseen to be reimbursed by the State to Mesta AS in instalments over a three-year period of 2003-2005. Initially the restructuring measures also included a further cost item (v) related to compensation for salary<sup>(7)</sup>. However, immediately prior to fixing the opening balance of Mesta AS the Norwegian authorities decided that the relevant costs should rather be covered by a capital contribution to Mesta AS in the form of equity.

The restructuring costs were not included in the opening balance of Mesta AS since the restructuring costs were to be funded by the State via the State budget for the three years of 2003, 2004 and 2005<sup>(8)</sup>.

It appears from the State budget for 2006 that Mesta AS has received a total of NOK 993,5 million from the State to cover restructuring costs already accrued as well as future restructuring costs. In this regard Mesta AS received NOK 357 million for 2003; NOK 356,5 million for 2004; and NOK 280 million for 2005<sup>(9)</sup>. It appears furthermore from the State budget for 2007 that at the end of 2006 total restructuring costs were estimated by Mesta AS to amount to NOK 1 212 million until the year of 2013<sup>(10)</sup>. However, the Norwegian authorities have explained that although it was initially foreseen that the State should cover all restructuring costs (implying that if the original estimate of the restructuring costs of NOK 1 468 million would be insufficient the State would grant additional funds) the State budget for 2007 provides that Mesta AS will not be granted further restructuring funds than NOK 993,5 million (albeit subsequently amended by the Norwegian authorities to NOK 993,6 million).

The Norwegian authorities have explained that if at the end of the period the restructuring costs should turn out to be less than originally estimated the surplus amount must be repaid to the State or injected into the company as a capital contribution — which in the form of equity would be subject to the required rate of return. However, the authorities maintain that it is unlikely that Mesta AS will have a surplus of funds at the end of the period due to the fact that the total amount which Mesta AS ultimately will receive is considerably lower than the initial estimate for restructuring costs.

In terms of regulation, the Norwegian authorities adopted an Act on the transformation of the production activities of the Public Road Administration to a State owned limited liability company which regulates the rights of employees who were transferred from the Public Road Administration for employment in Mesta AS<sup>(11)</sup>.

<sup>(1)</sup> The first proposal in this regard was included in St. prp. nr. 1 Tillegg nr. 4 (2001-2002). The proposal was further detailed in St. prp. nr. 1 Tillegg nr. 1 (2002-2003) entitled "om omdanning av Statens vegvesens produksjonsvirksomhet til statlig aksjeselskap" on the transfer of the production activities within the Public Road Administration into a State owned company.

<sup>(2)</sup> Section 2 of Ot. prp. nr. 6 (2002-2003) entitled "Om lov om omdanning av Statens vegvesens produksjonsvirksomhet til statlig aksjeselskap" on the transfer of production activities within the Public Road Administration into a State owned limited liability company.

<sup>(3)</sup> Section 4.2 of St. prp. nr. 1 Tillegg nr. 1 (2002-2003).

<sup>(4)</sup> Civil servant pension is translated from "tjenestepensjonsordning".

<sup>(5)</sup> Translated from "Opprettholdelse av særaldersgrense".

<sup>(6)</sup> Section 5 of St. prp. nr. 1 Tillegg nr. 1 (2002-2003).

<sup>(7)</sup> Translated from "Ventelønn".

<sup>(8)</sup> Section 5 of St. prp. nr. 1 Tillegg nr. 1 (2002-2003).

<sup>(9)</sup> St. prp. nr. 1 (2005-2006).

<sup>(10)</sup> St. prp. nr. 1 (2006-2007).

<sup>(11)</sup> Act of 13 December 2002 ("lov om omdanning av Statens vegvesens produksjonsvirksomhet til statlig aksjeselskap").

## A. Restructuring measures

### (i) Early pension

It appears from preparatory legislative work that during a three year period as of 1 January 2003 until the end of 2005 Mesta AS could offer employees transferred from the Production Department within the Public Road Administration an arrangement according to which they would be able to retire with pension at the age of 60 rather than the normal retirement age of 67 years. Both state owned and private companies have the right to make use of this instrument.

In legislative preparatory works the State funded costs of offering early pension arrangements (including administration costs representing about 5 % of total costs) were estimated to amount to NOK 911 million <sup>(1)</sup>. However, the Norwegian authorities have subsequently explained that in August 2005 accrued costs were merely NOK 113 million and that the amount of total estimated costs would be NOK 637 million (rather than NOK 911 million). The reason for this reduction is, according to the Norwegian authorities, that it was subsequently realised that the workforce could be reduced by means of normal retirement which reduced the need to offer early pension arrangements (in fact, only 470 individuals have benefited from early pension) <sup>(2)</sup>.

### (ii) Maintenance of civil servant pension rights

The employees of the Public Road Administration had the status of a civil servant but lost this status upon their transfer to Mesta AS (although certain specific rights were maintained for a limited period, see further subsection (v) below). The authorities decided, however, that the employees should benefit from a five year transitional regime (i.e. from 1 January 2003 to the end of 2007). The transitional regime implies that the State pays Mesta AS the relevant costs for purposes of ensuring that employees are guaranteed pension contributions equal to that of civil servants during the relevant period <sup>(3)</sup>.

In Norway the costs relating to the pension rights of civil servants are paid into the State pension fund ("*Statens pensjonskasse*" or "SPK") <sup>(4)</sup>. Membership of the SPK provides rights corresponding to those of civil servants. Therefore, in order to ensure the transitional regime the membership of the State pension fund was maintained.

The State funding to Mesta AS is intended to cover the difference between the average costs of an ordinary private pension scheme and the (higher) costs of maintenance of membership in the SPK. Originally the relevant costs were estimated to amount to NOK 395 million <sup>(5)</sup>. The Norwegian authorities have,

<sup>(1)</sup> Section 5 of St. prp. nr. 1 Tillegg nr. 1 (2002-2003).

<sup>(2)</sup> The authorities have nonetheless pointed out that although early pension packages will not be offered after the end of 2005, payments in respect of the early pensions arrangements accepted prior to this date may still be made until the end of 2012.

<sup>(3)</sup> The Norwegian authorities have explained that if Mesta AS decides to maintain the civil servant pension rights beyond 2007 the company must cover the costs itself and the State will not reimburse the company for such costs.

<sup>(4)</sup> The rights of civil servants are set out in the Act on civil servants "*Lov 4.3.1983 om statens tjenestemenn*".

<sup>(5)</sup> Section 5 of St. prp. nr. 1 Tillegg nr. 1 (2002-2003).

however, subsequently explained that per August 2005 the costs accrued in this respect amounted merely to NOK 209 million. In this regard the authorities have also explained that the original amount of NOK 395 million was in any event not intended to be a fixed amount as the parameters for the annual pension premium to be paid (which are assessed by the SPK as a percentage of the pension-qualifying income) vary <sup>(6)</sup>.

Individuals employed after the establishment of Mesta AS are offered a pension scheme of which the costs are paid for in full by the company.

### (iii) Maintenance of special retirement age

Certain of the civil servants who were transferred to Mesta AS were entitled to retire at an earlier age (i.e. at 65 years) than the normal retirement age of 67 years. In connection with the transfer of employees of the Public Road Administration to Mesta AS, the employees, who at the time of the establishment of Mesta AS (i.e. on 1 January 2003) had 10 years or less left before retirement (that is, those who were 55 years or older), were granted the right to maintain their special retirement age of 65 years <sup>(7)</sup>. The additional costs of maintaining the special retirement age arrangement were originally estimated to amount to NOK 85 million (including administration costs representing about 5 % of the total amount) to be funded by the State <sup>(8)</sup>.

The Norwegian authorities have explained that per August 2005 NOK 24,5 million costs had been incurred for purposes of maintaining the special retirement age but further costs may incur until the expiry of the arrangement in 2012.

### (iv) Costs related to moving, commuting, maintenance of salary and renovation of machines as well as other related costs

According to preparatory legislative works, this cost item covers costs for purposes of moving ("*flyttekostnader*"); commuting ("*pendlergodtgjørelse*"); maintenance of salary ("*bibehold av lønn*"); and renovation of machines ("*maskiner — sanering*") <sup>(9)</sup>. The Norwegian authorities have explained that it also involves costs related to moving offices ("*kontor-flyttekostnader*"); moving maintenance and support offices ("*støttepunkter-flyttekostnader*"); and transfer of archives ("*arkivoverføring*").

With the exception of the measure relating to maintenance of salary (which has not been put into effect and hence did not incur any costs) all measures were carried out at the time of the establishment of Mesta AS and lasted until the end of 2005. While the total costs pertaining to all measures were originally estimated to amount to NOK 77 million <sup>(10)</sup>, the Norwegian authorities have explained that, per January 2006, total costs accrued amounted to approximately NOK 82,4 million. The Norwegian authorities have also explained that although not being liable, the State nonetheless paid for the costs.

<sup>(6)</sup> The pension-qualifying income varies from year to year, amongst others, due to adjustment of salaries. Elements influencing the level of the premium are the premium rate and the contribution of employers to the National Insurance.

<sup>(7)</sup> The special retirement age arrangement would therefore be applicable until the end of 2012.

<sup>(8)</sup> Section 5 of St. prp. nr.1 Tillegg nr. 1 (2002-2003).

<sup>(9)</sup> St. prp. nr. 1 Tillegg nr. 1 (2002-2003).

<sup>(10)</sup> Section 5 of St. prp. nr. 1 Tillegg nr. 1 (2002-2003).



Moving: Costs accrued per January 2006: NOK 0,5 million

This item includes costs incurred in relation to relocating leading or administrative personnel in order to take up employment at Mesta AS. As the personnel took up positions in different locations within Mesta AS than those where such personnel previously worked within the Public Road Administration, certain employees had to move domiciles to take up their new employment. Examples of costs include actual, documented costs related to the purchase of domiciles ("*faktiske, legitimerte kostnader ved boligkjøp*")<sup>(1)</sup>, paid absence for purposes of moving ("*flyttepermisjon*") and travel costs in relation to inspections of new property ("*visningsreise*").

Commuting: Costs accrued per January 2006: NOK 6,8 million

This item also covers costs considered necessary to ensure that leading or administrative personnel took up employment within Mesta AS at premises far away from their domicile. Examples of costs include commuting costs between the domicile and work ("*hjemreise*"), costs for double rent ("*Dekning av husleie*")<sup>(2)</sup> driving allowance between domicile and work ("*kjøregodtgjørelse*") and board allowance ("*kostgodtgjørelse*").

Moving offices: Costs accrued per January 2006: NOK 7,8 million

This item involves costs for moving from the offices of the Public Road Administration to the central headquarters and regional offices of Mesta AS. Examples of costs are cleaning out of old offices ("*Rydding og rengjøring av gamle kontorer*"); packing office material up<sup>(3)</sup> and transporting it to the new offices ("*Pakking og transport*"); preparation, furnishing and upgrading of new offices at Mesta AS ("*Klargjøring, innredning og oppgradering av nye kontorer*"); as well as costs for the administration of moving activities ("*administrasjon av flytting*").

Moving of support and maintenance offices: Costs accrued per January 2006: NOK 40,1 million

This item includes costs for purposes of moving from old offices to new local maintenance and support offices as well as reorganising former operation and support offices into new operation and support offices for Mesta AS. Examples of costs are cleaning up of old operation and maintenance support offices ("*rydding og rengjøring av gamle driftsstøttepunkt*"), packing office material up and transporting it to the new offices ("*pakking og transport*"), preparation, furnishing and upgrading of new operation and maintenance support offices ("*Klargjøring, innredning og oppgradering av driftsstøttepunkt*") and administration of moving activities ("*administrasjon av flytting*").

Transfer of archives: Costs accrued per January 2006: NOK 7,1 million

This item includes costs for purposes of installing electronic and physical archives in Mesta AS. It covers the costs involved in

separating relevant archives from other irrelevant archives within the Public Road Administration as well as the costs related to the establishment of new archives in Mesta AS. Examples of costs included are the costs for assessing the extent of necessary resources for each archive ("*Ressursbehov pr. arkiv*"), photocopying ("*kopiering*"), transport ("*frakt*"), preparation ("*klargjøring*") and quality assurance work ("*kvalitetssikring og sikkerhetsarbeid*").

Renovation of machines: Costs accrued per January 2006: NOK 20,1 million

Although this cost item would suggest that it covers costs related to repairing or renovating machines this is not the case. The Norwegian authorities have explained that the contribution in kind to Mesta AS contained discarded machines, surplus machines and scrapped sites which could not be used for its business. The machines were old, wrecked, or in other ways not of any use for purposes of modern road construction. For practical reasons all machinery was transferred to the new company which should dispose of the machines and clean up the unusable sites. Hence this cost item covers costs related to cleaning up of sites ("*opprydding*") and removing, scrapping and transporting unnecessary machinery ("*jerning, skrotning, og frakt-kostnader*").

The evaluation of machines and the identification of surplus and unusable machines and material were carried out by the machinery department in Mesta AS under the supervision of the Director for logistics and purchases. Mesta's auditor verified that the use of the funds was in line with internal instructions<sup>(4)</sup>.

(v) *Compensation for salary and other measures for reducing the work force*

Although the cost item of compensation for salary does not form part of what the Norwegian authorities would refer to as "restructuring costs" it represents nonetheless one of the instruments used for reducing the previous work force of the Public Road Administration.

As mentioned above, while the employees transferred from the Production Department lost their civil servant status, certain specific rights derived from this status were nonetheless maintained for a limited period. These rights are regulated in the Act of 13 December 2002 No 84 on the conversion of the production activities to a State owned limited liability company (hereinafter the "Mesta Act")<sup>(5)</sup>. Section 4 of the Mesta Act provides that during a period of three years after commencing employment in Mesta AS on 1 January 2003 employees who are subsequently dismissed and meet certain conditions (for example minimum employment of one year) have the right to be offered an appropriate position within the State administration ("*fortrinnsrett til annen statlig stilling*") or, if a position cannot be offered, the right to receive compensation for salary ("*ventelønn*").

<sup>(1)</sup> Such as actual moving costs.

<sup>(2)</sup> Such as where a room is rented during the week.

<sup>(3)</sup> With the exception of archives which is covered by a separate cost item below.

<sup>(4)</sup> The internal instructions are based on legislative preparatory works such as St. prp. nr. 1 Tillegg nr. 1 (2002-2003).

<sup>(5)</sup> Act of 13 December 2002 ("*lov av 13.12.2002 om omdanning av Statens vegvesens produksjonsvirksomhet til statlig aksjeselskap*").

Compensation for salary is regulated by the Act on civil servants <sup>(1)</sup>. It is an arrangement whereby civil servants who have been given notice for reasons of redundancy and who have not been offered a different suitable job will be entitled to 2/3 of the salary as of the date on which notice was given and up to a maximum of 16 years (depending on the age and duration of State employment).

Although the costs relating to compensation for salary initially formed part of the restructuring costs the Ministry of Labour later decided that the estimated costs should rather be taken into account when identifying the size of the equity of Mesta AS. Or in other words, the means to finance the relevant costs would be injected by the State in Mesta AS as equity <sup>(2)</sup>. The rationale for this approach was that funding through equity should result in a more careful use of dismissals as a reorganisation tool in the public sector. Instead, more use should be made of other (cheaper) reorganisation instruments, such as leave of absence with reduced pay and pension packages, etc. <sup>(3)</sup>.

At the time of the establishment of Mesta AS it was originally foreseen that 450 employees would be covered by the compensation for salary scheme with total costs of approximately NOK 512 million. This amount was therefore taken into account when determining the equity of Mesta AS <sup>(4)</sup>. However, as Mesta AS made use of the following (cheaper) alternative workforce reducing instruments Mesta AS spent considerably less of its equity funding than initially anticipated <sup>(5)</sup>:

*Termination packages* which is an arrangement according to which employees terminate employment without benefiting from compensation for salary in return for receiving up to a years salary as well as financial assistance to find other employment.

*Pension packages* is an arrangement whereby employees at the age of 62 will terminate employment in return for being guaranteed 66 % of the salary until the retirement age at 67 years and the right to continue to earn normal pension rights during this period <sup>(6)</sup>.

*Leave of absence with reduced salary* is an arrangement to induce employees who would acquire the right to receive early pension (at the age of 60) between 2003 and 2005 to terminate before by offering such employees to terminate immediately in return

<sup>(1)</sup> The Act on civil servants ("lov av 4.3.1983 om statens tjenestemenn").

<sup>(2)</sup> The Norwegian authorities have explained that while the State is responsible for paying compensation for salary directly to the entitled individuals, the State requires the costs reimbursed from Mesta AS — who in turn — has received NOK 512 million from the State in the form of equity to cover such costs.

<sup>(3)</sup> A letter dated 3 June 2002 from the Ministry of Labour and Administration reveals that this approach was the result of a general review during which it was found that in all cases of transforming a state integrated entity into a separate state owned company the company needs to be given an incentive to reduce potential claims for compensation for salary. This was considered achieved by making the company pay for the costs of compensation for salary itself — while the State would finance the relevant costs via equity (which would be subject to a fixed rate of return).

<sup>(4)</sup> Section 4.4 of St. prp. nr. 1 Tillegg nr. 1 (2002-2003).

<sup>(5)</sup> By letter dated 6 October 2006 to the Authority, the Norwegian authorities have submitted a table providing an overview of the costs accrued in respect of the various instruments for reducing the work force.

<sup>(6)</sup> The description of the arrangement by the Norwegian authorities was as follows: "Der ordinær AFP ytelse var lavere enn garantert ytelse på 66 % (tidlig pensjon) ble det ytt et mellomlegg (gavpensjon)".

for paying them 66 % of the salary up to the point in time at which they would have acquired the right to early pension.

In the context of implementing the above arrangements various administration costs were incurred, including the costs of external consultants to operate a career centre.

The Norwegian authorities have explained that NOK 17 million was spent for the abovementioned measures in 2003 while NOK 70 million was spent in 2004. In 2005 a further NOK 56 million was spent and a provision of NOK 158 million made for future liabilities. Costs for purposes of compensation of salary or alternative instruments are therefore currently expected to total approximately NOK 301 million. The "remaining" amount of NOK 211 million forms part of the company's equity. The Norwegian authorities have explained that there is no decision dictating that an eventual surplus equity should be returned to the State and that the final accounts have to be assessed before a final decision can be taken on how to deal with surplus equity <sup>(7)</sup>.

### 2.3. Value of machinery and equipment (hereinafter "machinery") and real estate and buildings (hereinafter "real estate") in the opening balance

The following provides an overview of the process for purposes of establishing the value of the fixed assets in the final opening balance of Mesta AS. For purposes of this process two auditors were engaged: Ernst & Young, was engaged by the Public Road Administration in order to establish the new company while the Ministry of Transport and Communication engaged Deloitte & Touche in order to undertake a quality check of the value assessment of the assets and the proposal for an opening balance (including the documentation submitted) as well as evaluating the process, methods and principles applied in this context. Subsequently, Ernst & Young became the auditor of Mesta AS.

#### A. Value assessment of assets separately

##### (i) Machinery

For purposes of assessing the value of the assets, the Public Road Administration, Arthur Andersen & Co AS, the attorney to the Norwegian Government, ViaNova and Skagerak Forsikringsmegling AS prepared a report dated 10 May 2002 entitled the *Opening balance* <sup>(8)</sup>. In this report, the starting point for the assessment was the book value of machinery of NOK 1 111 million on 1 January 2002. By deducting equipment (not planned for a transfer to Mesta AS) estimating investments and depreciation for the year 2002 and taking account of other correction factors, the estimated value of machinery was NOK 866 million, preliminary adjusted to NOK 747 million on 1 January 2003. While the report states that engineers of the Public Road Administration have assessed the real value on the basis of market price observations, Ernst & Young has in a subsequent letter stated that the value of NOK 747 million represented the retroactive creation of book values <sup>(9)</sup>.

<sup>(7)</sup> The final accounts referred to were those for the year of 2005 but the authorities have not provided an update of the situation yet.

<sup>(8)</sup> The original title of the report is "Åpningsbalanse".

<sup>(9)</sup> Letter of 20 February 2007 from Ernst & Young to the Authority.

The evaluation process was continued by the preparation of a report dated August 2002 entitled the *Opening balance* <sup>(1)</sup> prepared by the Public Road Administration, Ernst & Young, Via Nova and Skagerak Forsikringsmegling AS. The report reveals that in July 2002 it was decided that the assets of the Production Department to be transferred to Mesta AS should be assessed on the basis of their real value. The report also reveals that since the process for obtaining real values of machinery had not been completed the value of machinery <sup>(2)</sup> was based on the principle of "simulated continuity", that is, the values would be re-constructed to what they would have been had the Production Department been subject to general accounting law <sup>(3)</sup>.

A further report dated December 2002 entitled *Opening balance Supplement: Value assessment of assets*, prepared by the Public Road Administration, Ernst & Young, Via Nova, OPAK and Skagerak Forsikringsmegling AS presents a new estimate in the value of machinery <sup>(4)</sup>. To arrive at real value two principles were followed (i) for certain groups of machinery, the starting point was recorded book value corrected for a value added tax and amended depreciation periods plus other discretionary assessments; for other groups (ii) values were based on external valuations and prices. The new estimate for the value of machinery to be included in the opening balance was NOK 572 million. This value was calculated by using two points of reference namely the estimated value of machinery of NOK 747 million and a book value of NOK 1 035 million.

(ii) *Real estate*

In the May 2002 report entitled the "*Opening balance*" the value of real estate was estimated to be NOK 277 million. The estimate was fixed starting with the book value of NOK 596 million per 1 January 2002 which was adjusted downwards to take into account increased depreciations and non-transferred real estate.

In the August 2002 report entitled the "*Opening balance*" the value of NOK 277 million was stated to represent the value of real estate had the Production Department been subject to the regular law on accounting.

The December 2002 report entitled "*Opening balance Supplement: Value assessment of assets*" shows how a book value of real estate of NOK 596 million was reduced to a real value of NOK 331 million on the basis of (i) sales; and (ii) an evaluation carried out by the independent expert OPAK of about 1/3 of the properties and a description of the remaining properties.

In terms of expert assessments the Norwegian authorities have submitted a report dated 28 February 2002 in which OPAK assessed the value of 375 properties to approximately NOK 336 million (taking account of planned sales) <sup>(5)</sup>. A

<sup>(1)</sup> The original title of the report is "Åpningsbalanse".

<sup>(2)</sup> The value between NOK 866 million and NOK 747 million.

<sup>(3)</sup> The State administration is not subject to the general accounting law ("regnskapsloven").

<sup>(4)</sup> The original title of the report is "Åpningsbalanse Supplering: Verdivurdering av eiendeler". Page 11 of the report.

<sup>(5)</sup> Prior to sales the value would be NOK 420 486 240 million. Only 100 out of 375 properties were inspected and OPAK observed that certain information to be submitted by the Public Road Administration in respect of the remaining properties was lacking.

follow-up report dated 21 October 2002 prepared by OPAK explains that following, amongst others, the addition of 16 properties, a new evaluation resulted in the value of approximately NOK 395 million.

**B. Value assessment based on discounted cash flow and quality check**

A separate value assessment was carried out and summarised in a report dated October 2002 entitled: "*Value assessment*" prepared by Ernst & Young for purposes of verifying the results of the work undertaken in respect of the value assessment of the assets <sup>(6)</sup>. The auditors conclude the report by stating that the application of the discounted cash flow method means that the employed capital ("*sysselsatt capital*") amounts to NOK 600 million (within an interval of +/- 25 %). The analysis was based on a cash flow assessment for 2003-2012 for which period Ernst & Young estimated a negative present value of NOK 300 million while the terminal value was fixed at plus NOK 900 million. In this regard Ernst & Young has in a subsequent letter explained that "*the fair market value at a minimum must equal the company's equity*". The results of the discounted cash flow method meant therefore that a downward adjustment of the value of the assets had to be made <sup>(7)</sup>. Ernst & Young has further explained that "*Had the value [of NOK 747 million] been fully applied in the Parliament Proposition, the company would have had equity of NOK 2 100 million. This equity exceeds the value resulting from the verification of the value of the company against future cash flows by NOK 200 million. On this background it was decided to adjust machines and equipment downward with NOK 200 million in relation to estimated value of the machinery at the time. The total adjustment was at the time ... done as an adjustment of machines, as it was expected that a valuation based on estimated fair market values would reduce the values of machines*".

A quality control of the value assessments undertaken by Deloitte & Touche resulted in a report dated 12 December 2002 and entitled *Evaluation of proposal for a value assessment and the opening balance* <sup>(8)</sup>. The report shows that the auditors endorse the application of the principle of real value for purposes of assessing assets <sup>(9)</sup>. The auditors also found that the previous estimated value of total fixed assets of NOK 1 137 in the opening balance <sup>(10)</sup> should be reduced with NOK 200 million to NOK 937 million. According to the auditors this adjustment should be made as a result of the value assessment (resulting from the abovementioned discounted cashflow method) <sup>(11)</sup> which showed that the value would be lower by assessing the employed capital ("*sysselsatt capital*") than if the assets would be evaluated separately or in groups. Although Deloitte & Touche expressed concerns about the (discounted cashflow) value assessment they concluded that it was the best possible estimate of the values of the assets and that it could be used for a downward adjustment of the operational assets.

<sup>(6)</sup> Translation from the Norwegian title "Verdivurdering".

<sup>(7)</sup> Letter of 20 February 2007.

<sup>(8)</sup> Translation from the Norwegian title: "Vurdering av forslag til verdsettelse og åpningsbalanse Vegproduksjon AS for Samferdselsdepartementet".

<sup>(9)</sup> See page 3 of the report. It appears that Deloitte & Touche assumed that the value assessment (on which the opening balance is based) has been based on acknowledged principles for the value assessment of companies.

<sup>(10)</sup> The value of NOK 1 137 million was made up of machinery NOK 747 million, real estate of NOK 331 million and other assets of NOK 59 million.

<sup>(11)</sup> I.e. the report entitled *Value Assessment* dated October 2002 by Ernst & Young.

It appears from the Deloitte & Touche report that the report of December 2002 entitled *Opening balance Supplement: Value assessment of assets* (which provides for a value assessment of machinery of NOK 572 million) did not form part of the documents submitted to Deloitte & Touche for purposes of checking the value assessments undertaken.

The Norwegian authorities have explained that the discount factor used for the cash flow analysis was based on principles similar to those underlying the rate of return by a private investor. It was therefore based on the average market rate of return and the company's commercial risk. The rate of return on equity was calculated based on the "capital asset pricing model" (CAPM) by using the following formula: Expected return of the assets (R) = risk free interest rate (r) plus Beta of the asset (b) X {expected return on the market portfolio — risk free interest rate (r)}. According to the authorities the rate was fixed at 6,7 % nominal return on total assets after tax. It was based on risk free interest rate of 6 % before tax, or 4,2 % after tax (of 28 %), a risk premium after tax of 2,1 % (0,35 % of 6 %) and a correction for loss premium factor for debt of 0,4 %.

### C. Value assessment in final opening balance

#### (i) Machinery

The final opening balance of 1 January 2003 prepared by Mesta AS with assistance of Ernst & Young, ViaNova Plan and Trafikk AS (attached as Annex A) shows a total value of fixed assets of NOK 977 million of which value of (i) machinery is NOK 594 million; and (ii) real estate is NOK 281 million.

In line with previous recommendations to reduce the value of fixed assets by NOK 200 million, and to allocate this reduction to machinery, the value of this item was reduced from NOK 747 million to NOK 547 million<sup>(1)</sup>. The addition of further investments and some minor adjustments brought the final value of machinery to NOK 594 million.

#### (ii) Real estate

In the final opening balance of 1 January 2003 the value of NOK 331 million (identified in the December 2002 report) is adjusted downwards to a final value of NOK 281 million.

#### (iii) Contribution of liquidity

The opening balance also recorded a substantial liquidity instalment of NOK 1 600 million to cover expected negative cash flows during the first years of operation in respect of, *inter alia*, pension obligations and restructuring measures. Based on a balance sheet of NOK 2 686 million, equity made up NOK 1 900 million and liabilities constituted NOK 786 million.

<sup>(1)</sup> The report continues by referring to the value of machinery of NOK 572 million identified in the December 2002 report (entitled *Opening balance Supplement: Value assessment of assets*). It is stated that since the value assessment of Mesta AS shows that the company can only justify an equity of NOK 1 900 million, the NOK 572 million had to be adjusted downwards by NOK 25 million. In a subsequent letter dated 20 February 2007 Ernst & Young has explained that this meant that the actual downward adjustment of the value of machinery was not NOK 200 million but rather NOK 25 million.

### 2.4. Transfer of transitional contracts and their value in the opening balance

It appears from the legislative preparatory works that as of 1 January 2003 all new contracts of the Public Road Administration should be subject to public tender procedures in order to increase competition. At the same time, it was decided that already existing contracts under which the Production Department carried out work on behalf of the Public Road Administration would be transferred to Mesta AS to allow the latter to fulfil remaining obligations under the contracts<sup>(2)</sup>. In this regard the Norwegian authorities have explained that all construction contracts ("*utbyggingsprosjekter*") and operation and maintenance contracts ("*funksjonsavtaler*") for carrying out works which expired after 1 January 2003 were "formalised" into "transitional contracts" and transferred to Mesta AS<sup>(3)</sup>. The Norwegian authorities have stated that the method and schedule for handling transitional contracts have been subject to a review by "several external consultants" prior to the establishment of Mesta AS and the results of this have been laid down in a report prepared by the Public Road Administration, Arthur Andersen & Co, the attorney general, ViaNova and Skagerak Forsikringsmegling AS. However, so far, the Norwegian authorities have not submitted this report.

The Norwegian Authorities have explained that the manner of handling transitional contracts is intended to introduce competition in a fast and efficient manner while at the same time ensuring safety for the road users. The authorities considered that prices would gradually be reduced following the introduction of competition. The authorities have further explained that it was essential that all contract work was carried out uninterrupted as of 1 January 2003 and that "*Neither the NPRA nor the private sector was able to tender all the approximately 100 contracts before that date. It was not possible for Mesta to cut staff and machines from that date.*"

In terms of fixing the value of the transitional contracts the Norwegian authorities have explained that the transitional contracts are commercially based in the sense that they have been redrafted and contain contract terms similar to those included in contracts between the Public Road Administration and private operators, such as provisions ensuring the use of the Norwegian Standard ("NS"), the obligation to pay value-added tax, insurance provisions, guarantee liabilities, etc. which also reflect the (new) regulatory framework applicable to Mesta AS.

### A. The construction contracts

The Norwegian authorities have explained that the construction contracts had to be transferred to Mesta AS in order to continue the completion of ongoing construction projects. The contracts vary in terms of complexity and duration but all expired in the course of one or two years after the establishment of Mesta AS.

The Authority has asked the Norwegian authorities whether the value of the construction contracts transferred to Mesta AS was fixed on the basis of the prices resulting from previous public tenders<sup>(4)</sup>. The Norwegian authorities responded that "*prices were set as a continuation of the prices the productions division had*

<sup>(2)</sup> St. prp. nr. 1 Tillegg nr. 1 (2002-2003), Ot. prp. nr. 6 (2002-2003).

<sup>(3)</sup> No transitional contracts have been entered into with respect to asphalt and road marking.

<sup>(4)</sup> Letter dated 8 September 2005 from the Authority to the Norwegian authorities.

set for the negotiated agreements”, that new contractual obligations were not to affect prices and that prices had been negotiated on a model which is, as far as possible, based on market terms. According to the authorities this model includes the following feature: “The model was that the prices set would ensure that the production division in each county would reach the demands estimated from the requirements specified in the fiscal budget. Prices were then to be adjusted in relation to the profit or deficit made in the preceding years. This implied that a deficit could be guaranteed already from the onset of an agreement, if the productions division of the county in question had made a large profit in the preceding years”<sup>(1)</sup>. In subsequent correspondence the Norwegian authorities have explained that prior to the establishment of Mesta AS about 50 % of the construction work (required by the Norwegian Public Road Administration to be carried out) had been put up for public tenders while the rest was awarded to the Production Department. Due to the fact that the Public Road Administration could identify a price level for construction contracts on the basis of such public tenders, it was practice that the price levels in the internal contracts should correspond to the price level in the contracts awarded through public tenders. On this basis the price level reflected in public tenders have been taken into account for purposes of identifying the price level for the internal construction contracts which were later transferred to Mesta AS<sup>(2)</sup>.

#### B. The operation and maintenance contracts

102 existing operation and maintenance contracts (“funksjonsavtaler”) were taken over by Mesta AS. These contracts would all expire within a period of maximum four years, i.e. the third quarter of 2006. In terms of duration they fall in four categories set out below. Upon expiry of the operation and maintenance contracts the Public Road Administration put them up for public tenders per 1 September each year.

- Category A: 24 contracts, which expired during the autumn of 2003;
- Category B: 25 contracts, which expired during the autumn of 2004;
- Category C: 27 contracts, which expired during the autumn of 2005;
- Category D: 26 contracts, which expired during the autumn of 2006.

The Norwegian authorities have explained that the value of all operation and maintenance contracts have been based on the costs and prices fixed in the agreements with the Production Department and that the real market value will appear upon the completion of the contracts when the Public Road Administration can give an outline of the costs for these contracts. Upon querying the authorities whether they could provide such an outline at the current stage the authorities have responded that an indication of the cost price is the price resulting from a report referred to as a report issued by ViaNova Plan (see below).

<sup>(1)</sup> Letter dated 10 November 2005 from the Norwegian authorities to the Authority.

<sup>(2)</sup> Letter dated 6 October 2006 from the Norwegian authorities to the Authority.

#### C. The value at which the contracts were transferred

The values at which the contracts have been transferred appear from an overview over contracts assigned to the Production Department<sup>(3)</sup>. It appears that construction contracts and operation and maintenance contracts had a value of about NOK 2 960 million and NOK 5 750 million, respectively, in total approximately NOK 8 710 million<sup>(4)</sup>. The overview of operation and maintenance contracts provides annual values per region but does not indicate the price of individual contracts.

The values in the abovementioned overview of the contracts correspond to the values forwarded in a letter from the Ministry of Transport dated 19 December 2002 to the association of construction businesses (“Byggenæringens Landsforening”). In this context the values for operation and maintenance contracts were referred to as being “estimates” only<sup>(5)</sup>.

Aside from this, the company, Veidekke ASA, has submitted an Excel spreadsheet showing the prices at which the operation and maintenance contracts were transferred to Mesta AS. According to Veidekke ASA the spreadsheet was forwarded from the Ministry of Transport to the association for asphalt entrepreneurs (“Asfaltentreprenørenes Forening”) who distributed it to its members (including Veidekke ASA)<sup>(6)</sup>. The spreadsheet shows that the total price at which the operation and maintenance contracts have been transferred to Mesta AS is NOK 5 885,2 million.

#### D. Price level resulting from subsequent tenders

A report commissioned and published by the Directorate of Public Roads, ViaNova Plan and Trafikk AS covers an analysis of the price level of contracts in December 2003 (the “ViaNova Report”). The ViaNova Report shows that a number of transitional operation and maintenance contracts transferred to Mesta AS were subject to public tenders in January 2003. One of the conclusions in the report was that the cost level of the transitional contracts which have been subject to public tenders during 2003 appear to be about 32 % below the original cost level of comparable transitional contracts transferred to Mesta AS.

In relation to questions regarding this report the Norwegian authorities have answered that reduced prices were expected in the future and that the Public Road Administration did not enter into re-negotiations for purposes of obtaining a price reduction in respect of the (remaining) transitional contracts. According to the authorities, it was in any event not an option to review the transitional contracts following the results of this report as this would infringe public procurement regulations. In this context the authorities have also explained that “there is a wide gap between the bids as the market needs to be established and it is the first time that this type of contract is used in Norway. Hence all parties have to learn and identify the correct price level partly by

<sup>(3)</sup> Enclosure 26 to the letter dated 1 November 2004 from the Norwegian authorities to the Authority. The overview is enclosed in a letter dated 13 November 2002 entitled: “Kontrakter som tildeles Produksjonsavdelingen uten konkurranse i 2002”.

<sup>(4)</sup> The figures represent the values remaining at the point in time the contracts were transferred from the Production Department to Mesta AS.

<sup>(5)</sup> Referred to as “Regionsvise anslag for funksjonskontrakter”.

<sup>(6)</sup> Veidekke ASA has submitted comments in the form of observations.

calculating uncertainties involved in four to five years contracts carried out in difficult weather situations. The difference between some of the bids and later bids are up to a 100 % taking into account the lowest and highest bids which is an indication of an immature market" (1).

The Norwegian authorities have submitted an overview of the prices resulting from tendering out operation and maintenance contracts between 2003 and 2006. The amounts represented in the overview submitted by the Norwegian authorities are (with some discrepancies) similar to those stated in an Excel spreadsheet submitted by Veidekke ASA which also includes a table comparing the winning (i.e. lowest) offer in each tender procedure with the prices at which the contracts were transferred. The comparison submitted by Veidekke ASA shows that in respect of contracts tendered out in 2003 to 2006 the resulting winning prices were generally lower than the prices at which the contracts were previously transferred to Mesta AS. Moreover, the overview also shows that the prices submitted in offers by Mesta AS (itself) in subsequent tenders are lower than the prices at which the contracts have been transferred to Mesta AS (2):

| Tender year | Winning price (million NOK) | Amount by which contract transfer price exceeds winning price (million NOK) | Amount by which contract transfer price exceeds Mesta AS' tender offers (million NOK) |
|-------------|-----------------------------|---|---|
| 2003        | 1 226,6                     | 94  | 67  |
| 2004        | 1 605,2                     | 328   | 282   |
| 2005        | 1 857,1                     | 760   | 563   |
| 2006        | 7 455,5                     | 948   | 900   |

The overview of operation and maintenance contracts put up for public tender between 2003 and 2006 submitted by the authorities shows that Mesta AS won 14 out of 24 contracts tendered out in 2003. In 2004 Mesta AS won 13 out of 25 contracts while in 2005 Mesta AS won 20 out of 29 contracts. In 2006 Mesta AS won 21 out of 30 contracts (3). This means that out of a total of 108 contracts Mesta AS won 68 contracts which equals about 62,7 %.

#### E. Previous price examinations and experience of the Public Road Administration

The Norwegian authorities have explained that prior to the establishment of Mesta AS the Norwegian Parliament supported five test/pilot contracts which the Public Road Administration had planned to put up for public tender. The authorities have explained that the resulting prices were used to evaluate this type of contract internally (both in the period before and after the decision to establish Mesta AS in 2001). The prices have, however, not been used as a basis for fixing the prices of the transitional contracts. Upon queries by the Authority of the reason for this, the Norwegian authorities have explained that

it had been decided that the value of the transitional contracts should be determined on the basis of the cost base for the contracts.

According to the authorities the winning prices of the five test/pilot contracts were as follows:

Bærum (1998) five years: NOK 74 940 000

Nedre Romerike (1999) five years: NOK 56 000 000

Ibestad Dyrøy (1999) four years: NOK 30 418 400

Lågendalen (2000) four years: NOK 45 706 323

Våler og Åsnes (2001) five years: NOK 39 018 023.

In December 2000 the Public Road Administration issued a report in which it examined the competitiveness of the operation and maintenance services of the Production Department (4). The report contains preliminary results of August 2000 and the ability to compete has been calculated by identifying the relation between the calculated costs of a contract and the agreed price. In the case of the contracts of the Production Department the costs represented 94 % of the price while with respect to contracts entered into by private entrepreneurs the costs represented 71 % of the price. It appears that the test/pilot cases formed the basis for coming to this conclusion. On page 7 of the report the Bærum contract is listed as having an average annual value of NOK 15 million as a result of the public tender. This figure is a result of price per km of 125 000 × 120 km road which equals NOK 15 million (or NOK 75 million during five years) (5). The Nedre Romerike contract is listed in the report with an annual value of NOK 11,2 million. The price per km is 50 000 × 198 km road which equals NOK 9,9 million (or NOK 49,5 million during five years) (6).

Aside from this, it appears, from questions posed by the transport committee in the Parliament to the Ministry of Transport in 1999-2000 concerning the situation of the Public Road Administration, that an analysis had been carried out in Akershus which showed that the price level of the operation and maintenance contracts was 20-25 % above those of the private contracts (7). Moreover, in a press release dated 17 April 2001 the Public Road Administration refers to the fact that a comparison between, on the one hand, four contracts under which maintenance and operation services were provided by private operators, and on the other hand, contracts under which the Production Department carried out corresponding services, showed that the lowest price offer amongst the private providers was about 15-20 % lower than that of the Production Department.

(4) "Rapport nr. 110 "Produksjonsavdelings konkurransevne Drift og vedlikehold" Statens vegvesen Akershus".

(5) The details regarding the road length and price per km is derived from a report on a meeting between the Transport Committee of the Parliament and the association for asphalt entrepreneurs dated 19 October 2000.

(6) There is, however, some discrepancy in the price of the Nedre Romerike contract reflected in the report and the price submitted by the Norwegian authorities.

(7) "Spørsmål fra Samferdselskomiteen om St. meld. nr. 46 (1999-2000) Nasjonal transportplan 2002-2011"; "Spørsmål 28: Konkurransesituasjonen mellom Statens vegvesens produksjonsvirksomhet og den private asfaltbransjen". The question (No 28) and answer appear in Innst. S. No 119 (2000-2001) of 9 February 2001, p. 183. The question formed part of the background for the recommendation of the Transport Committee concerning St. meld. nr. 46 (1999-2000) which was approved on 29 September 2000.

(1) Answer provided in Section 2.2.3(b) (question 6) of the letter dated 10 November 2005 from the Norwegian authorities to the Authority.

(2) The prices set out in the Excel sheet have been calculated into annual prices by Veidekke ASA in order to allow for a comparison between them and the price submitted in tender offers.

(3) The figures deviate slightly from those submitted by Veidekke ASA.

## F. The transitional contracts and the opening balance

Upon queries by the Authority as to whether the value of the transitional contracts have been reflected in the opening balance of Mesta AS, the Norwegian authorities have stated that the transitional contracts and all future contracts have been reflected in the opening balance. In this regard the authorities have stated that: “[t]he transitional contracts have been reflected in the opening balance of Mesta AS through their contribution to future cash flow as an element in the valuation of the business as a going concern.” but that the transitional contracts constituted only a small part of this value. In this context reference has been made to a previous statement that “[t]he ongoing operations of Mesta have been evaluated based on discounted future cash flows and an interest rate of 6,7 %. The real value of operations has been established to NOK 600 million. The estimated real value has been allocated to the assets and the valuation of the assets stated in the proposal to the opening balance reflects their real value”<sup>(1)</sup>.

Furthermore, the Norwegian authorities have stated that as revenues from the “contracts must be entered as income in the account gradually as they produce revenues for the company.” the contracts “are included in the cash flow which form the basis for the valuation of the assets and as such reflected in the opening balance.”.

### 2.5. Exemption from document duty and registration fee

According to Section 3(2) of the Mesta Act, real estate transferred to Mesta AS have been exempted from the payment of document duty and registration fee.

In terms of legislation on document duty and registration fee the main rule is that when ownership of real estate is transferred a title document must be issued (“formell overskjøtning” or “hjemmelsoverføring”). The transfer of ownership in a title document may be registered in the real estate registry in Norway (“Eiendomsregisteret”) <sup>(2)</sup>, but there is no obligation to do so. However, registration of ownership to property in the real estate registry ensures that any third party can verify who is the owner of the property and in this manner protects the real owner from allowing, third parties to transfer title to his property to others in good faith. The registration of the issuance of a title document in the context of transfer of ownership triggers the payment of (i) document duty of 2,5 % of the value of the property; and (ii) registration fee of fixed rate of NOK 982 per document <sup>(3)</sup>. The new title holder must pay the duty <sup>(4)</sup>.

If the registration does not involve registering the issuance of a title document there is no obligation to pay either document duty or registration fee. For example, if only the name of the owner of the real estate has been changed, the registration does

not involve registering a title document and there is therefore no obligation to pay document duty or registration fee.

Exemption from document duty and registration fee may be granted by reference to the continuity principle which is a term that covers situations where the acquiring company takes over the legal rights and obligations of the transferring company. Two circulars lay down principles on the application of the so-called continuity principle: One circular (“First Circular”) issued by the Ministry of Justice on 25 May 1990 (G-37/90) was replaced by another circular (“Second Circular”) issued by the Ministry of Justice on 21 June 2005 (G 06/2005). Under the First Circular it was only where ownership would be transferred in the context of mergers between limited liability companies that an exemption from document duty and registration fee would be granted by reference to the continuity principle. However, the Second Circular broadened the scope to cover both mergers, de-mergers and conversions undertaken on the basis of corporate legislation which is based on the continuity principle.

According to the Norwegian authorities and Section 3(2) of the Mesta Act <sup>(5)</sup> any real estate pertaining to the Production Department which was transferred to Mesta AS was processed in the real estate registry (and in other public registers) as a name change. Hence no document duties or registration fees have been paid by Mesta AS.

### 2.6. Trade in maintenance and construction activities

While the Norwegian market for construction includes a number of Norwegian operators <sup>(6)</sup> it appears from offers submitted in open public tenders in Norway that market operators also include international participants in the EEA such as Lemminkäinen Norge AS, Skanska Norge AS and NCC Construction AS <sup>(7)</sup>. Moreover, operators on the Norwegian construction market are active in other EEA countries, such as the construction company, Veidekke ASA, which is active both in Denmark (via Hoffmann A/S) and in Sweden (via Veidekke Sverige AB).

## 3. COMMENTS BY THE NORWEGIAN AUTHORITIES

### 3.1. Restructuring costs

The Norwegian authorities have argued that the grant of an amount of up to NOK 395 million for purposes of maintaining membership in the State Pension Fund (“SPK”) was necessary because continued membership of the SPK scheme is a burden imposed upon the company by the State. In order to protect the State’s investment the costs should be covered by the State.

<sup>(1)</sup> Letter dated 1 November 2004 from the Norwegian authorities to the Authority. Another similar statement appears in a letter dated 6 October 2006 from the authorities to the Authority: “The transitional contracts and all future contracts were reflected in the opening balance through the present value per 1 January 2003 of their estimated contribution to the estimated future cash flow in Mesta.”

<sup>(2)</sup> The Real Estate Registry contains information from “Tinglysningsregisteret” or “Grunnboken” and “GAB-registeret (Grunneiendommer, Adresser og Bygninger)”.

<sup>(3)</sup> Section 7(1) of Law No 59 of 1975 on document duty and Law No 86 of 1982 on court fees.

<sup>(4)</sup> Section 2-6 of the Regulation on Document Duty, Ministry of Finance, 16 September 1975 as amended.

<sup>(5)</sup> Section 3(2) of the Mesta Act (cf. footnote 33) concerns the transfer of ownership to real estate from the Public Road Administration to Mesta AS.

<sup>(6)</sup> Section 3.3 of St. prp. nr. 1 Tillegg nr. 1 (2002-2003). It appears that the total market for construction and building in Norway accounts for approximately NOK 130 billion per year. The construction market and those parts of the building market which are relevant for the newly established company accounts for approximately NOK 42 billion (of which operating and maintenance work accounts for NOK 12 billion while investment work accounts for NOK 30 billion).

<sup>(7)</sup> According to Section 2.1 of St. prp. nr. 1 Tillegg nr. 1 (2002-2003) the total turnover of the Production Department was NOK 6,55 billion for the year of 2001.

With respect to the costs related to moving, commuting and renovation of machines, the Norwegian authorities have argued that the State, as an owner, should logically cover such costs in accordance with the private market investor principle. The authorities have further argued that when an owner spins off a part of its business and transfers it into a separate entity, it is normal that the owner covers the costs related to measures such as the transfer of archives to the new entity. It would be a burden on Mesta AS to cover such costs itself and it is therefore not an advantage for Mesta AS to receive compensation for this purpose. Hence in the present case the State paid for the costs while it was both practical and efficient to let Mesta AS handle the implementation of the relevant measures.

The Norwegian authorities have further argued that the State funded the renovation of machines because discarded machines and machines not compatible to the company's business (which constituted part of the contribution in kind) constituted a burden on the company. The Norwegian authorities have argued that if one compares the situation to a situation in which a private company was to take over the Production Department, the surplus machines and other production facilities would have led to a discount for the buyer or a demand for compensation for taking on such a liability. It was therefore necessary to protect the State's investment and logical that the costs inflicted on Mesta AS for taking over machines and other production facilities not compatible to its business should be covered by the State. The State could have chosen another model, namely to sell surplus machines and taken responsibility for cleaning up discarded sites itself.

More in general the authorities have pointed out that in order to ensure that the State only covered costs that were necessary to achieve an effective restructuring process, Mesta AS established written internal instructions on how to account for the relevant restructuring costs. When each business unit had identified items considered as "restructuring costs" it was assessed whether they could qualify as such on the basis of the internal criteria. The Chief Financial Officer in Mesta AS has been responsible for controlling that the internal instructions have been complied with. The company's auditor controlled whether the company's accounting practice in respect of the restructuring costs was in compliance with the State's objective of only covering necessary costs.

### 3.2. *Transitional contracts*

In general the Norwegian authorities maintain that the transitional contracts were necessary because the State "has a responsibility for keeping the public roads open and in good repair" and that at the time no private operator was able to carry out the type of work. The authorities have moreover argued that had the contracts been made subject to open public tenders (i.e. exposed to competition) Mesta AS would have been the only supplier which possessed the resources, geographical presence and other qualifications required to be able to submit bids on many of the contracts. Mesta AS could therefore have won them all and thereby obtained a monopoly. A monopoly situation would not meet the objective of the reorganisation as outlined by the Norwegian Authorities. The Norwegian authorities have further argued that from the point of view of the Public Road Administration the act of putting a significant amount of existing and future projects out for public tenders requires new competence and resources for purposes of drafting contract terms. In this context the authorities have also argued

that since Mesta AS could not cut down on staff and machinery as of 1 January 2003 it was not possible to tender all contracts prior to that date.

Specifically with respect to the operation and maintenance contracts the Norwegian authorities have pointed out that it did not seem prudent to reduce the four years period during which Mesta AS took over the operation and maintenance contracts.

In the context of answering questions from the Authority of whether the transitional contracts were transferred to Mesta AS at market rates, the Norwegian authorities explained that although prices in the relevant market are volatile the trend, that prices are reduced below that of the transitional contracts, was difficult to foresee at the time, considering that many elements influence the price (just like it is difficult to foresee whether the current prices will remain stable over the next years). The price reduction is argued by the authorities to demonstrate that the authorities are about to achieve the objectives of the reorganisation of the Production Department of the Public Road Administration.

### 3.3. *Exemption from document duty and registration fee*

The Norwegian authorities have argued that the manner of proceeding in the present case (which escapes the obligation to pay document duty or registration fee) constitutes a general practice based on the application of the "continuity principle" which is in line with the treatment accorded to all other State restructurings that have previously taken place. The Norwegian authorities have further argued that should the Authority consider that this way of proceeding constitutes an exemption from the general rules, the exemption — based on the continuity principle — is justified by the nature or general scheme of the tax system.

## II. APPRECIATION

### 1. PROCEDURAL REQUIREMENTS

Pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement, "*the EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. [...]. The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision*".

The Norwegian authorities have not notified the Authority of any of the measures taken in relation to the transfer of the activities of the Production Department to Mesta AS. Therefore, in the event that the Authority comes to the conclusion that Mesta AS has received State aid within the meaning of Article 61(1) of the EEA Agreement the Norwegian authorities will be considered not to have respected their notification obligation pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement.

The grant of State aid within the meaning of Article 61(1) of the EEA Agreement which has not been notified constitutes unlawful State aid within the meaning of Article 1(f) in Part II of Protocol 3 to the Surveillance and Court Agreement. It follows from Article 14 in Part II of Protocol 3 to the Surveillance and Court Agreement that the Authority shall decide that unlawful aid which is incompatible with the State aid rules under the EEA Agreement must be recovered from the beneficiaries unless it would be contrary to a general principle of law.



## 2. THE PRESENCE OF STATE AID

2.1. **State aid within the meaning of Article 61(1) of the EEA Agreement**

Article 61(1) of the EEA Agreement reads as follows:

*“Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement”.*

To be termed State aid, within the meaning of Article 61(1) of the EEA Agreement a measure must meet the following four cumulative criteria: The measure must (i) confer on recipients an economic advantage which is not received in the normal course of business; (ii) the advantage must be granted by the State or through State resources and must (iii) be selective by favouring certain undertakings or the production of certain goods; and (iv) distort competition and affect trade between Contracting Parties. In the following it is examined whether these four cumulative criteria are met in the present case.

2.2. **Economic Advantage****Restructuring and other reorganisation measures**(i) *Restructuring measures*

Mesta AS has received funding from the State for purposes of the costs related to three types of pension packages offered to employees transferred from their previous State employment to Mesta AS. The funds cover (i) the costs related to early pension packages offered between 1 January 2003 and the end of 2005; (ii) the additional costs of paying pension contributions corresponding to that of a civil servant (beyond those paid for an ordinary pension scheme) between 1 January 2003 and the end of 2007; and (iii) the costs involved in maintaining employees' entitlement to a special (early) retirement age.

In order to determine whether the three above mentioned measures involve an economic advantage the Authority must examine whether the costs of such measures may be considered as normally included in the budget of an undertaking.

From a general point of view financial obligations arising from the application of labour legislation or collective agreements to provide unemployment benefits or pension schemes constitute the normal costs of a company and hence any relief from such obligations are normally considered as State aid <sup>(1)</sup>. If this were not the case, a company could receive the benefit of the work carried out by its employees without, however, paying the full costs of the terms on which the company has employed them.

<sup>(1)</sup> See for example paragraph 62 of Section 3.2.6 of the State Aid Guidelines on aid for rescuing and restructuring firms in difficulty and Case C-251/97, *France v Commission*, [1999] ECR I-6639, paragraph 40.

If this approach is followed in the present case the financial obligations arising out of the three pension regimes established by the Norwegian authorities in 2003 in respect of Mesta AS could be considered to constitute the “normal costs” that Mesta AS has to bear and any relief from such costs would be equivalent to an economic advantage.

However, the Authority observes that this approach does not take into account the terms on which the previous employer i.e. the State, employed the relevant workers and the State liability arising from such arrangements. For example, the costs of paying additional pension contributions at a civil servant level (measure ii), may be considered to be a liability of the State because it is a direct consequence of the employees' previous State employment as civil servants <sup>(2)</sup>. Since the State financing is limited to the difference between the costs of an ordinary pension scheme and the costs of a civil servant scheme, the State pays only for its own liability in the form of the additional costs resulting from the previous working relationship. If the relevant costs are considered to be a liability of the State the provision of State funding to cover such costs would not constitute an economic advantage.

In the context of a privatisation the European Commission has considered that the public funding of costs relating to employees' previous civil servant status did not constitute aid as “[t]he State (as an employer) had the obligation to compensate its employees for the changing working conditions as the employees would lose their status and associated employment conditions as civil servant” <sup>(3)</sup>. Moreover, in a case concerning the transfer of public transport activities to an independent State-owned undertaking (Combus A/S) for purposes of providing transport operations on a commercial basis, the Court of First Instance has ruled that the aim of a replacement of the privileged and costly status of officials with the status of employees (comparable to that of other similar undertakings) is to free the company from a structural disadvantage it would have in relation to its private sector competitors <sup>(4)</sup>. Based on this judgment it could be maintained that if the State or a State entity has employed individuals by giving them a civil servant status (or a status similar to that) a State intervention in favour of such employees, which will allow the company to take on workers on conditions comparable to that of private company workers, does not constitute an advantage for the company.

A similar argument could be made with respect to the State's funding of special retirement age packages since the entitlement to retire at a specific (early) age was offered in the context of the State employment and is hence therefore also a liability incurred by the State. At first sight this argument seems, however, not to be valid with respect to early retirement packages as this offer was made available by Mesta AS as part of the new employment terms of 1 January 2003. However, to the extent that employees accepting early retirement offers would have been part of a transitional regime for purposes of maintaining the civil servant status, early retirement packages constitute simply a (cheaper) alternative for the State to get rid of its civil servant liability. Under those circumstances the above argument could also be made with respect to early pension packages as the relevant costs substitute the State's civil servant liability.

<sup>(2)</sup> This may be considered in line with the approach adopted in the European Commission's decision *Poste Italiane* (OJ L 282, 19.10.2002, p. 29).

<sup>(3)</sup> Decision of the European Commission No N 483/2000 — *The Netherlands; Sale of engineering group South Holland*.

<sup>(4)</sup> Case T-157/01, *Danske Busvognmænd v Commission*, [2004] ECR II-917.

Due to the abovementioned considerations, the Authority has doubts as to whether the abovementioned three pension regimes offered by the State to Mesta AS in the context of restructuring involves an economic advantage. The Authority invites the Norwegian authorities to provide any additional information it may consider relevant for purposes of this matter.

With respect to the funding provided by the State to Mesta AS in order to cover costs incurred for purposes of "moving" and "commuting" the Authority observes that the obligation to cover such costs have not arisen from the previous working relationship between the State and the employees. On the contrary, based on the description of the measures which are covered, the costs result from a range of incentives offered to previous leading or administrative personnel in the Public Road Administration (such as, reimbursement for costs in relation to the purchase of domiciles, commuting, double rent of domiciles, inspection trips, etc.) in order to induce them to take up employment at Mesta AS.

As referred to above, the normal financial obligations of an undertaking include as a starting point, any labour costs a company incurs for purposes of employing or attracting employees. While the most common incentive to attract employees is salary, other incentives, such as compensation for disadvantages related to the geographic location of employees' domiciles (such as the financing of moving and commuting) are no more or no less a tool used by a company to obtain and pay desired employees. The Authority has therefore taken the preliminary view that the reimbursement by the State to Mesta AS of the costs incurred under the items entitled "moving" and "commuting" constitutes an economic advantage which Mesta AS would not have received in the normal course of its business.

With respect to the State funding received by Mesta AS to cover costs for purposes of moving offices and support and maintenance offices from the Public Road Administration to the new offices of Mesta AS as well as reorganising former offices and sorting out old archives for purposes of establishing new archives (covering a total amount of NOK 50,2 million), such costs include not only costs for purposes of cleaning out old offices at the Public Road Administration but also the preparation and upgrading of new offices for Mesta AS as well as installing electronic and physical archives in Mesta AS.

The Authority considers that while it may be argued that costs related to cleaning out old offices of the Public Road Administration relate to the work previously carried out by the latter, the nature of the costs for purposes of preparing and upgrading offices for the use of Mesta AS are similar to costs incurred for purposes of establishing a new company. These costs should thus be borne by the new company. The preliminary conclusion of the Authority is therefore that the costs related to moving offices (including support and maintenance offices) as well as the transfer of archives are costs which should be partly borne by the State and partly by the new company itself. The Norwegian authorities are therefore invited to provide the Authority with information allowing the Authority to allocate costs to the specific measures undertaken under each cost item.

As to the cost item of renovation of machines, it is the owner, in this case the State, which is responsible for covering the costs of discarding machinery which can no longer be used. The fact

that the authorities did not itself discard such machinery but chose to transfer the machinery to Mesta AS and reimburse the costs incurred for the disposal does not change this assessment. Nonetheless, if the inclusion of unusable machinery in the assets transferred to Mesta AS has had a negative impact on the value assessment of all assets, this manner of handling the disposal of unusable machinery may result in the grant of State aid via the rate of return required by the State. This is further explained below in the Section entitled "Contribution of assets". In the light of this the Norwegian authorities are invited to inform the Authority of whether the unusable or obsolete machinery formed part of the machinery subject to the value assessment carried out by the auditors.

(ii) *Other reorganisation measures — compensation for salary*

With respect to the compensation for salary the State has financed the relevant costs by means of a capital contribution to Mesta AS in the form of equity.

As a preliminary point, the Authority observes that the manner in which costs may be funded are irrelevant from the point of view of the application of the State aid rules. Hence, the fact that the Norwegian authorities have chosen to finance the costs for compensation of salary in the form of equity does not influence the assessment as to whether the State's financing of the relevant costs may constitute State aid. As may be recalled, the reason that the Norwegian authorities chose to fund via equity (rather than by grants) was simply to induce the company to spend the funds for alternative instruments for reducing the work force than the compensation for salary arrangement.

Secondly, with respect to whether State financing of costs incurred for purposes of offering compensation for salary constitutes an economic advantage, it could be argued that in line with the approach set out above, the financial obligations arising out of pension arrangements established by the State constitutes the "normal costs" that the company has to bear. If this approach is followed Mesta AS has received an economic advantage in the form of funds to cover the costs related to compensation for salary since this regime was established and imposed on Mesta AS as of the date of its establishment.

However, the entitlement to compensation for salary is one of the rights derived from the civil servant status previously held by the relevant employees of the Public Road Administration and could therefore be argued to be the liability of the State as a direct consequence of its previous working relationship with the employees. If this approach is taken the State funding of such costs would not constitute an economic advantage.

The Authority has not taken a final position on how to proceed in this matter. In the meantime the Norwegian authorities are invited to submit any further information of relevance for the issue.

With respect to the fact that the funds intended for compensation for salary were spent on alternative measures to reduce the work force, namely the termination and pension packages as well as packages for leave of absence, such measures merely represent acknowledged alternatives to compensation for salary. Indeed, if the State funding earmarked for compensation for salary is used to cover costs of alternative work force reducing measures, intending to achieve the same aim as compensation

for salary, it does not alter the assessment of whether the company has received an economic advantage via funding for compensation for salary. In this regard it is recalled that the State's intention of funding compensation for salary by means of equity was simply to bring down overall costs by inducing the company to use cheaper alternative work force reducing instruments.

Finally, with respect to eventual surplus funding, the Authority understands that out of the total amount of NOK 512 million the "remaining" amount of NOK 211 million remains to form part of the company's equity. However, out of the amount of NOK 301 million expected to be spent for compensation of salary and alternative measures, NOK 143 million has already been spent, while NOK 158 million represents only the estimated amount for future liabilities. Should this amount not be spent in full, or at all, any remainders will also form part of the equity.

In view of the fact that the Norwegian authorities have not yet decided on how to deal with eventual surplus funding in relation to the above mentioned measures, at the current stage it is difficult to address the question of whether any remaining equity may constitute a capital injection which could have been made by a private investor (under the rules governing the private market investor principle) <sup>(1)</sup>.

In the light of the above considerations the Norwegian authorities are invited to inform the Authority on how the authorities will proceed in this matter.

### (iii) *Surplus funding*

The Norwegian authorities have not requested Mesta AS to repay any funding in excess of the amounts spent for purposes of the restructuring costs. If it turns out that the State funding is in excess of the restructuring costs the Norwegian authorities must inform the Authority of the extent of the excess funding and how the authorities intend to proceed in this respect.

## **Contribution of assets**

### (i) *The application of the private market investor principle*

Mesta AS qualifies as a public undertaking within the meaning of the Transparency Directive <sup>(2)</sup>. In determining whether a financial transaction by the owner of a public undertaking involves an economic advantage the Authority applies the "market economy investor principle" which has been confirmed several times by the European Court of Justice. According to this principle, if public authorities contribute capital or

<sup>(1)</sup> According to this principle, if public authorities contribute capital or contribution in kind to one of its undertakings on conditions which would be acceptable to a private market investor no economic advantage is involved. The principle is explained in more detail below in the following Section.

<sup>(2)</sup> Commission Directive 80/723/EEC of 25 June 1980 on the transparency or financial relations between Member States and public undertakings (the "Transparency Directive") (OJ L 195, 29.7.1980, p. 35) as last amended by Directive 2005/81/EC (OJ L 312, 29.11.2005, p. 47). The Directive is incorporated into the EEA Agreement by means of Article 1 of Annex XV.

contribution in kind (e.g. assets) to one of their undertakings on conditions which would be acceptable to a private market investor no economic advantage is involved <sup>(3)</sup>. Conversely, if money or other assets are contributed to public undertakings on conditions which are unacceptable to a private market investor an economic advantage is involved <sup>(4)</sup>. This is normally considered to be the case where the structure and future prospects of the company is such that a normal return (by way of dividend payments or capital appreciation) by reference to a comparable private enterprise cannot be expected within a reasonable time <sup>(5)</sup>. For example, if the rate of return is fixed on the basis of the value of assets, which have been assessed at below market value, the return may not be equivalent to what a private investor would consider acceptable in similar circumstances.

The Authority observes that in a case like Mesta AS, there is considerable uncertainty with respect to the value of fixed assets to be recorded in the opening balance. The Authority observes also that valuations have been carried out by independent auditors/experts and on the basis of different methods and combinations of methods.

The Authority observes furthermore that the value of fixed assets, transferred by the Norwegian authorities to Mesta AS, was adjusted considerably downwards compared to previous estimates. This is the case both with respect to value assessments of the assets on an individual basis and as a result of the discounted cash flow analysis which assumed substantial negative cash flows during the first years of operation. In this context the Authority observes that the downward reduction of machinery was made on the basis of NOK 747 million which was merely an estimated preliminary value.

As regards real estate, the value identified in the most recent OPAK report (of October 2002) was NOK 395 million. Later, in the December 2002 report <sup>(6)</sup> this value was reduced to NOK 331 million and the final opening balance fixes a value of NOK 281 million. It is not clear on what basis the final value of real estate was fixed. Aside from this, the Authority observes that the value of real estate determines the actual amount payable in document duty and registration fee and that any such charges should be calculated on the basis of the relevant valuation principles laid down in the relevant rules.

The Authority recalls that the cash flow analysis estimated the value of employed capital at NOK 600 million. On the basis of this analysis it was decided to reduce the value of assets with

<sup>(3)</sup> See the State Aid Guidelines on the application of State aid provisions to public enterprises in the manufacturing sector. The guidelines apply, however, also to other sectors. The principle is explained in Section 3 which provides that "[t]o ensure respect for the principle of neutrality the aid must be assessed as the difference between the terms on which the funds were made available by the State to the public enterprise, and the terms which a private investor would find acceptable in providing funds to a comparable private undertaking when the private investor is operating under normal market economy conditions (hereinafter "market economy investor principle")".

<sup>(4)</sup> See first indent paragraph 6(c) of the State Aid Guidelines on rules on State ownership of enterprises and on aid to public enterprises.

<sup>(5)</sup> Section 7.1 of the State Aid Guidelines on the application of State aid provisions to public enterprises in the manufacturing sector. This manner of applying the market economy investor principle has been confirmed by the Court of Justice; see joined Cases T-228/99 and T-233/99, *Westdeutsche Landesbank Girozentrale, Land Nordrhein-Westfalen v Commission*, [2003] ECR II-435, at paragraphs 254 and 258.

<sup>(6)</sup> Entitled "Opening balance Supplement: Value assessment of assets".

NOK 200 million of which the entire amount was allocated to machinery. Still, in the final opening balance the overall value of fixed assets was fixed at NOK 977 million of which machinery alone was fixed at a value of approximately NOK 600 million (NOK 594 million). The logic behind this manner of proceeding is not entirely clear to the Authority.

Moreover, as discussed in the Section below, there is a question as to whether the transitional contracts were transferred to Mesta AS at above market values. To the extent that this took place, the additional value could, from an accounting point of view, have been included as an asset in the opening balance. The consequence of this would have been that the value of other assets would be reduced correspondingly which could potentially lead to very low calculated values of all machinery and real estate.

Finally, the Authority observes that the December 2002 report (by Deloitte & Touche) comments that the equity *ratio* is very high — which was partly a result of the substantial liquidity injection of NOK 1 600 million.

On the basis of these considerations, the Authority is uncertain as to whether the value of fixed assets set out in the final opening balance of Mesta AS involves an economic advantage within the meaning of Article 61(1). The Authority therefore invites the Norwegian authorities to further clarify the uncertainties outlined above.

### Transfer of transitional contracts

One example of the application of the private market investor principle is that if the State sells land and buildings at market price, State aid is presumed not to be involved since the State has behaved like a private market investor<sup>(1)</sup>. However, the private market investor principle applies equally when the State is purchasing goods and services. Thus, if the State enters into a contract for purposes of having services provided by a market operator, no State aid will be presumed to be involved if the State behaves as a private market investor by paying the market price. Conversely, if the price is higher than the market price the contract may involve an economic advantage for the service provider, corresponding to the difference between the market price for providing similar services and the price at which such services are provided under the contract. One way for the State to obtain an indication of the market price is to subject work contracts to a non-discriminatory public tender. However, this is not the only manner in which the market price may be established and the Authority will take into account all circumstances of the transaction for purposes of determining whether a market price has been applied.

In the present case a number of the service contracts, entered into between the Public Road Administration and the Production Department for purposes of the provision of services by the latter to the former, were transferred from the Production Department to Mesta AS in the sense that Mesta AS replaced the Production Department in its capacity as service provider. The Authority must therefore examine whether the prices at which the contracts have been “entered into” between the Public Road Administration and Mesta AS reflect market prices.

<sup>(1)</sup> The State Aid Guidelines on State aid elements in sales of land and buildings by public authorities.

### (i) Construction contracts

At the current stage it is not clear to the Authority how the prices of the construction contracts transferred to Mesta AS have been fixed. The Authority observes that the Norwegian authorities have explained that the original prices of construction contracts resulted from “*negotiated*” prices and have been fixed on the basis of the price level resulting from submitting other construction contracts to public tenders. The authorities have also stated that the price of construction contracts was subject to an *ex-post* adjustment mechanism in order to take account of fiscal requirements. It seems that this mechanism involved adjusting prices so as to ensure a deficit if a profit had been made in previous years (and *vice versa*). According to the authorities this price was based on market terms. Finally, the authorities have stated that at the point in time of the transfer of contracts to Mesta AS the contracts were adjusted to take into account new fiscal and regulatory requirements. However, it is not clear whether those adjustments changed the actual price of the contracts.

The Authority finds reason to question whether the prices in the construction contracts transferred to Mesta AS reflected market price. Hence, the Authority requests the Norwegian authorities to clarify the manner in which the prices of the construction contracts transferred to Mesta AS have actually been fixed. In this regard it would be helpful if the authorities could clarify, in particular, to which extent the price level resulting from parallel public tenders have played in fixing the prices. The Authority would also appreciate it if the Norwegian authorities could confirm that the price at which the construction contracts were transferred to Mesta AS is about NOK 2 960 million, and, in the negative, provide the correct amount.

### (ii) Operation and maintenance contracts

The price at which the maintenance and operation contracts have been transferred is not clear to the Authority. According to the overview submitted by the Norwegian authorities it should be NOK 5 750 million. However, the Authority is uncertain whether this is the correct amount in view of the fact that a corresponding figure has been referred to as being an estimate only. Moreover, according to the spreadsheet submitted by Veidekke ASA, the total value of operation and maintenance is NOK 5 885,2 million.

With respect to whether the operation and maintenance contracts were transferred to Mesta AS at market price, the Authority has taken note of the fact that the ViaNova report revealed that the cost level of the transitional contracts which have been subject to subsequent public tenders during 2003, appeared to be about 32 % below the original cost level of comparable transitional contracts transferred to Mesta AS. This could indicate that the operation and maintenance contracts may not have been fixed at market prices. Moreover, the comparison submitted by Veidekke ASA showing that the price at which the contracts were transferred to Mesta AS was generally higher than the price at which similar contracts were subsequently won is another indication that the contracts transferred to Mesta AS may not have been fixed at market value.

The Norwegian authorities have argued that the market was not developed or the prices of similar contracts were not identified by the market. In the opinion of the Authority, this argument could be questioned in view of the fact that the Norwegian authorities — prior to the establishment of Mesta AS — had obtained prices resulting from five test/pilot projects. Some of these formed the basis for establishing that the cost share of the contract price was about 23 % points higher in the case of the Production Department than in the case of contracts entered into by other market operators. One example of this was the price identified for the Bærum contract (with a value of approximately NOK 75 million) <sup>(1)</sup>. Moreover, it seems that a price analysis was carried out in Akershus prior to 2000 showing that the price level of the operation and maintenance contracts was about 20-25 % above that of the contracts entered into by market operators.

In such circumstances it seems as if a price level had been identified by the market for comparable contracts prior to 1 January 2003 and that the Norwegian authorities were not unaware that the price level identified by the market was considerably lower than the prices at which the contracts were transferred. Moreover, even after the issuance of the first public tenders — upon which the authorities must have become aware of the price difference — the authorities did not take steps to renegotiate the contracts. Finally, the fact that Mesta AS has subsequently won the majority of the public tenders seems to show that the company applies a different price structure than the one applied for purposes of fixing the prices at which the contracts were transferred.

The Norwegian authorities have stated that they have a responsibility to ensure that the public roads are open and in a good State and that a private operator would not be able to carry out the contract work under the transitional contracts. According to the authorities this means that if the contracts were tendered out at that time, Mesta AS would have won them all. However, the Authority considers that the fact that the tenders in respect of the pilot/test projects appeared to be carried out without problems seems to indicate the opposite.

The above could indicate that the operation and maintenance contracts have not been transferred at market price to Mesta AS. Hence, in the light of the comments set out above the Authority invites the Norwegian authorities to explain further why the prices of transitional operation and maintenance contracts were not fixed on the basis of the prices resulting from the test cases. The Norwegian authorities are also invited to explain their argument that the public procurement rules would be infringed if the contracts transferred to Mesta AS were to be renegotiated for purposes of fixing the price. Finally, the authorities are invited to confirm whether the price at which the operation and maintenance contracts were transferred to Mesta AS is NOK 5 750 million, and, in the negative, provide the correct price.

### Document duty and registration fee

An economic advantage may be provided through a reduction in the undertaking's tax burden in various ways, including

<sup>(1)</sup> The price level listed in the report for the Nedre Romerike contract does not correspond entirely to the price which the Norwegian authorities have submitted and the Authority invites the Norwegian authorities to provide clarifying information in this respect.

a reduction in the tax base or total or partial reduction in the amount of tax, or a deferment, cancellation or even special rescheduling of tax debt <sup>(2)</sup>. The real estate transferred from the Production department to Mesta AS was registered as a name change implying that Mesta AS benefits from the protection offered by registration in the real estate registry while being exempted from paying document duty and registration fees, normally falling due in the case of transfer of title to property. Mesta AS received therefore an economic advantage which it would not have received during the normal course of business. This is in line with the Authority's conclusion in the Entra case adopted on 14 December 2005 <sup>(3)</sup>.

On 14 December 2005 the Authority adopted a negative decision in which it considered that the exemption granted in July 2000 to the company Entra AS (in the context of a transfer of real estate to Entra from the State) from paying document duty and registration fee involved State aid which was not compatible with the functioning of the EEA Agreement <sup>(4)</sup>. In this decision the Authority considered that the exemption did not form part of an administrative practice qualifying as a general measure as the application of the continuity principle to the reorganisation of companies was not an administrative practice at the time: Until late June 2005 the application of the continuity principle was limited to cases of the transfer of ownership in the context of mergers between limited liability companies. Only as of 21 June 2005 was its scope of application broadened to other transactions. Therefore the Authority found that the exemption was not justified by the nature or general scheme of the tax system in Norway.

### 2.3. Presence of State resources

#### (i) Restructuring and other reorganization measures

The condition of the presence of State resources is fulfilled because the total amount of estimated restructuring costs of NOK 1 468 million is intended to be covered by grants awarded by the Norwegian State between 2003 and 2005 (of which Mesta AS has received an amount of NOK 993,6 million). Moreover, the capital injected by the Norwegian authorities as equity into Mesta AS for purposes of covering the costs of the temporary salary also represents funds provided by the State.

#### (ii) The contribution of capital and assets (i.e. machinery, real estate and contracts)

It appears from the Transparency Directive <sup>(5)</sup> and the State Aid Guidelines on Public authorities' holdings' that the provision of capital to public undertakings involves State resources. In line with the Commission's decision practice the Authority considers likewise the investment by the State in the form of contribution in kind (such as machinery, real estate and contracts) involves the transfer of State resources <sup>(6)</sup>.

<sup>(2)</sup> See point 2 of Section 3 of the State Aid Guidelines regarding State aid measures on direct business taxation.

<sup>(3)</sup> Decision No 318/05/COL.

<sup>(4)</sup> Decision No 318/05/COL.

<sup>(5)</sup> Commission Directive 80/723/EEC. The Directive is incorporated into the EEA Agreement by means of Article 1 of Annex XV.

<sup>(6)</sup> See for example Commission Decision 2006/741/EC of 20 October 2004 on State aid implemented by Germany for Landesbank Schleswig-Holstein — Girozentrale, now HSH Nordbank AG (OJ L 307, 7.11.2006, p. 134).

(iii) *Transfer of transitional contracts*

The transfer by the public authorities of a contract for purposes of the provision of services by a State integrated entity in return for revenues by the State, to an undertaking, which takes over the role as a service provider, involves State resources in the form of payments by the State for the provision of services.

(iv) *Document duty and registration fee*

A loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure. Such State support may be provided just as much through tax provisions of a legislative nature as through the practices of the tax authorities. By virtue of its exemption from paying document duty and registration fee Mesta AS has kept the sums corresponding to the payment of the relevant duty and fee otherwise payable to the Norwegian authorities. As the State is therefore foregoing revenue the exemption involves the transfer of State resources. This is in line with the Authority's conclusion in the *Entra* case adopted on 14 December 2005 <sup>(1)</sup>.

**2.4. Favouring certain undertakings or the production of certain goods**

The provision by the State of funds to finance the restructuring costs as well as any contribution by the State of assets, including contracts, at a value which is below market value favour one company only, namely Mesta AS. The measures are therefore selective in nature.

With respect to document duty and registration fee, the Authority considers that the circulars issued by the Ministry of Justice confirm that, at the time of the establishment of Mesta AS on 1 January 2003, only mergers could benefit from the continuity principle which provided for an exemption from payment of document duty and registration fee. The Second Circular extended this practice to de-mergers and conversions in late June 2005; implicitly meaning that such transactions were not subject to any exemption prior to this point in time. Since the establishment of Mesta AS took place on 1 January 2003, and cannot be considered as a merger, the exemption established by means of the First Circular for mergers is not applicable in the case of Mesta AS.

Hence, the exemption of the latter from payment of the document duty and registration fee is selective which is not justified by the nature or the logic of the system. This is also in line with the conclusion reached in the case of *Entra* of 14 December 2005 <sup>(2)</sup>.

**2.5. Distortion of competition and effect on trade between Contracting Parties**

The international character within the EEA of the construction market is evidenced both by the fact that Norwegian construction operators are active in other EEA countries (such as Veidekke ASA), while international companies originating in other EEA countries than Norway are active on the Norwegian construction market (such as Lemminkäinen Norge AS, Skanska Norge AS, NCC Construction AS). In such circumstances, the

contribution of funds to one operator on the construction market, Mesta AS, will strengthen and reinforce its position compared to other undertakings which are located in Norway or in other EEA countries and competing in the construction (and related) businesses <sup>(3)</sup>. The funding will amongst others enable Mesta AS to offer lower priced bids for purposes of winning construction contracts in competition with its competitors.

On this basis, the Authority considers that the contribution of financial support to Mesta AS (either in the form of grants or in the form of an exemption from a duty) will distort competition and affect trade.

**2.6. Conclusion**

As appears from the above, the Authority has doubts as to whether the measures identified above involve State aid.

**3. COMPATIBILITY OF THE AID**

With respect to Article 61(2) of the EEA Agreement, it appears that none of the exceptions under this Article apply in the present case as none of the measures possibly involving State aid in favour of Mesta AS has been aimed at the objectives listed in those provisions.

With respect to Article 61(3)(a) of the EEA Agreement, a State aid measure is considered compatible with the functioning of the EEA Agreement under this provision when it is designed to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. However, the measures which may involve State aid to Mesta AS are neither destined for such areas nor are they designed for this purpose. This provision is therefore not relevant.

The exception in Article 61(3)(b) of the EEA Agreement does not apply to the present case either since any State aid granted to Mesta AS is not intended to promote the execution of an important project of common European interest nor to remedy a serious disturbance in the economy of Norway.

The exception laid down in Article 61(3)(c) of the EEA Agreement which provides that State aid may be considered compatible with the common market where it facilitates the development of certain economic activities or of certain economic areas may be relevant.

For purposes of assessing the compatibility of the restructuring and reorganisation measures — except for those related to moving, commuting, moving offices and the transfer of archives — the Commission's decision practice is relevant. In the context of assessing compatibility of pension schemes, the Commission has considered that a partial relief of the financial burden on a company resulting from pension rights, acquired by employees in the past, and exceeding those provided under generally applicable pension regimes, could be declared compatible. The Commission's conclusion in this regard was motivated by the

<sup>(1)</sup> Decision No 318/05/COL.

<sup>(2)</sup> Section 1.2.1 in Part II of Decision No 318/05/COL.

<sup>(3)</sup> See in this respect Case 730/79, *Philip Morris v Commission*, [1989] ECR 2671, at paragraph 11 where it is stated that "[t]hen State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid".

fact that the pension regime in question removed previously existing barriers to entry to the respective market and that the financing of additional pension rights (acquired at a point in time when the market was still closed) affected the companies' competitiveness once the market was open to competition.

In the present case the relevant restructuring and reorganisation costs all stem either directly or indirectly from the fact that the previous employees of the Public Road Administration held a civil servant status. Although the market for road construction has been open for competition for a long time, the Production Department was not on the market as it merely served the State in-house. Since the specific status of employees of the Public Road Administration was therefore granted in a framework which was not exposed to competition, the related costs (of the restructuring and reorganisation costs) imposed on Mesta AS could be considered to affect the latter's competitive position in a market open for competition. This could therefore be a reason to consider potential State aid to cover the extra costs of such pension obligations as compatible.

As regards the State funding of the remaining restructuring and organisation costs, the Authority has not been able to identify elements showing that such funding would facilitate the development of certain economic activities or of certain economic areas.

With respect to the compatibility under Article 61(3)(c) of potential State aid as a result of the contribution of assets (i.e. under evaluation of machinery, real estate and transitional contracts), any aid involved would be operating aid. The Authority has not identified elements showing how such potential aid would facilitate the development of certain economic activities or of certain economic areas. Likewise have the authorities not shown this with respect to any potential aid involved in the prices of the transitional contracts transferred to Mesta AS.

As to aid involved as a result of an exemption from the payment of document duty and registration fee in favour of Mesta AS, the Authority considers that it constitutes operating aid and, in line with its position taken in its decision adopted on 14 December 2005, that such aid cannot be found compatible on the basis of Article 61(3)(c) of the EEA Agreement.

Finally, at the current stage the Authority does not possess sufficiently detailed information to identify the existence of any public service costs. The Norwegian authorities have stated that they have a responsibility to ensure that the public roads are open and in a good State without claiming, however, that the conditions of Article 59(2) of the EEA Agreement are fulfilled. The Authority has therefore doubts that any State aid in favour of Mesta AS may be declared compatible under Article 59(2) of the EEA Agreement and invites the Norwegian authorities to submit further information in this regard should this argument be of relevance.

#### 4. CONCLUSION

Based on the information submitted by the Norwegian authorities, the Authority has doubts as to whether the measures in favour of Mesta AS involve State aid within the meaning of

Article 61(1) of the EEA Agreement and whether the measures may be considered as compatible with Article 61(2) or (3) of the EEA Agreement.

Consequently, and in accordance Article 4(4) of Part II of Protocol 3 to the Surveillance and Court Agreement, the Authority is obliged to open the procedure provided for in Article 1(2) of Part I of Protocol 3 of the Surveillance and Court Agreement. The decision to open proceedings is without prejudice to the final decision of the Authority, which may conclude that the measures in question are compatible with the functioning of the EEA Agreement or do not involve State aid at all.

In light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement, requests the Norwegian authorities to submit their comments within one month of the date of receipt of this Decision.

In light of the foregoing consideration, the Authority requires that, within one month of receipt of this decision, the Norwegian authorities provide all documents, information and data needed for assessment of the measures in favour of Mesta AS and requests the Norwegian authorities to forward a copy of this letter to the potential aid recipient of the aid immediately,

HAS ADOPTED THIS DECISION:

#### *Article 1*

The EFTA Surveillance Authority has decided to open the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement against Norway regarding the restructuring and reorganisation measures in favour of Mesta AS, the contribution of assets and the transfer of transitional contracts to Mesta AS as well as the exemption of Mesta AS from paying document duty and registration fee.

#### *Article 2*

The Norwegian authorities are requested, pursuant to Article 6(1) of Part II of Protocol 3 to the Surveillance and Court Agreement, to submit their comments on the opening of the formal investigation procedure within one month from the notification of this Decision.

#### *Article 3*

The Norwegian authorities are required to provide within one month from notification of this decision, all documents, information and data needed for assessment of the compatibility of the aid measure.

#### *Article 4*

The EC Commission shall be informed, in accordance with Protocol 27 (d) of the EEA Agreement, by means of a copy of this Decision.

*Article 5*

Other EFTA States, EC Member States, and interested parties shall be informed by the publishing of this Decision in its authentic language version, accompanied by a meaningful summary in languages other than the authentic language version, in the EEA Section of the *Official Journal of the European Communities* and the EEA Supplement thereto, inviting them to submit comments within one month from the date of publication.

*Article 6*

This Decision is addressed to the Kingdom of Norway.

*Article 7*

Only the English version is authentic.

Done at Brussels, 18 July 2007.

*For the EFTA Surveillance Authority*

Kristján Andri Stefánsson  
*College Member*

Kurt Jaeger  
*College Member*



## ANNEX A

**Final opening balance of Mesta AS on 1 January 2003**

|  |       |       |
|--|-------|-------|
| Fixed assets                                     | 977   |       |
| <i>Intellectual property</i>                     |       |       |
| Self-developed systems                           |       | 23    |
| <i>Permanent operational assets</i>              |       |       |
| Computer — hardware, etc.                        |       | 47    |
| Real estate and buildings                        |       | 281   |
| Other fixed assets (*)                           |       | 32    |
| Machinery and equipment                          |       | 594   |
| Current assets                                   | 1 709 |       |
| Stock/inventory                                  |       | 103   |
| <i>Claims</i>                                    |       |       |
| Customer claims                                  |       | 6     |
| Other claims                                     |       |       |
| <i>Bank contribution and cash</i>                |       |       |
| Liquidity  |       | 1 600 |
| Total assets                                     | 2 686 |       |
| Equity   | 1 900 |       |
| <i>Injected equity</i>                           |       |       |
| Share Capital                                    |       | 1 000 |
| Premium fund (**)                                |       | 900   |
| Liabilities                                      | 786   |       |
| <i>Set aside for future obligations</i>          |       |       |
| Guarantees                                       |       | 60    |
| Cleaning obligations relating to the environment |       | 37    |
| Pension liabilities                              |       | 319   |
| Other liabilities                                |       | 24    |
| <i>Short-term debts</i>                          |       |       |
| Supplier debt                                    |       | 6     |
| Public charges due                               |       | 85    |
| Accrued wage payments                            |       | 242   |
| Other short-term debt                            |       | 13    |
| Total equity and liabilities                     | 2 686 |       |

(\*) "Materialforekomster"

(\*\*) "Overkursfond"