

Case No: 62712
Event No: 491661
Dec. No: 390/09/COL

EFTA SURVEILLANCE AUTHORITY DECISION
of 7 October 2009
on the establishment of Mesta AS

(Norway)

THE EFTA SURVEILLANCE AUTHORITY,¹

HAVING REGARD to the Agreement on the European Economic Area,² 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,³ in particular to Article 24 thereof,

HAVING REGARD to Article 1(2) of Part I and Articles 4(4), 6 and 7(3) of Part II of Protocol 3 to the Surveillance and Court Agreement,⁴

HAVING REGARD to the Authority's Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement,⁵ in particular the section on state aid in the form of public service compensation,

HAVING REGARD to the Authority's Decision of 14 July 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3,⁶

Having called on interested parties to submit their comments pursuant to those provisions⁷ and having regard to their comments,

Whereas:

I. FACTS

¹ Hereinafter referred to as the Authority.

² Hereinafter referred to as the EEA Agreement.

³ Hereinafter referred to as the Surveillance and Court Agreement.

⁴ Hereinafter referred to as Protocol 3.

⁵ 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 Authority on 19 January 1994, published in the Official Journal of the European Union (hereinafter referred to as OJ) L 231, 3.9.1994 p. 1 and EEA Supplement No 32 of 3.9.1994 p. 1. Hereinafter referred to as the State Aid Guidelines. The updated version of the State Aid Guidelines is published on the Authority's website: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>

⁶ Decision No 195/04/COL of 14 July 2004 published in OJ C 139, 25.5.2006 p. 57 and EEA Supplement No 26, 25.5.2006 p. 1. The consolidated version of this Decision can be found on the Authority's website: <http://www.eftasurv.int/fieldsOfWork/fieldStateAid/legalTexts/>.

⁷ Published in OJ C 310, 20.12.2007 and EEA Supplement No. 61, 20.12.2007.

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.⁸ The letter was received and registered by the Authority on 2 September 2004 (Event No: 291 537).

Following various exchanges of correspondence,⁹ the Authority informed the Norwegian authorities by letter dated 18 July 2007 that it had adopted Decision No. 350/07/COL to initiate the procedure laid down in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement in respect of measures taken in the context of establishing Mesta AS (the “Opening Decision”).

By letter submitted on 7 December 2007 the Norwegian authorities forwarded comments (Event No: 456844). The Opening Decision was published in the Official Journal of the European Union and the EEA Supplement thereto and called on interested parties to submit their comments.¹⁰ The Authority received comments from four interested parties on 29 January as well as on 4, 21 and 27 February 2008 (Event Nos: 461463, 463234, 466015 and 467170). Additional comments were received on 4 April 2008 (Event No: 472381). By letters submitted on 21 February and 7 April 2008 (Event Nos: 463245 and 472529) the Authority forwarded these to the Norwegian authorities which were given the opportunity to react. By letter dated 23 May 2008 (Event No: 478082) the Norwegian authorities submitted comments.

During the autumn of 2008 and spring of 2009, the Authority and the Norwegian authorities have had informal contact via both telephone and electronic mail regarding the case. Information received by the Authority in this context has been consolidated by the Norwegian authorities in a letter submitted electronically on 6 July 2009 by the Ministry of Government Administration and Reform (Event no: 523766).¹¹

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

⁸ Translation from “Statens vegvesen”.

⁹ For more detailed information on such correspondence, reference is made to Decision No. 350/07/COL to open the formal investigation procedure, a summary of which is published in OJ C 310, 20.12.2007, and EEA Supplement No. 61, 20.12.2007. The full decision is published on the website of the Authority: www.eftasurv.int.

¹⁰ Publication details are cited in the footnote above.

¹¹ Annexes to the letter: Event nos: 523838-523841.

State.¹² 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.¹³ 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 about 4 750 of all employees (totalling approximately 5 000) previously employed in the Production Department were to be transferred to the newly established company, Mesta AS.¹⁴ Upon transfer to Mesta AS, the employees would lose their status as civil servants. As the employees were entitled to refuse such a transfer it was necessary to give incentives to employees in order to encourage them to accept the transfer.¹⁵ In addition, in order to ensure the establishment of a commercially viable company it was necessary to reduce the workforce by approximately 1 700 to approximately 3 050.¹⁶

The preparatory legislative work sets out different "restructuring" measures foreseen by the Norwegian authorities. Four measures consisted of (i) temporary maintenance of civil servant pension rights;¹⁷ (ii) maintenance of the right to a special retirement age;¹⁸ (iii) early pension packages; and various other measures involving (iv) moving, commuting,

¹² 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.

¹³ 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.

¹⁴ About 250 employees should remain in the State administration, cf. section 4.2 of St. prp. nr. 1 Tillegg nr. 1 (2002-2003).

¹⁵ Letter from the Ministry of Trade and Industry dated 28.8.2009 (Event 528656).

¹⁶ Section 4.2 of St. prp. nr. 1 Tillegg nr. 1 (2002-2003) which refers to a reduction down to 3 600 already in 2003 but which also shows that in total the reduction would be about 1 700 (by using early pension with respect to about 1 000 individuals; special retirement age with regard to about 275 individuals; and compensation for salary offered to about 450 individuals).

¹⁷ Civil servant pension is translated from "tjenestepensjonsordning".

¹⁸ Translated from "Opprettholdelse av særaldersgrense".

maintenance of salary and renovation of machines.¹⁹ These are referred to as the “restructuring measures” and are financed by direct grants. Initially a further cost item (v) compensation for salary, was foreseen to be financed through direct funding.²⁰ However, immediately prior to fixing the opening balance of Mesta AS the Norwegian authorities decided that the relevant costs should instead be covered by a capital contribution to Mesta AS in the form of equity.

The total cost of the four restructuring measures financed by a direct grant was initially estimated at NOK1 468m (discounted to present values) and foreseen to be reimbursed by the State to Mesta AS in instalments over a three-year period from 2003 to 2005.²¹ These 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 2005.²²

It appears from the State budget for 2006 that Mesta AS has received a total of NOK993.6m from the State to cover restructuring costs.²³ By 30 June 2008 Mesta AS had spent NOK879.6m of this amount while total restructuring costs were estimated to amount to NOK1 097.8m (until the year of 2013).²⁴ 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 NOK1 468m would be insufficient the State would grant additional funds), the State budgets for 2007 and 2008 make it clear that Mesta AS will not be granted further restructuring funds than the amount already received of NOK993.6m.²⁵

The Norwegian authorities have explained that although very unlikely, if, at the end of the period, the restructuring costs should turn out to be less than the amount received by Mesta AS, the surplus amount must be repaid to the State.

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 some of the rights of employees who were transferred from the Public Road Administration for employment in Mesta AS (hereafter referred to as the “Mesta Act”).²⁶

2.2.1. General

The Norwegian authorities have explained that the main challenge with respect to transferring employees from Production Department to Mesta AS was to enable the new company to operate on terms similar to that of its competitors and thereby create a level playing field. The Norwegian authorities decided to transfer the work force to Mesta AS and let Mesta AS (as opposed to the Road Administration) be in charge of implementing the measures involved in the transfer and reduction of the work force. These issues and their resolution formed part of and were a pre-requisite for the liberalisation and opening

¹⁹ Section 5 of St.prp. nr. 1 Tillegg nr. 1 (2002-2003).

²⁰ Translated from “*Ventelønn*”.

²¹ Section 5.1 of St.prp. nr. 1 Tillegg nr. 1 (2002-2003)

²² Section 5 of St.prp. nr. 1 Tillegg nr. 1 (2002-2003).

²³ Mesta AS received NOK357m for 2003; NOK356.5m for 2004; and NOK280m for 2005, cf. St.prp. nr. 1 (2005-2006). Any reference to NOK993.5m has been adjusted to NOK993.6m by the Norwegian authorities.

²⁴ St.prp. nr. 1 (2008-2009).

²⁵ The authorities refer to the fact that Mesta AS has been more profitable than anticipated during the first three years since its establishment cf. White Paper of Parliament; “Stortingsmelding nr. 13 (2006-2007)” .

²⁶ Act No. 84 of 13.12.2002 (“lov om omdanning av Statens vegvesens produksjonsvirksomhet til statlig aksjeselskap”).

of the national road network market. The Norwegian State would not have opened this market without being able to establish a new company with sufficient staff. The Norwegian authorities have explained that this formed the background for the State's negotiations with the trade unions on the transfer of employees from the Production Department to Mesta AS. The negotiations resulted in an "understanding" between the parties on 4 June 2002 on a temporary continuation of certain civil servant rights and the possibility to offer measures, such as early pension, aimed at reducing the work force.²⁷ The specific elements of this understanding are set out in the sub-sections below.²⁸

Prior to 1 January 2003 an interim board of directors of Mesta AS (the "Interim Board") was established to represent the future company. The Norwegian authorities have explained that the Interim Board was not a party to any of the negotiations regarding the employees. However, the right to compensation for salary was included in the Mesta Act.²⁹ By contrast, there was no law or other legal instrument regulating other civil servant rights.

Prior to describing the terms of the understanding it is useful to briefly outline the status of the employees in the Production Department prior to their transfer to Mesta AS: The Norwegian authorities have explained that the employees in the Production Department were employed by the State. It follows from Norwegian law that State employees hold the status of civil servants³⁰ and that for such employees membership of the State pension fund ("*Statens pensjonskasse*" or "*SPK*") is mandatory.³¹ Hence membership of the SPK ensures civil servants pension rights. Furthermore, on the basis of a law setting out the terms on the right to a special (early) retirement age for civil servants, certain of the civil servants in the Production Department (such as chauffeurs and cooks) had the right to retire at a specific (early) age.³²

Since civil servant status is linked to State employment, employees transferred to Mesta AS ceased to be civil servants on 1 January 2003. If the employment measures at issue had not been adopted those employees would have lost the rights linked to their civil servant status.³³ The Norwegian authorities have explained that under Norwegian law the transfer of the Production Department to Mesta AS qualifies as a "business transfer".³⁴ With reference to the rules on the transfer of undertakings, the employment contracts of transferred employees were transferred to the new company, except with respect to pension rights.³⁵ As the new employer did not form part of the State, the Norwegian authorities have explained that the civil servants employed in the Production Department were entitled to refuse transfer to Mesta AS. However, by refusing a transfer they would run the risk of being dismissed according to the generally applicable rules for civil

²⁷ Summary of meeting between the Norwegian authorities and the trade unions dated 4.6.2002 (Event 455878).

²⁸ They also appear from St.prp. Nr. 1 Tilleg nr. 1 (2002-2003).

²⁹ Section 1.4 of letter from the Ministry of Trade and Industry dated 28.8.2009 (Event 528656).

³⁰ The rights of civil servants are set out in the Act on civil servants "Lov 4. mars 1983 om statens tjenestemenn".

³¹ Act on State pension fund; "Lov 28. juli 1949 nr. 26 om Statens Pensjonskasse."

³² Act on special retirement age; "Lov 21. desember .1956 nr.1 om aldersgrenser for offentlige tjenestemenn m. fl." which applies only to members of SPK. The Act was made applicable to certain job categories in the Production Department ("1116 Spesialarbeider, 1117 Fagarbeider, 1119 Formann, 1122 Førstekokk, 1130 Renholdsbetjent, 1203 Fagarbeider med fagbrev and 1081 Sjåfør") via a Parliament decision of 14.12.1995 during discussions on St.prp. nr. 38 (1994 – 95).

³³ Section 1.3 of letter from the Ministry of Trade and Industry dated 28.8.2009 (Event 528656).

³⁴ Although the scope of this right is, however, not entirely clear, cf. the previous Act on protection of employees in force at the time; "Lov 4. februar 1977 nr. 4 om arbeidervern og arbeidsmiljø".

³⁵ Act on protection of employees; "Lov 4. februar 1977 nr. 4 om arbeidervern og arbeidsmiljø" section 73B.

servants unless another suitable position could be found: in such circumstances civil servants have a right of priority to vacant positions within the state administration (but not to compensation for salary).³⁶

While employees could therefore choose to remain in State employment, transfer of the employees of the Production Department to the new entity (Mesta AS) was a prerequisite in order for the liberalisation to take place at all. In that light the Norwegian authorities had to offer the employees additional incentives to encourage them to agree freely to the transfer.

(i) *Temporary maintenance of civil servant pension rights*

As described above, the employees of the Public Road Administration had the status of a civil servant but lost this status upon their transfer to Mesta AS. Nonetheless, based on the above-mentioned understanding between the trade unions and the State, the employees were to benefit from maintaining civil servant pension rights during a transitional period of five years (i.e., from 1 January 2003 to the end of 2007). The State funding awarded to Mesta AS is intended to cover the additional costs for purposes of ensuring that employees would be guaranteed pension contributions equal to that of civil servants during the relevant period.³⁷

As stated above, membership of the SPK ensures pension rights of civil servants and the costs relating to such rights are paid into SPK. Therefore, in order to ensure the five-year transitional regime the membership of the SPK for the employees was maintained. Furthermore, in order to enable Mesta AS to pay contributions in respect of its employees Mesta AS applied for, and was granted, membership in SPK.³⁸

The State funding to Mesta AS is limited to the difference between the average costs of an ordinary private pension scheme and the (higher) costs of maintenance of membership in the SPK. While the original cost estimate was about NOK 395 million,³⁹ the Norwegian authorities have stated that by 30 June 2007 accrued costs amounted to NOK277.3m (excluding administration costs).⁴⁰

(ii) *Maintenance of the right to a special retirement age*

As referred to above, 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. Under the terms of the understanding between the trade unions and the State, the employees in the Production Department, 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

³⁶ Section 4.1 of St.prp. Nr. 1 Tillegg nr. 1 (2002-2003) and also reiterated in section 1.3 of letter from the Ministry of Trade and Industry dated 28.8. 2009 (Event 528656).

³⁷ 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.

³⁸ While such membership is normally not open for employees which are not employed by the State the Norwegian authorities instructed the SPK to derogate from this principle on the basis of a provision in the Act on State pension fund ("Lov 28. juli 1949 nr. 26 om Statens Pensjonskasse"). Mesta's application for membership contained no reference to the time limit described above.

³⁹ Section 5 of St.prp. nr. 1 Tillegg nr. 1 (2002-2003). The original amount was 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. Elements influencing the level of the premium are the premium rate and the contribution of employers to the National Insurance.

⁴⁰ St.prp. nr. 1 (2007-2008) p. 161.

65 years.⁴¹ This arrangement was made possible by the fact that the employees were still members of SPK as described above.

The State funding to Mesta AS covers the difference between the average costs of an ordinary pension scheme and the costs of maintaining the special retirement age. While the original cost estimate was about NOK85m⁴² (including administration costs representing about 5% of the total amount) total costs accrued by 30 June 2007 were NOK26.5m (excluding administration costs).⁴³

(iii) Early pension packages

The understanding between the trade unions and the State also states 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, 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.⁴⁴ Early pension could be offered at the discretion of the company based on an individual assessment of employees.⁴⁵

The State funding to Mesta AS covers the difference between the average costs of an ordinary private pension scheme and the costs of offering early pension. 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.⁴⁶ The Norwegian authorities have explained that about 470 employees made use of this arrangement and by 30 June 2007 the total costs accrued were NOK691.9m (excluding administration costs).⁴⁷

(iv) Moving, commuting, maintenance of salary and renovation of machines

According to preparatory budgetary documents, this cost item covers costs for purposes of moving ("flyttekostnader"); commuting ("pendlergodtgjørelse"); maintenance of salary ("bibehold av lønn"); and renovation of machines ("maskiner - sanering").⁴⁸ 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 NOK77m,⁴⁹ the Norwegian authorities have explained that, per January 2006, total costs accrued amounted to approximately NOK82.4m (excluding administration costs). The State paid for the costs.⁵⁰

Moving: Costs accrued per January 2006: NOK0.5 m.

⁴¹ The special retirement age arrangement would therefore be applicable until the end of 2012.

⁴² Section 5 of St.prp. nr.1 Tillegg nr.1 (2002-2003).

⁴³ St.prp. nr. 1 (2007-2008) p. 161.

⁴⁴ St.prp. nr 1 (2002-2003).

⁴⁵ Section 4.3 of St.prp. nr 1 (2002-2003).

⁴⁶ Section 5 of St.prp. nr. 1 Tillegg nr. 1 (2002-2003).

⁴⁷ St.prp. nr. 1 (2007-2008) p. 161.

⁴⁸ St.prp. nr.1 Tillegg nr.1 (2002-2003).

⁴⁹ Section 5 of St.prp. nr. 1 Tillegg nr. 1 (2002-2003).

⁵⁰ St.prp. nr. 1 (2007-2008) p. 161.

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 moving costs (“faktiske, legitimerede kostnader ved boligkjøp”), paid absence for purposes of moving (“flyttepermisjon”) and travel costs in relation to inspections of new property (“visningsreise”).

Commuting: Costs accrued per January 2006: NOK6.7m

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”)⁵¹ driving allowance between domicile and work (“kjøregodtgjørelse”) and board allowance (“kostgodtgjørelse”).

Moving offices: Costs accrued per January 2006: NOK7.8m

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 up⁵² 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: NOK40.2m

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. It includes the establishment of a new IT system which was necessitated by the fact that the Production Department had shared an IT system with other departments within the Public Road Administration. Specific 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: NOK7.2m

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: NOK20m

⁵¹ Such as where a room is rented during the week.

⁵² With the exception of archives which is covered by a separate cost item below.

Although this cost item would suggest that it covers costs related to repairing or renovating machines this is not the case. The authorities have explained that prior to the reform, the Production Department had carried out works in which context machinery and other equipment had been left at the building and restoration sites.⁵³ Hence this cost item consisted of the residual liability of previous work contracts and involved cleaning up of sites ("opprydding") and removing, scrapping and transporting unnecessary machinery ("fjerning, skroting, og fraktkostnader"). The machines to be removed were old, wrecked, and not of any use for the business and did therefore not form part of any value assessment of the machines (or the business as a whole).⁵⁴ The Norwegian authorities have explained that Mesta AS assigned part of the work to sub contractors on commercial terms. The other part of the work was carried out by Mesta AS itself at an hourly cost based rate (exclusive of profit margin) which was therefore lower than the market rate for similar work at the time.⁵⁵ The Norwegian authorities have submitted documentation listing bills from sub contractors and the prices charged by Mesta AS itself.⁵⁶

(v) *Compensation for salary*

The cost item of compensation for salary ("ventelønn") does not form part of what the Norwegian authorities would refer to as "restructuring costs". Nonetheless the compensation for salary formed part of the incentives offered to encourage employees to transfer to Mesta AS. It should be viewed in the light of the need to reduce the size of the work force.

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. Certain of these rights are regulated in the Mesta Act.⁵⁷ 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").

Compensation for salary is regulated by the Act on civil servants.⁵⁸ It is an arrangement whereby civil servants who have been given notice for reasons of redundancy and who have not been offered another suitable job will (subject to the conditions and time limitations set out in the Act) be entitled to 2/3 of the salary as of the date on which notice was given.

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

⁵³ The Norwegian authorities have updated the explanation stated in the Opening Decision in this regard. Contrary to what was stated in the Opening Decision this item does not involve sites owned by the Production Department and transferred to Mesta AS but only work equipment left behind at building sites on the national road network.

⁵⁴ The identification of unusable machines and other equipment was 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 (which are based on legislative preparatory works such as St.prp. nr. 1 Tillegg nr. 1 (2002-2003)).

⁵⁵ Cf. Annex 3 to the letter from the Norwegian authorities of 6.7.2009 (Event No: 523766).

⁵⁶ Cf. Annex 3 to the letter from the Norwegian authorities of 6.10.2006 (Event No: 392699 and 392700)

⁵⁷ Act of 13.12.2002 ("lov 13. desember 2002 om omdanning av Statens vegvesens produksjonsvirksomhet til statlig aksjeselskap").

⁵⁸ The Act on civil servants ("lov 4. mars 1983 om statens tjenestemenn").

rather be taken into account when identifying the size of the equity of Mesta AS. In other words, the means to finance the relevant costs would be injected by the State in Mesta AS as equity.⁵⁹ 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 new company. Instead, more use should be made of other (cheaper) reorganisation instruments, such as leave of absence with reduced pay and pension packages etc.

While it was originally foreseen that 450 employees would be covered by the compensation for salary scheme with total costs of about NOK512m,⁶⁰ this estimate was updated in October 2002 and changed to 150 employees with total costs of approximately NOK150m.⁶¹ Hence, it was the latter amount which was taken into account when determining the equity of Mesta AS.

In order to keep costs down Mesta AS made use of the following (cheaper) alternative workforce reducing instruments.⁶² Nonetheless, the Norwegian authorities have explained that the combined costs for such measures and compensation for salary total NOK 359 million (of which NOK255.1m had been spent by 21 December 2008) and exceeds therefore by far the amount injected to cover such costs:

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.

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

2.3. Value of machinery and equipment (“machinery”) and real estate and buildings (“real estate”) in the opening balance

The following provides an overview of the process 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 as well as verifying the process, methods and principles applied in this context. Subsequently, Ernst & Young became the auditor of Mesta AS.

⁵⁹ Cf. section 4.4 of St.prp. nr. 1 Tillegg nr. 1 (2002-2003). 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 funding from the State in the form of equity to cover such costs.

⁶⁰ The Norwegian authorities have explained that they made a mistake when they first stated that the amount injected to cover the costs was NOK512m, cf. section 2.2(v) of Part I of the Opening Decision.

⁶¹ Section 3.2.2.8 of the report submitted by the Norwegian authorities of October 2002 entitled: “Value assessment” prepared by Ernst & Young.

⁶² The implementation of the alternative arrangements also included different types of administration costs.

In brief, in May 2002 the auditors commenced assessing the value of the assets based on the simulated continuity principle (i.e., reconstructed book value) but changed the evaluation principle to “real value” in August 2002. Individual (or group) assessments were carried out in respect of both machinery and real estate (described in detail under subsection A). In October 2002 the auditors made an assessment of the fair value of the total business of Mesta AS as a going concern on the basis of the discounted cash flow method (described in detail under subsection B). The discounted cash flow showed that the total value of the business (i.e., the operational capital) was less than the value resulting from individual asset assessments. Since the Norwegian Limited Liability Company Act provides that equity cannot exceed the total value of the business the value of the individual (or groups of) assets was reduced.

2.3.1. Value assessment of assets separately

(vi) 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**.⁶³ The evaluation was, in principle, based on “book value”. However, since the State administration is not subject to the Accounting Act,⁶⁴ the values appearing in the books of the Production Department had to be re-constructed to what they would have been, had the Production Department been subject to general accounting law.⁶⁵ Thus the evaluation principle was rather “retroactive creation of book value” or simply “simulated continuity”. Based on this, the value of machinery stated in the books of the Production department on 1 January 2002 of NOK1 111m was adjusted to NOK866m. On 1 January 2003, the value was further adjusted to NOK747m.

However, a subsequent report dated August 2002 entitled the **Opening balance**⁶⁶ prepared by the Public Road Administration, Ernst & Young, Via Nova and Skagerak Forsikringsmegling AS, 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 the principle of “real value” instead of “simulated continuity” since the former is a more transparent valuation principle.

The 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 the value of machinery based on real value.⁶⁷ To determine the real value two approaches were followed: For certain groups of machinery the starting point was the book value as registered in the State administration, adjusted for the application of value added tax, depreciation periods and some discretionary assessments. For other groups of machinery the values were based on external evaluations and prices.⁶⁸ On that basis the real value of machinery was estimated at NOK572m while the total value of all assets was estimated at NOK1 162m.⁶⁹

⁶³ The original title of the report is “Åpningsbalanse”.

⁶⁴ “Regnskapsloven”

⁶⁵ This involves taking account of differences with respect to depreciation periods and treatment of value added tax.

⁶⁶ The original title of the report is “Åpningsbalanse”.

⁶⁷ The original title of the report is “Åpningsbalanse Supplering: Verdivurdering av eiendeler”.

⁶⁸ Page 11 of the report.

⁶⁹ This approach was therefore based on an assessment of individual of assets.

⁶⁹ Based on explanations provided by Ernst & Young on the basis of an e-mail dated 11.11.2008 (Event 512771).

Ernst & Young have subsequently explained that calculations appearing in the abovementioned report, which uses as its starting point the simulated continuity book value of NOK747m in order to arrive at a real value of NOK572m, are misleading. According to Ernst & Young such calculations have not formed part of the process for determining the real value of machinery to be transferred to Mesta AS.

(vii) *Real estate*

In the May 2002 report entitled the “Opening balance” the book value of real estate registered by the State administration on 1 January 2002 was NOK596m. Following exclusions of real estate not to be transferred to Mesta AS and adjustments on the basis of the simulated continuity principle, the value was estimated at NOK277m.

Following the change of evaluation principles from simulated continuity to real value, real estate was assessed by an independent real estate expert, OPAK. The Norwegian authorities have submitted an expert assessment dated 28 August 2002 in which OPAK assessed the value of 375 properties to approximately NOK336m.⁷⁰ A follow-up report dated 31 October 2002 prepared by OPAK found that following, amongst others, the addition of 16 properties, the approximate value of real estate was NOK395m. Ernst & Young have explained that subsequently, exclusions of properties not to be transferred to Mesta AS and corrections for rented properties⁷¹ brought the value of real estate to NOK331m.⁷²

The December 2002 report entitled “Opening balance Supplement: Value assessment of assets” shows that while the value of real estate based on the principle of simulated continuity was NOK596m, the application of the principle of real value resulted in a value of NOK331m.

2.3.2. *Value assessment based on discounted cash flow*

In parallel with, but separately from, the individual asset assessments an assessment was made of the fair value of the total business as a going concern on the basis of the discounted cash flow method, summarised in a report dated October 2002 entitled: “Value assessment” prepared by Ernst & Young.⁷³ The report concludes that by applying the discounted cash flow method the operational capital⁷⁴ is approximately NOK600m (within an interval of +/- 25%). The analysis was based on a cash flow assessment for 2003-2012 for which period a negative present value of NOK300m and a terminal value of plus NOK900m was estimated.⁷⁵ The rate of return was fixed at 6.7% nominal return on total assets after tax.⁷⁶

⁷⁰ That figure takes account of planned sales. If account is not taken of planned sales the value would be NOK420m, 486m and 240m. 100 out of 375 properties were inspected.

⁷¹ Corrections were made for properties thought to be in the ownership of the Public Road Administration but which were only rented properties – and vice versa.

⁷² Ernst & Young have confirmed that the value of properties selected to be transferred correspond to NOK331m.

⁷³ Translation from the Norwegian title “Verdivudering”.

⁷⁴ “*Sysselsatt kapital*”.

⁷⁵ The discounted cash flow report is based on the premise that the work force is being reduced.

⁷⁶ It is composed of 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%. It has been calculated on the basis of the “capital asset pricing model” (CAPM): 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)}.

Ernst & Young have explained that the operational capital (of NOK600m) is composed of total assets less short term debt. By comparison, the estimate resulting from the individual asset assessment was NOK1 162m. If short term debt (of NOK464m) is excluded from NOK1 162m, the operational capital⁷⁷ is NOK698m. This is higher than the operational capital of NOK600m resulting from an assessment based on the fair value of the total business (i.e., the discounted cash flow method). The Norwegian Limited Liability Company Act provides that the equity cannot exceed the total value of the business and it was therefore necessary to reduce the value of the assets.⁷⁸ Hence Ernst & Young reduced the value of the assets in order to bring the operational capital to 619m. This is shown in the following:⁷⁹

Fixed assets	1 053
Current assets	109
Short term debt	(464)
Net	698
Downward adjustment machines	(25)
Downward adjustment real estate	(54)
Total downward adjustment	(79)
Value after downward adjustment	619
Debt (pensions)	319
Equity	300
Equity in cash	1 600
Total equity in opening balance	1 900

As is apparent from the above a downward adjustment of NOK 79 million was made. Due to the high uncertainty of the value of real estate and machines, the downward adjustment was allocated to those assets in the manner indicated below:

Estimated real value of machinery	572
Purchases	44
Downward adjustment	<u>(25)</u>
Value in opening balance	591
Estimated real value of real estate	331
Purchases	4
Downward adjustment	<u>(54)</u>
Value in opening balance	281

2.3.3. *Quality check*

In parallel with the process for determining real value, Deloitte & Touche had initiated (in October 2002) an exercise for checking the very first asset assessments (based on simulated continuity) against the results of the discounted cash flow. On this basis Deloitte & Touche found that the (simulated continuity) value of the fixed assets had to be reduced from NOK1 137m⁸⁰ to NOK937m (i.e., by NOK 200m).⁸¹

⁷⁷ I.e., net value of the assets.

⁷⁸ "Lov 13. juni 1997 nr. 44 om aksjeselskaper", Section 2-6(1)(4). Ernst & Young have stated that "Da samlet verdi var estimert til NOK600m, var det basert på Aksjelovens krav om at egenkapitalen ikke kan oppføres med en samlet verdi som overstiger verdien av virksomheten totalt sett, ansett nødvendig å foreta en nedjustering av verdien av de tilførte eiendeler."; Event no: 512771.

⁷⁹ Ernst & Young have explained that the difference between 619 and 600 was considered as unimportant; Event no: 512771.

⁸⁰ Consisting of machinery NOK747m, real estate of NOK331m and other assets of NOK59m.

2.3.4. Value assessment in final opening balance

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 NOK977m.⁸²

The final opening balance confirms that the value of machinery of NOK572m identified in the December 2002 report (entitled “Opening balance Supplement: Value assessment of assets”) was adjusted downwards by NOK25m to NOK547m. The addition of further investments and minor adjustments brought the final value of machinery to NOK594m.

Following certain purchases of NOK4m the value of real estate was NOK335m and the downward adjustment of NOK54m (necessitated by the result of the discounted cash flow) method meant that the value of real estate was NOK281m.

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

2.4.1. The construction contracts

The Norwegian authorities have explained that as of 1 January 2003 all new construction contracts (for works such as roads, tunnels, docks and bridges) were subject to a public procurement procedure.

However, the existing construction project had to be transferred to Mesta AS in order to continue the completion of ongoing construction projects. The existing contracts varied in terms of complexity and duration but all expired in the course of one or two years after the establishment of Mesta AS. The Norwegian authorities have explained that the construction contracts were transferred to Mesta AS at the prices originally fixed for such contracts. In the view of the Norwegian authorities such prices reflect market prices. Prior to 1 January 2003 a fair part of the construction contracts were tendered out and the Public Road Administration therefore gained some experience with the level of the market price. Moreover, the prices of internal construction contracts between the Public Road Administration and the Production Department had to be concluded in compliance with internal guidelines which contained rules on how to price internal contracts.⁸³ According to the internal guidelines the price experience obtained in the context of open tenders has to form the basis for fixing the prices of internal contracts: Either such public tender prices should be used directly, or the prices of internal contracts should be based on estimates tested against the market and (where relevant) reduced to the market level.⁸⁴ In either case the overall condition of the Road Administration was that prices fixed in internal agreements should reflect the price level of the market.⁸⁵ Finally, the Norwegian authorities also clarified that apart from taxes and duties imposed on all services fiscal and other regulatory requirements did not influence the price at which the contracts were transferred.⁸⁶

⁸¹ 12 December 2002 and entitled “Evaluation of proposal for a value assessment and the opening balance”. Although Deloitte & Touche expressed some concerns about the discounted cash flow value assessment the company concluded that it was the best possible estimate of the value of the assets and that it could be used for a downward adjustment of the operational assets.

⁸² In addition to machinery and real estate, other assets amounted to NOK 102 million.

⁸³ The internal guidelines were entitled “Oppgave-og rollefordeling, avtaleformer mellom myndighet og produksjon”.

⁸⁴ According to explanations provided by the Norwegian authorities of the understanding of sections 2 and 5 of the internal guidelines.

⁸⁵ This is supported, amongst others, in sections 3.3 and 8 of the internal guidelines.

⁸⁶ Also, contrary to what was stated in the Opening Decision, there was no ex-post adjustment mechanism.

The prices at which the construction contracts were transferred to Mesta AS were the same as those used for purposes of determining the revenues of the contracts in the discounted cash flow analysis.

2.4.2. *The operation and maintenance contracts*

102 existing operation and maintenance contracts ("funksjonsavtaler") were taken over by Mesta AS.⁸⁷ These contracts, which covered works such as road surface, marking, drainage, gritting as well as flooding and avalanche, 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 about 25% of the contracts up for public tender per 1 September each year in the following manner:

- 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.

While each category covers contracts covering geographic areas evenly spread throughout Norway (so as to ensure continued stability in service provision) the categories also correspond to the level of difficulty as regards the work to be carried out. In this regard, Category A include the simplest contract work in small areas (that is, areas which pose minimum challenges as regards the traffic and weather conditions and the type of road) while Category D includes contract work of a difficult character both in terms of the road (such as mountain and cliff roads) and traffic and weather. Categories B and C cover contract work between the two extremes.

The Norwegian authorities have explained that the prices of the services provided under the operation and maintenance contracts entered into by the Production Department were maintained upon transfer of the contracts to Mesta AS.

2.4.3. *The value at which the contracts were transferred*

The prices at which the contracts have been transferred appear from an excel spreadsheet submitted by the Norwegian authorities which is similar to the spreadsheet previously submitted by Veidekke ASA.⁸⁸ Following the Opening Decision the Norwegian authorities have updated the estimate of the total price at which the construction contracts have been transferred to Mesta AS from NOK2 960m to NOK2 942m.⁸⁹ The Norwegian authorities have also updated the estimate of the total price at which the operation and maintenance contracts have been transferred to Mesta AS from NOK5 750m to NOK5 866m. The overview does not indicate the price of individual contracts.

2.4.4. *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

⁸⁷ The 102 contracts were established on the basis of 67 operation and maintenance contracts between the Production Department and the Public Road Administration.

⁸⁸ See subsection "C" of section 2.4 of the Opening Decision.

⁸⁹ The difference results from having included more decimals in the updated figure. The figures represent the values remaining at the point in time the contracts were transferred from the Production Department to Mesta AS.

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. The Norwegian authorities have commented that it is correct 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.

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:⁹⁰

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.⁹¹ This means that out of a total of 108 contracts Mesta AS won 68 contracts which equals about 62.7%.

2.4.5. 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

⁹⁰ 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.

⁹¹ The figures deviate slightly from those submitted by Veidekke ASA.

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: NOK74 940 000
- Nedre Romerike (1999) five years: NOK56 000 000
- Ibestad Dyrøy (1999) four years: NOK30 418 400
- Lågendalen (2000) four years: NOK45 706 323
- Våler og Åsnes (2001) five years: NOK39 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.⁹² 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 NOK15m as a result of the public tender. This figure is a result of price per km of 125 000 x 120 km road which equals NOK15m (or NOK75m during five years).⁹³ The Nedre Romerike contract is listed in the report with an annual value of NOK11.2m. The price per km is 50 000 x 198 km road which equals NOK9.9m (or NOK49,5m during five years).⁹⁴

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.⁹⁵ 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.

2.4.6. The transitional contracts and the opening balance

The Norwegian authorities have explained that the transitional contracts were assets which formed part of the discounted cash flow and were therefore taken into account when

⁹² "Rapport nr. 110 "Produksjonsavdelingens konkurranseevne Drift og vedlikehold, Statens vegvesen Akershus".

⁹³ 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.

⁹⁴ 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.

⁹⁵ "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. nr. 119 (2000-2001) of 9.2.2001 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 29.9.2000.

assessing the total value of Mesta AS. However, based on the results of the discounted cash flow the value of the contract portfolio⁹⁶ was too low to be allocated any value.⁹⁷

2.4.7. Temporary public service obligation

The Norwegian authorities have explained that in accordance with Article 59(2) EEA the Norwegian authorities imposed an obligation on Mesta AS as of 1 January 2003 to carry out a public service obligation in the form of operation and maintenance services on the national road work. The obligation was gradually phased out in order to cease on 1 September 2006. The public service task is described in detail in a report on standards for operation and maintenance issued by the Public Road Administration of 1999 (updated in 2003).⁹⁸ The report lays down the fundamental requirements for ensuring that the standard of the operation and maintenance works are sufficient for maintaining road safety via setting concrete standards or actions with respect to tunnels, drainage, road coverage, bridges, quays and pavements (the “Standardisation Report”).⁹⁹ The Standardisation Report also lays down specific standards in relation to reliable winter maintenance to ensure maintenance of road safety. The service task has been entrusted to Mesta AS via a provision in each contract awarded to Mesta AS by giving a short overview of the relevant standards and referring to the Standardisation Report for operation and maintenance.

The Norwegian authorities have explained that the entrustment to Mesta AS of the above described public service task was to guarantee a sufficient level of road safety up until September 2006. In this regard the authorities have explained that the Public Road Administration is responsible for road safety and ensuring a minimum standard by means of supervising and monitoring repairs and maintenance.¹⁰⁰ Up until 1 January 2003 this task involved monitoring mainly the works of one service provider, i.e., the Production Department. However, after that date this task would take on a new dimension since road maintenance work would be subject to public tenders and hence carried out by a number of different service providers. In this regard it appears from preparatory legislative works that the rationale behind a gradual opening of the market was to ensure that the Public Road Administration could continue to adequately control and ensure that road standards and safety would be kept at a satisfactory level.¹⁰¹

The Norwegian authorities have further explained that this is also the motivation behind tendering out the most risky and demanding contracts at the end of the process while the simplest and smallest were tendered out first.¹⁰² By leaving the most challenging contracts to the end, the Public Road Administration would already have obtained a fair amount of experience from having supervised and monitored several service providers after the first tender rounds. The Public Road Administration would therefore have the best possible

⁹⁶ Which included both existing and future contracts over the 10 year period of the discounted cash flow.

⁹⁷ Ernst & Young have stated that “Given the fact that net value of identified assets and liabilities were above the net value of operations, no additional value of contracts were identified to be included in the opening Balance Sheet”; Event No: 523923.

⁹⁸ Referred to as “Håndbok 111”.

⁹⁹ “Standard for drift og vedlikehold” of 1999 and updated in 2003. In some counties (about 20%) the local road administration have deviated slightly from the Standardisation Report in order to adapt to the local circumstances.

¹⁰⁰ See “Instruks for Statens vegvesen” of 27 May 2005.

¹⁰¹ Cf. letter from the Public Road Administration of 4 December 2002 stating that “Kontraktene skal sikre forsvarlig drift og vedlikehold av vegnettet fram til jobbene kan utlyses ut i åpen konkurranse.” See also St.prp. nr. 60 (2001-2002) which states that “Samtidig får forvaltningsdelen tid til å opparbeide kompetanse for å kunne mestre full konkurranseeksponering av vegvesenet sine oppgaver.”

¹⁰² See the explanation of the categories in section A above.

conditions for maintaining control of the level of road safety by the time the more challenging contracts were tendered out.¹⁰³

With respect to payment of compensation for the public services the Norwegian authorities have submitted the following tables providing an overview of the costs, revenues and rate of return in respect of the services provided by Mesta AS under the transitional operation and maintenance contracts.¹⁰⁴ In this context the Norwegian authorities have explained that Mesta AS maintained separate accounts for each transitional contract during 2003 to 2006. Hence all revenues (and costs) set out in the following tables are directly related to the operation and maintenance transitional contracts.

Table 1 shows that in relation to total capital invested in Mesta AS, capital has been allocated to the transitional operation and maintenance contracts with the same proportion as that which the share of revenue from the transitional contracts represents out of total revenue.

Mesta AS - capital allocation in million NOK

Total Capital	2003	2004	2005	2006
Opening balance	2 686	3 989	4 291	4 643
Closing balance	3 989	4 291	4 643	4 340
Average	3 338	4 140	4 467	4 492
Total turnover Mesta	6 386	5 899	6076	4 492
Total turnover operation and maintenance	3 645	3 613	3 235	3 253
Share of operation and maintenance turnover compared to total turnover	57%	61%	53%	55%
Capital allocated to operation and maintenance	1 905	2 536	2 378	2 460
Share of operation and maintenance capital allocated to transitional contracts (%)	96%	81%	60%	30%
Share of operation and maintenance capital allocated to transitional contracts (NOK)	1 835	2 050	1 437	748

The following table provides an overview of the costs, revenue and the actual rate of return obtained by Mesta AS on the basis of the transitional operation and maintenance contracts during 2003 to 2006. The Norwegian authorities have specified that no specific rate of return were fixed in advance in respect of the transitional operation and maintenance contracts.

Mesta AS: Revenue, costs and rate of return in million NOK for transitional operation and maintenance contracts

	2003	2004	2005	2006	Total
Revenue	2 116	1 871	1 293	586	5 866
Profit before tax¹⁰⁵	277	175	199	151	802

¹⁰³ The Norwegian authorities have stated that such an approach would give companies already operating in the road operation and maintenance market the possibility to gain experience and make investments.

¹⁰⁴ Tables submitted in Event No: 523924.

¹⁰⁵ Costs are the difference between revenue and profit before tax.

Profit after tax	199	126	144	108	577
Profit margin	9 %	7 %	11 %	18 %	
Capital allocated to transitional contracts	1 835	2 050	1 437	748	6 070
Actual return on capital	10.86 %	6.15 %	9.98 %	14.50 %	

The Norwegian authorities have explained that the average rate of return in the operation and maintenance market, that is, the “reference rate of return” is the weighted average cost of capital (“WACC”) after tax of 8.42%.¹⁰⁶

The following table provides an overview of the composition of the reference rate of return.

Composition of reference rate of return

Weighted average cost of capital (WACC)	
Risk free interest ¹⁰⁷ before tax	3.85 %
Market rate risk premium ¹⁰⁸	5.00 %
Total capital beta	0.90
Net debt/equity	
Equity beta	1
Cost of equity after tax	8.85 %
Cost of outside capital	
Risk free interest before tax	3.85 %
Premium on loan	2.50 %
Cost of outside capital after tax	6.35 %
Tax rate	28 %
Cost of outside capital after tax	4.57 %
Weighted average cost of capital (WACC)	
Cost of equity	8.85 %
Share of equity	90 %
Weighted cost of equity after tax	8.00 %
Cost of outside capital after tax	4.6 %

¹⁰⁶ The WACC is based on the CAPM model which is similar to that used for composing the rate of return in the discounted cash flow, cf. footnote 76. The WACC is the cost of the different components of financing used by the firm, weighted by their market value proportions. The CAPM model is used to estimate the cost of equity while the cost of debt is estimated on the basis of the costs of a risk-free asset adding a loan premium and taking account of tax deductions.

¹⁰⁷ Rate of risk free interest of 3.85% is based on the return of 5 year-state bonds (of 2003-2007) cf. Central Bank of Norway.

¹⁰⁸ The market rate risk premium shows the return operators require for stocks compared to investments free of risk. A market rate risk premium of 5% is based on the fact that operators generally require 3-6%. It is 0.5% higher than the rate set in PricewaterhouseCoopers 2008 report entitled “Mesta AS – Entrepriseverdi pr. 1.januar 2008” (the “PWC 2008 report”). The PWC report was issued in the context of establishment of the Mesta group and was verified by the auditors BDO Noraudit.

Share of outside capital	10 %
Weighted cost of outside capital after tax	0,5 %
WAAC cost of total capital after tax	8.42 %

The reference rate of return of 8.42% is based on a beta value of 1 which has been fixed by reference to:

- Observations of the beta value over a 40 month period (2002-2007) of 15 comparable companies (such as Veidekke ASA, Skanska AB-B SHS, PEAB AB);¹⁰⁹
- the rate of return is correlated on the basis of Morgan Stanleys “All Country World Index”;¹¹⁰
- the equity share has been considered to be in line with the sector average (based on 15 comparable companies).¹¹¹

Finally, the following table shows the difference between the reference rate of return and the actual return obtained by Mesta AS on the operational and maintenance contracts in the relevant years.

Rate of return in million NOK

	2003	2004	2005	2006	Total
Mesta: rate of return	10.86%	6.15%	9.98%	14.5%	
Reference rate of return	8.42 %	8.42 %	8.42 %	8.42 %	
Surplus return in %	2.44 %	-2.27 %	1.56 %	6.08 %	
Surplus return NOK	44.8	-46.4	22.5	45.5	66.4

2.5. Document duty and registration fees

According to the Mesta Act real estate transferred from the Production Department to Mesta AS was to be registered in the Norwegian real estate registry as a “name change”.¹¹² This meant that Mesta would have its real estate registered in the real estate registry without incurring document duty and registration fees which normally fall due in the case of transfer of title to property in Norway.¹¹³

In Norway an administrative practice, referred to as the “continuity principle” provides for an exemption from payment of document duty and registration fee in cases where the undertaking is considered to “continue” in some form. Two circulars have been issued by the Ministry of Justice on the application of the continuity principle. According to the First Circular, which was applicable on 1 January 2003, only mergers between limited liability companies can benefit from the continuity principle.¹¹⁴ The Second Circular extends this practice to de-mergers and conversions as of 1 July 2005.¹¹⁵

¹⁰⁹ It is in line with PriceWaterhousecoopers best practice on value assessments; cf. the PWC 2008 Report.

¹¹⁰ Cf. the PWC 2008 Report.

¹¹¹ Cf. the PWC 2008 Report.

¹¹² Section 3 thereof.

¹¹³ Act 1935 No 2 (“Lov om tinglysing”) and Act 1975 No 59 (“Lov om dokumentavgift”).

¹¹⁴ The First Circular was issued on 21.5.1990 (“Rundskriv G-37/90 av 2.5. 1990”).

¹¹⁵ The Second Circular was issued on 27.6.2005 (“Rundskriv G-6/2005 av 27.6.2005”) and entered into force 1.7.2005.

2.6. Grounds for initiating the procedure

On 18 July 2007, the Authority adopted the Opening Decision to initiate a formal investigation on the basis of the preliminary finding that the measures taken in the context of establishment of Mesta AS could involve state aid which would not qualify for any of the exemptions provided for in the EEA Agreement.¹¹⁶ The Authority therefore had doubts that the relevant measures could be considered to be compatible with the functioning of the EEA Agreement. The relevant measures concern the restructuring measures, value assessment of assets, transitional contracts transferred to Mesta AS and the lack of payment of document duty and registration fees.

3. Comments from third parties

Comments have been received from four interested parties after the Opening Decision following which the Authority and various interested parties have had a comprehensive dialogue on the issues involved.

3.1. Arntzen de Besche – Mesta AS

The lawfirm, Arntzen de Besche (“Arntzen”) has submitted comments on behalf of Mesta AS.

On the issue of state compensation for restructuring measures Arntzen submits that the key issue is whether the costs represent a liability of the state. It is only if this is not the case that the restructuring costs may be considered to form part of the normal budget of Mesta AS and a reimbursement for such costs represents an economic advantage. Based on the “Combus” judgment the decisive issue is whether the compensation “lightens the burdens normally assumed in an undertaking’s budget” and it is only relief from such costs which constitute an economic advantage.¹¹⁷

A distinction must be drawn between compensation of (i) costs incurred in the normal operation of a company and (ii) imposed costs which are therefore not incurred in the normal operation of the company and do not correspond to cost obligations of competitors. Compensation of the latter type of costs may, as in this case, merely offset or neutralise a structural disadvantage by ensuring a level playing field and do therefore not constitute state aid. On this basis Arntzen submits that compensation for restructuring measures to Mesta AS originate in a State liability with the objective of offsetting structural disadvantages and does therefore not involve state aid.

In the event the Authority should find that the restructuring measures do involve state aid, Arntzen submits that the aid is compatible since it allows Mesta AS to compete on a level playing field in a market just opened for competition. Since the production arm of Mesta AS was previously the State’s in-house service provider, Mesta AS was established with an organisation unfit for competition. Without compensation Mesta AS’ competitive position would be affected. The Commission has in its decision on “Destia” considered that the opening of the market is a Community objective in the common interest.¹¹⁸ Moreover, the guidelines on state aid linked to stranded costs aim at facilitating the transition of undertakings to a competitive market. Indeed aid (limited in time and effects) for attaining a common objective of facilitating transition from a closed market to a (partially) liberalised market is in the common interest and serves to counterbalance

¹¹⁶ Decision No. 350/07/COL, OJ C 310, 20.12.2007 and EEA Supplement No. 61, 20.12.2007.

¹¹⁷ Case T-157/01 “Danske Busvognmænd v Commission” [2004] ECR II-917.

¹¹⁸ OJ L 274, 10.11.1006, p. 2 at § 125.

distortion of competition. In this context attention is drawn to that Mesta AS must repay any excess restructuring funds.

As regards the evaluation of machinery Arntzen submits that upon changing the evaluation principles from book value to real value the discounted cash flow analysis established a value of the business of NOK600m. The allocation of the value to the assets does not change the overall value and does therefore not raise state aid issues. Based on the result of the discounted cash flow analysis, the value of the assets (including short-term debt) was reduced from a real value of NOK698m to NOK619m. Hence the adjustment represented NOK79m not NOK200m.

With respect to the transitional contracts Arntzen submits that Mesta AS was only compensated for the cost of providing services under the relevant contracts and did therefore not receive any economic advantage within the meaning of the state aid rules. Arntzen further submits that for purposes of establishing an advantage the Authority must establish a reference price which, when compared to the actual price of the contracts transferred to Mesta AS, will constitute the economic advantage. It is only if the Authority can demonstrate that undertakings existing on 1 January 2003 could provide similar services at a cheaper price than the prices at which the contracts were transferred to Mesta AS were overpriced. The burden of proof is on the Authority.

Arntzen further submits that, in fact, there was no market price on 1 January 2003 since all operation and maintenance services were carried out in-house and a de facto monopoly was created on 1 January 2003 with the establishment of Mesta AS. The prices resulting from the public tenders of the pilot projects cannot be used as reference prices: First, the Authority has not established that other undertakings were actually ready and able to deliver the relevant services at a cheaper price. Considering the importance of the case the Authority ought to carry out a detailed assessment of whether other undertakings were actually ready to provide the relevant services at a cheaper price. It is only if this is the case that state aid may be involved. Secondly, while the price levels resulting from the public tenders of the pilot contracts were lower than the prices at which the contracts have been transferred to Mesta AS, the two groups of contracts are not similar. This means that the pilot contracts cannot be considered to represent the market price. In this regard it is noted that the original contract price of one of the pilot contracts, i.e., the Bærum contract, was raised with 25% due to additional works. A large part of such additional works is included in the base price of the transitional contracts transferred to Mesta AS. Finally, the Authority does not have information demonstrating that undertakings which won the pilot contracts or the contracts tendered out after 2003 actually cover their costs of providing the services. If the undertakings do not cover their costs it is not an efficient opening of opening the market.

3.2. Thommessen - Veidekke ASA

The lawfirm, Thommessen Krefting Greve Lund AS (“Thommessen”), has submitted arguments on behalf of Veidekke ASA.

As regards the restructuring measures, Thommessen submits that the Combus judgment recognises that State financing of cost inefficiencies originating in past labour legislation does not constitute state aid provided it is proportional to the structural disadvantage. Any compensation beyond the difference between the costs of the structural disadvantage and relevant labour costs of a comparable undertaking is state aid. The State intervention should not alleviate Mesta AS from pension obligations incurred in the past but only from structural disadvantages for the future (i.e., as of 2003 onwards). Thommessen submits

that Mesta AS was overcompensated for the structural disadvantages. The Authority should therefore verify whether the overstaffing of Mesta AS resulted in some benefits for the company which meant that the structural disadvantage (of overstaffing) was overrated. In other words, the Authority must clarify whether the disadvantage of overstaffing was neutralised by access to surplus and cheap work force. In this regard attention is drawn to the fact that Mesta AS' profitability was significantly better than first anticipated during the first three years of its existence. St.prp. nr 1 (2007-2008) shows that the funds awarded for each year covered more than the relevant liability of the restructuring measures, thus indicating overcompensation.

In particular, the Authority should verify whether the State had the possibility to retransfer, reallocate or replace some employees instead of offering them early pension. The Authority should request the Norwegian authorities to produce evidence showing that early pension was necessary for handling the personnel issue. The Authority should verify whether the authorities only compensated for the difference between average costs of an ordinary private pension scheme and membership in the state pension fund and whether compensation was limited to civil servants. The Authority is requested to verify whether costs for maintenance of special retirement age are costs normally included in the budget of an undertaking and therefore not a structural disadvantage meaning that the compensation may amount to state aid. The Authority should also assess the transaction under directive on the transfer of undertakings.

Thommessen also states that the "Government's guidelines states that the employer may apply for continued membership in the Labour ministry. If refused the individual may be linked to the pension scheme through so called *closed membership* arrangement" and asks whether closed membership has been considered as an alternative to compensation Mesta AS for restructuring measures. Thommessen submits that Mesta AS might have taken on an obligation which it was not obliged to take on. If the restructuring costs of Mesta AS in this regard is a consequence of voluntarily taking over (or maintaining) obligations, this is a decision of Mesta AS. Compensation for costs which Mesta AS was not legally bound to observe are costs normally included in the budget of a company and state funding for this purpose constitutes state aid.

Compensating restructuring costs may be compatible under Article 61(3)(c) EEA provided the conditions of necessity and proportionality are respected. In this regard the aim of increasing the efficiency of the former Production Department must be balanced against the objective to make the market more competitive. Thommessen submits that the competitiveness of Mesta AS has indeed materialized via a high share of public procurement contracts won at the cost of effective competition in the market. Mesta AS is, by far, the largest player with a market share of 60%. The steadily decreasing number of bidders in public tenders confirm this. The problem is that Mesta AS was overcompensated for its structural disadvantages. The market has simply moved from an oligopolistic market to a duopolistic market with Mesta AS as the dominant player. The Authority must review that the measures in question do not confer an advantage with market distortion as a consequence.

On the issue of asset evaluation Thommessen submits that the Authority must examine the case independently of whether the opening balance complies with Norwegian accounting and company regulations. In this regard Thommessen submits that the Norwegian limited liability Act includes a rule to ensure that the share capital contribution is not beyond fair value. However, while the Board of Directors may be liable for an assessment beyond fair value there is no liability for assessments below fair value. Therefore, Thommessen

expects a separate independent expert evaluation of whether the assets have been fixed at market value.

Thommessen agrees that the assets should be based on fair value as a going concern which could be based on a discounted cash flow analysis. According to section 4(2) of the Norwegian Accounting Act the analysis must be based on the principle of “best estimate”. However, Thommessen submits that the estimate submitted by the Norwegian authorities is not in accordance with this principle but has been based on one-sided arguments to bring down the value of the assets. First, although the discounted cash flow analysis acknowledged that there are inherent uncertainties, the fair value assessment of the individual assets showed that the real value was substantially higher and so the discounted cash flow analysis should have been adjusted upwards. Secondly, it appears from the discounted cash flow analysis that the terminal value was NOK900m but that this was adjusted downwards because the cash flows over the period 2003-2012 were estimated at -300m. Thommessen submits that the uncertainties in setting up Mesta AS and how it would perform were exaggerated and were aimed at adjusting the fair value of the assets downwards. Thirdly, the external evaluation of 18 machinery groups was estimated to NOK424m. This is considerably higher than NOK148m which was the resulting value of evaluating an even higher number i.e., 37 machinery groups. Thommessen submits that it is incomprehensible how machinery of Mesta AS, larger in quantity, than that of Veidekke ASA is fixed at a market price below that of Veidekke ASA. The Authority should investigate this. Finally, Thommessen submits that it is unusual that the fair value of a going concern does not contain any goodwill.

Aside from this Thommessen submits that the downward adjustment of NOK200m of machinery and NOK50m of real estate (i.e., the difference between NOK331m and NOK281m) involves advantages because a lower evaluation of assets means that depreciation is lower and hence operating income is higher. The extra operating income is state aid. Moreover, the higher the evaluation of the assets, the higher the required rate of return should be. Hence a lower assessment means that the annual profits of the Norwegian authorities are too low and the difference between that, and the profits based on a correct assessment, amounts to state aid.

As to the transitional contracts, Thommessen welcomes that the Norwegian authorities acknowledge the difference between the market price (resulting from public tenders) and the price at which the transitional operation and maintenance contracts were transferred; the difference being about NOK 2 billions.¹¹⁹ As to the argument of the Norwegian authorities that the estimated gross revenue of the contracts form part of the opening balance and that it is not necessary to assess the market value of them, Thommessen submits that the discounted cash flow analysis incorrectly presupposes that the contracts have been transferred at market value.¹²⁰ As to the argument that no market price or reliable indicators of a market price existed on 1 January 2003, the Norwegian authorities are ignoring the prices resulting from the pilot cases, the market price in similar markets of other Nordic countries and the market price resulting from public tenders undertaken in 2003 and onwards.

Hence Mesta AS was compensated for structural disadvantages by restructuring funding of NOK993.6m, cash injection of NOK1 600m and excess prices of the transitional contracts transferred to Mesta AS. Mesta AS has been compensated twice for the same

¹¹⁹ Thommessen’s best estimate is NOK 2.1 billions while the construction contracts account for NOK 0.4 billion.

¹²⁰ Reference is made to the Destia decision OJ L 274, 10.11.1006.

restructuring costs. The Norwegian authorities were aware that the market price was 25-30 % below the internal pricing between the Production Department and the Public Road Administration – which is precisely the reason for the liberalisation of the market. Reference is made to Report of December 2000 issued by the Public Road Administration which finds that the costs of the Production Department was far higher than the costs of similar contracts entered into by private entrepreneurs. Hence Thommessen submits that the market price was well documented. Finally, Thommessen submits that if the market price should be established on the basis of the costs of Mesta AS, the relevant cost base of Mesta AS is the cost base existing after the restructuring measures have been paid off, that is, the cost base of a “competitive” Mesta AS compared to the cost base of a Mesta AS subject to restructuring costs which has been (or will be) compensated. If the cost base of a competitive Mesta AS is taken into account Thommessen submits that Mesta AS has been overcompensated with about NOK1 81m (which is the difference between the prices at which the contracts were transferred and the prices resulting from subsequent tenders).

3.3. Schjødt

As regards restructuring measures, the law firm, Schjødt, which have submitted comments on behalf of an anonymous complainant, points out that funding to maintain benefits derived from the civil servant status does not constitute state aid if such funding is granted to individual persons on the basis of objective criteria and does not result in benefits to certain companies. Conversely funding for employee benefits which constitutes part of the normal burden of companies constitutes state aid. Hence, the question is what may be considered to constitute the normal financial burden of companies. Schjødt submits that state aid is only involved insofar as the benefit goes beyond what employees recruited on the market would be offered. The *Combus* judgment (which has never been appealed) showed that direct payments to employees in return for renouncement of the civil servant status involves no aid to the company.¹²¹ However, the *Combus* judgement was delivered when there was a lot of uncertainty about structural disadvantages and in any event it is not clear whether the facts in Mesta AS is similar to those in *Combus* and hence whether *Combus* forms a reliable precedent for the present case.

Schjødt submits that compensation for moving personnel, commuting, moving offices, moving support and maintenance offices etc. qualify as state aid which appears not capable of being found compatible. Also, expenses related to renovation of machinery cannot be compensated and at the same time count as a negative asset.

Schjødt objects to considering restructuring aid for Mesta AS as compatible by reference to the State aid Guidelines on rescue and restructuring measures. Mesta AS and its predecessor was, and is, not in difficulty within the meaning of these guidelines which are in any event not applicable to new firms emerging from reorganisations.

As to the evaluation of assets Schjødt points out that an independent assessment might provide guidance for purposes of assessing the alleged under evaluation of the assets. The under-evaluation together with the cash injection of NOK1 600m could result in an equity ratio in excess of what would follow from a proper application of private market investor principle. In the context of verifying this it should also be verified whether the Norwegian authorities have foregone the payment of an adequate return on their investments.

As to the transitional contracts Schjødt points out that the arguments of the Norwegian authorities assume that (i) the contracts should be transferred at market price in order not to constitute aid; and (ii) that their actions must be assessed on the basis of the information

¹²¹ Similarly in N 483/2000 *Nederland*.

available at the relevant point in time, implying that subsequent evidence (which shows that the prices of the transitional contracts were above market price) cannot be taken into account.¹²² However, Schjødt submits that evidence, post factum, can be taken into account to the extent that it just corroborates information available at the relevant point in time. The Norwegian authorities were aware that the prices of the contracts transferred to Mesta AS were in all likelihood above the market price. Indeed the driving force behind the reorganisation was efficiency gains and “more value for less money”.¹²³ It appears from a report issued in 2001 by *Statskonsult* that as of 1996 Oslo Municipality exposed its road operation and maintenance activities to competition which resulted in a cost reduction in the field of operation and maintenance of about 20%. Finally, the Report issued in 2001 by the Public Road Administration itself also showed that the operation and maintenance contracts awarded to private operators were more competitive than those performed by the Production Department.

Rather than acting on the basis of the information available to them, the Norwegian authorities ignored previous experiences and transferred the contracts at prices above the market price. Schjødt submits that the Norwegian authorities cannot write off such information. The authorities could easily have applied a general reduction rate the contract portfolio. Schjødt further submits that an approval of excess pricing may not be authorised as Mesta AS has already been compensated for restructuring measures, and the contract prices were not based on public tenders nor did they include an adjustment mechanism. The Mesta AS case is therefore entirely different from the Destia case.¹²⁴

The Norwegian authorities repeatedly state there were no private operators on the market for operation and maintenance although it appears from St. prp. nr.1 (2001-2002) that 30% of operation and maintenance works is put up for competition between market operators. Moreover, the aforementioned *Statskonsult* report states that while most operation and maintenance work is carried out by the Public Road Administration in 2000, 28% had been put on the market. As regards the attainment of relevant skills by the Public Road Administration for tendering out works Schjødt points out that the Public Road Administration had been using that skill via the operation and maintenance agreement (“funksjonsavtale”) with the Production Department so that by 2003 the skill should have been attained. The authorities have not explained how the skills for tendering out works to market operators would be any different from the skills used in the context of the agreements with the Production Department.

Finally as to document duty Schjødt submits that the exemption amounts to an economic advantage for Mesta AS and that the continuity principle is not valid as there is no actual transfer of title. The facts of the Mesta AS case are similar to that of the Entra case, and hence as in the Entra case, the advantages granted to Mesta AS constitute state aid. Since the value of real estate has been adjusted downwards in the opening balance the amount of aid cannot be calculated on that basis but must be assessed on the basis of the market value of the transferred real estate.

3.4. Wiersholm - Skanska

The lawfirm, Wiersholm, submitted comments on the basis of Skanska.

¹²² The Via Nova report concludes that the cost level of the transferred contracts subject to tendering was about 32% lower than the cost level of comparable transitional contracts.

¹²³ Cf. St.prp. nr. 1 (2001-2002) stating that “experiences within the state road administration show that competition will lead to gains of 1 to 15% within operation and maintenance and 5 to 10% within construction”.

¹²⁴ OJ L 270, 10.10.2008, p.1 at paragraph 125.

Wiersholm submits that a rate of return fixed on the basis of assets evaluated below the market price does not comply with the private market investor test. Wiersholm points out that, as referred to by the Authority, there is considerable uncertainty with respect to the value of fixed assets and fails to see how the Norwegian authorities have complied with the private market investor test. The Norwegian authorities have failed to explain why not all groups of machinery were subject to external review of real values (which included only 18 out of 55) as well as the reason for the differences in evaluation methods between the different groups. Wiersholm submits that an independent evaluation is necessary. Considering the extent of figures submitted in this case, the doctrine according to which the transfer of assets at book value does not constitute aid (i.e. the “book value doctrine”) adopted by the Commission in its decision on Destia cannot be directly applied.¹²⁵ Reference is made to the Authority’s decision in Arcus¹²⁶ in which production facilities and other assets were transferred from a State monopoly to the Arcus Group. In the Arcus case the Authority found that the transferred assets were assessed at below market value with an amount of NOK 264 million and that the State was undercompensated by the same amount. The transaction implied that the Arcus Group received state aid in the same order. The decision shows that a scrutiny of the evaluation of assets in the Mesta AS case is relevant.

As to the transitional contracts, Wiersholm refers to the Authority’s statement in the Opening Decision from which it appears that a contract price below market price involves an economic advantage for the service provider. According to Wiersholm the position of the Norwegian authorities is that it is not so important whether the contracts were transferred to Mesta AS at market price. The main point is that the gross revenues of the contracts are included in the cash flow analysis and has been taken into account in the opening balance of Mesta AS as contribution in kind. However, the Norwegian authorities have also stated that the transitional contracts constituted only a small part of this value. Wiersholm submits that the authorities cannot disregard the necessity of establishing a market price by reference to gross revenues in the discounted cash flow. The Commission clearly stated in its opening decision on Destia that the mark-up constitutes state aid: “This confers an economic advantage to Tieliikelaitos [Destia], which is financed through State resources: Tieliikelaitos [Destia] obtains from the State more money than a normal market operator would obtain for an equivalent service.”¹²⁷

Skanska disagrees with the argument of the Norwegian authorities that no market price existed at the time of establishing Mesta AS. A market price already existed via the pilot contracts and Veidekke ASA’s analysis, referred to in the Opening Decision, clearly demonstrates a difference between the prices at which the contracts were transferred and the prices resulting from subsequent tendering of the same contracts. Expectations of subsequent price reductions do not imply that there was no economic advantage involved in the prices at which the contracts were transferred to Mesta AS. The authorities try to justify the pricing policy by arguing that the market was not entirely open to competition in 2003-2006. However, Mesta AS benefitted from the overpriced contracts still in force during the opening of the market. Indeed Mesta AS’ average price level has increased during the transitional period while Skanska’s average price level has been stable. This is based on an analysis of tenders involving both construction contracts as well as operation and maintenance contracts during the period between 1 August 2002 and 1 February 2008. It appears from this analysis that Mesta AS’ average prices have evolved from being 20% below those of Skanska to become higher than the price level of Skanska. This shows that

¹²⁵ OJ L 274, 10.10.2008, p.1.

¹²⁶ 339/98/COL of 3.12.1998.

¹²⁷ OJ L 270, 10.10.2008, p.1 at paragraph 234.

the contracts transferred to Mesta AS involved an economic advantage amounting to state aid.

4. Comments by the Norwegian authorities

4.1. Restructuring and reorganisation measures

The Norwegian authorities have argued that no state aid is involved in the State funding for restructuring measures.

In this regard the Norwegian authorities have argued that Mesta AS was established on 1 January 2003 with a number of disadvantages originating in the fact that the Production Department formed part of the State administration and that the employees held a civil servant status. Disadvantages included the transfer to Mesta AS of an excessive number of employees (1700) for whom civil servant pension rights (or alternative rights) were maintained for a transitional period. Mesta AS paid the additional costs of maintaining such rights during the transitional period.¹²⁸ The intention behind granting Mesta AS funding for the restructuring measures was to compensate Mesta AS for having been established with costs which are inappropriate for commercial operations, such as the additional pension costs of civil servants, and which no competitors have. The Norwegian authorities consider that such costs (which are subject to compensation) derive from obligations incurred as a consequence of the Production Department having formed part of the State administration and constitute therefore a State liability. Hence compensation for such costs does therefore not constitute an economic advantage for Mesta AS.

In addition, the Norwegian authorities have submitted that it could have achieved the same result by undertaking the relevant restructuring measures prior to the transformation of the Production Department into Mesta AS. However, this would have been time consuming, less cost efficient and consequently delayed the liberalisation process. In this context the Norwegian authorities note that if the restructuring measures would have been undertaken prior to the transformation no aid would have been involved and the net effect for Mesta AS is the same irrespectively of whether the measures are carried out before or after. In the view of the Norwegian authorities the fact that the alternative approach would not raise state aid issues shows that compensating for restructuring costs does not entail an economic advantage for Mesta AS.

In support of their arguments the Norwegian authorities refer to the *Combus* case where the Court of First Instance found that compensation for measures intended to offset a structural disadvantage does not constitute state aid.¹²⁹ In that case the Danish Government paid DKK 100 million to civil servants for waiving their civil servant status (and related rights) in the context of being transferred to *Combus*. The Norwegian authorities also point out that the Court of First Instance stated that the Danish Government could have achieved the same result by not transferring the officials to *Combus*: "... the Danish Government could have obtained the same result by reassigning their officials within the State, without paying any particular bonus, which would have enabled *Combus* to employ immediately employees on a contract basis falling under private law."¹³⁰

¹²⁸ The transitional maintenance of civil servant rights was an agreement between the Government and the labour organisations representing the employees of the Production Department.

¹²⁹ Case T-157/01 *Danske Busvognmænd v Commission* [2004] ECR II-917.

¹³⁰ The Norwegian authorities have also referred to the Authority's decision on "*Arcus*" in which the Authority accepted that the payment of costs related to contractual obligations taken on by the prior (public)

The Norwegian authorities have argued that based on the *Combus* judgment the decisive issue is whether compensation “lighten[s] the burdens normally assumed in an undertaking’s budget and which are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions”. According to the authorities the statement warrants an approach according to which a distinction should be drawn between “costs that have been incurred in the running of the company and costs that have been imposed on the Company, but which have not been incurred in the normal course of the Company’s budget”. The authorities consider that compensation for the latter costs does not amount to an economic advantage but compensates merely for a structural disadvantage which its competitors do not have.

Separately from this, the Norwegian authorities have argued that if the financial obligation is “included” in the contribution in kind this reduces the overall net value of the business and the transferor may therefore compensate for such financial obligations so as to keep them neutral. The contribution in kind to Mesta AS involved a number of items involving disadvantages not suited for commercial operations. Instead of reducing the value of the contribution in kind the authorities have maintained the original value and instead compensated for the disadvantages of the restructuring measures.

In support of the argument that the value of the contribution in kind remained unaffected by the financial obligations (and that the authorities should therefore compensate for the negative impact of such obligations) the Norwegian authorities have referred to the Net Present Value calculation and the equity of Mesta AS. In this regard reference is made to Deloitte & Touche which in its 12 December 2002 Report¹³¹ states that “The [restructuring] costs are estimated on the basis of existing plans for reductions in the workforce and existing salary agreements. The company will take over the existing employment agreements and must cover these costs, but the costs derived from obligations belonging to the government and will therefore be covered through appropriations in 2003, 2004, and 2005.” And “The restructuring of the company implies costs that must be observed as a lag from the past as a public entity and are as such already incurred at the time of establishment. The company will take over the existing employment agreements and must cover these costs, but the costs derive from obligations belonging to the state and will therefore be covered through appropriations in 2003, 2004 and 2005.” Deloitte & Touche also states that this was also the reason that Mesta AS was granted funding to cover the restructuring costs (which did not form part of the opening balance) on an ongoing basis over three years.

The Norwegian authorities argue that the owner must be able to offset the same disadvantages as a private purchaser would have required if the Production Department would have been sold without being caught by the state aid rules: If the Production Department would have been sold, a purchaser would discover that the structure would be inappropriate for commercial operations and demand (i) a reduction, corresponding to the disadvantages in the purchase price; or (ii) that the seller (i.e., the authorities) covers the costs necessary to make the business fit for commercial operations.

- (a) Early pension, maintenance of civil servant pension rights and maintenance of special retirement age

The Norwegian authorities recall that early pension was offered to reduce employees which were civil servants. According to the Norwegian authorities it is incorrect to

owner towards the employees (as well as certain start-up costs necessary for adapting a company, Arcus, to market conditions) did not constitute state aid; cf. 339/98/COL of 3 December 1998.

¹³¹ Entitled “Evaluation of proposal for a value assessment and the opening balance”.

maintain that such an arrangement implies that Mesta AS received the benefit of the work carried out by such employees without paying the full costs of their employment terms. It would have been more expensive for the State to keep the employees than to transfer them to Mesta AS and reimburse the latter for early pension arrangements.¹³² Hence compensation for early pension falls outside Article 61(1) EEA.

The Norwegian authorities argue that compensation for maintenance of civil servant pension is a direct consequence of the employees previous status as civil servant and should therefore be considered as a liability of the Norwegian authorities. The same conclusion applies to maintenance of the special retirement age scheme (from which certain employees benefitted during their employment in the Production Department). In both cases the compensation has only covered the difference between the additional costs for civil servant pensions or special retirement age scheme, on the one hand, and an ordinary pension scheme, on the other. No competitors of Mesta AS have been imposed such obligations in respect of their employees and hence compensation for these measures do not involve state aid within the meaning of Article 61(1) EEA.

(b) Moving offices, moving of support and maintenance offices, transfer of archives, moving

The costs of moving of offices were not a result of activities carried out in Mesta AS but were incurred as a consequence of the geographical location of the Production Department. Also, the costs for moving support and maintenance offices originate from activities carried out prior to the establishment of Mesta AS and can therefore not be considered as costs normally assumed in an undertakings budget but derive rather from State obligations. The same goes for the costs for transferring archives. Contrary to the Authority's statement in the Opening Decision this is also true for the moving costs incurred by personnel of the Production Department which had to move domiciles to take up employment in the new premises of Mesta AS. In this regard the Norwegian authorities have also pointed out that it was necessary to offer key personnel incentives in order to minimise the risk that they would resign. Finally, commuting costs during two years (i.e., up until 1 January 2005) for key personnel were also a result of the activities in the Production Department to discourage such personnel from leaving Mesta AS.

(c) Conclusion and arguments on compatibility

Based on the above, the Norwegian authorities conclude that none of the measures for which restructuring funding has been provided involves an economic advantage to Mesta AS. In fact, since the State has awarded Mesta AS only NOK993.6m to cover restructuring costs (although the estimated total restructuring cost amount to NOK1 097.8m) Mesta AS is undercompensated with about NOK104.2m.¹³³

Should the Authority nonetheless come to the conclusion that state aid is involved in the restructuring measures, the Norwegian authorities have submitted that the aid is compatible by reference to Article 61(3)(c) as (i) the measures pursues an objective of common European interest; (ii) the restructuring of Mesta AS is necessary to achieve this objective; and (iii) the aid does not adversely affect trading conditions to an extent which is contrary to the common interest.

¹³² Reference is made to the *Combus* judgment and the Authority's decision on *Arcus*, 339/98/COL of 3 December 1998. The Norwegian authorities point out that in *Arcus* the Authority found that compensation for costs related to work force reductions and early retirement did not constitute aid as the costs refer to expenses related to costs associated with A/S Vin Monopolet's contractual obligations towards its former employees."

¹³³ Cf. St. prp. nr. 1 (2008-2009).

As to the pursuit of a common European interest, the Norwegian authorities argue that the opening up of markets to competition is a Community objective in the common European interest.¹³⁴ In the present case the establishment of a State owned undertaking to compete on a level playing field with new entrants was a necessary step in the context of opening up the market. The Norwegian authorities recall that the national authorities remain free to decide on how the opening of the market should take place. The authorities also note that the opening of the road operation and maintenance markets for competition is better for competition than any of the alternatives of continuing to carry out the services within the State, or open up the market for competition only in part.

Finally, when the effect on competition is considered account must be taken of the overall economic effect of restructuring the road maintenance and operation activities: Mesta AS was established with a structural disadvantage compared to its competitors. Hence from an economic perspective Mesta AS was not in a situation comparable to that of its competitors as Mesta AS bore the burden derived from the former Production Department within the State. Therefore, when analysing the effects on competition account must be taken of the principle of neutrality set out in Article 125 EEA. In the view of the Norwegian authorities this means that it must be acceptable to compensate Mesta AS for structural disadvantages for purposes of establishing a commercially geared company. The authorities also note that the aid for the restructuring measures was limited to what was necessary in order to open up the market for competition. Finally, the process has not adversely affected trading conditions to an extent contrary to the common interest.

4.2. Transitional contracts

The Norwegian authorities point out that the prices at which both the construction contracts and the operation and maintenance contracts were transferred to Mesta AS are the same as those used for determining the generation of revenue in the context of the discounted cash flow analysis. Hence the contracts, as assets, formed part of the assessment of the total value of the business which in turn formed part of the contribution in kind. There is therefore no state aid within the meaning of Article 61(1) EEA in the contracts as contribution in kind. Consequently it is not necessary to assess whether the contracts were transferred to Mesta AS at market price.

In any event, with respect to the construction contracts the Norwegian authorities point out that due to having followed internal guidelines, the prices at which the construction contracts were transferred correspond to the price level resulting from public tenders.

As regards operation and maintenance contracts, on 1 January 2003 there was no market price, or any reliable source indicating a market price since all operation and maintenance services were carried out by the Production Department.¹³⁵ In the view of the Norwegian authorities the market for operation and maintenance works was not opened for competition on 1 January 2003 but only on 1 September 2003 (and only in part).¹³⁶ Until 1 January 2003 the Public Road Administration had been responsible for 100% of the

¹³⁴ Reference is made to Destia case on the restructuring of a Finnish road administration agency, OJ L 270, 10.10.2008, p. 1.

¹³⁵ The argument of Schjødt that 30% of such contracts were already carried out by private operators is inaccurate. While it is true that the Production Department (via the Road Administration) had engaged subcontractors (on ad-hoc basis) to carry out limited tasks, such as snow clearance, the subcontractors had no independent responsibility for specific parts of the public road network.

¹³⁶ The market was opened in full on 1 September 2006. The gradual opening was based on the objectives of maintaining road safety and creating a sustainable market.

operation and maintenance works in relation to the public road network. Since there was therefore no market for the relevant services on 1 January 2003, there was no alternative than to transfer the transitional contracts at the cost based prices previously fixed in the Production Department. None of the third party comments weaken this point of view.

In this context the Norwegian authorities have also argued that the reason that there was no (mature) market was because private operators were not prepared to provide the relevant services for maintaining road safety on 1 January 2003.¹³⁷ It was therefore considered in the best interest of all to open the operation and maintenance market gradually: A gradual opening would ensure a rational allocation of the contracts because operators would be relieved from having to prepare bids in respect of the full contract portfolio on one and the same day. A gradual opening would also be in line with the need for operators to gradually increase skills as service providers during the transitional period and hence a maturation of the market.¹³⁸ Finally, a gradual opening would be administratively easier and allow the Public Road Administration to develop the skills as a purchaser of the relevant services.¹³⁹ According to the Norwegian authorities preparatory legislative work confirm this approach by highlighting that such elements were the reason that the market was not yet mature for competition on 1 January 2003.¹⁴⁰

In the event that the Authority should consider that market operators were in a position to provide the relevant services the Norwegian authorities argue that there were no reliable sources referring to prices lower than those fixed in the transitional contracts. The five pilot contracts could not have been used as reference prices as they formed part of a process for “professionalising” the Public Road Administration. This process included the preparation of a model contract on operation and maintenance which should be tested out by means of internal operation and maintenance contracts¹⁴¹ and the five pilot contracts,¹⁴² thereby allowing the Public Road Administration to gain experience as a “contracting authority”. The purpose of the pilot contracts was therefore not to test the market for a market price.

Moreover, the bids submitted for the pilot contracts varied considerably (for example, for the Våler/Åsnes contract the highest bid was NOK63m while the lowest was NOK30.4m). Such variety demonstrate that the market was immature and the prices could therefore not have constituted a reliable indication of the price level.¹⁴³ Moreover, as the pilot contracts represent less than 2% of the total road network (1 000 out of a total of 54 000 kilometres) they cover a small geographic area. Furthermore, the duties under the pilot contracts

¹³⁷ Also, the operation and maintenance contract could not be tendered out in the middle of the winter season on 1 January 2003.

¹³⁸ The Norwegian authorities have added that private operators did not indicate opposition to a gradual opening the market. On the contrary, operators such as Veidekke KOLO seemed to be in favour of this based, cf. a presentation of given by the company of 7 November 2007.

¹³⁹ St.prp. nr. 60 (2001-2002).

¹⁴⁰ St.prp. nr. 60 (2001-2002) which states (i) that 1-5 years is the most useful contract period for operation and maintenance works; (ii) road operation is important for road safety and control systems must therefore be developed prior to opening the market for competition; and (iii) by gradually opening the market, operators will have time to gain competence and invest in machines and personnel enabling them to operate and maintain public roads in a satisfactory manner.

¹⁴¹ These were county based contracts to be implemented by the end of 1998.

¹⁴² In 1998-2001.

¹⁴³ For the (i) Bærum contract the highest was NOK212m whereas the lowest was NOK73m; Nedre Romerike contract the highest was NOK72m while the lowest was NOK56m (iii) Ibestad/Dyrøy contract the highest was NOK63m while the lowest was NOK30m; and (iv) for Lågendalen the highest was NOK59m while the lowest was NOK46m.

covered additional works.¹⁴⁴ An illustrative example is the Bærum contract won by Selmer ASA at an original contract price of NOK74 940 323. However, additional works meant that NOK18 726 793 had to be added, thereby increasing the contract price with 25%. The volume of additional works in the pilot phase shows that the Public Road Administration miscalculated the work load involved in operation and maintenance contracts. However, such additional works were included in the transitional contracts transferred to Mesta AS. In this regard the authorities draw the attention to the fact that Report 118 warns against comparing experiences obtained in the context of the Bærum contract with other contracts.¹⁴⁵ In the view of the Norwegian authorities the pilot contract prices could therefore not be used as reliable market price indicators.

Aside from this the Norwegian authorities object to the suggestion in the Opening Decision (and as reiterated by Veidekke ASA) that the price level of the first group of operation and maintenance contracts subject to public tendering in 2003 could be representative for establishing a price level for the remaining transitional operation and maintenance contracts. The Norwegian authorities argue that this price level is not reliable as the market of operation and maintenance services is not mature even today in the sense that it is impossible to foresee the results of a public procurement procedure. The significant difference between the highest and the lowest bids in the contracts illustrate this. The lowest difference was 2% while the highest difference was 113%. This is not a sufficient basis for identifying a market price. The Norwegian authorities questions whether a market price can be established by reference to the lowest bid in an immature market. The Norwegian authorities consider that the price level of the transitional contracts did not exceed “what should be regarded as a sustainable market price at the time the transitional contracts were transferred...” In any even the assessment must be based on the facts available at the time of establishing the company.

However, should the Authority come to the conclusion that there is nonetheless state aid involved in the prices of the contracts transferred to Mesta AS, the Norwegian authorities argue that such aid is compatible with the functioning of the EEA Agreement by reference to Articles 61(3)(c) or 59(2).

As to Article 61(3)(c), the Norwegian authorities have argued that Mesta AS was established to open up a monopolised market to full competition and create a sustainable market over a transitional period of four years.¹⁴⁶ A gradual opening was necessary in order to ensure that national roads are safely operated and maintained. As already stated preparatory legislative works confirm that the skills of the Public Road Administration (with limited experience as a purchaser of services and a controller of relevant contractual obligations) needed to be improved.¹⁴⁷ Also market operators needed time to adjust in order to be able to carry out the relevant tasks. A gradual increase in public tenders was considered to allow companies to gain competence and make investments for handling road operation and maintenance in a satisfactory manner. As stated above, the gradual opening of the market ensures a rational allocation of the contracts as opposed to if the contracts would all be tendered out at the same time.¹⁴⁸ Maintenance of road safety was to

¹⁴⁴ The duties also varied. For example, some contracts included tunnel and road surface works while other contracts included only part of such works.

¹⁴⁵ “Rapport nr. 118 ”Dritt- og vedlikeholds-kontrakt med funksjonsansvar Bærum 1998-2003” by Statens vegvesen Region øst.

¹⁴⁶ Even if five years would have been acceptable, the Norwegian authorities decided that, in the interest of a rapid opening of the market, the transitional period should be maximum four years cf. St.prp. nr. 60 (2001-2002).

¹⁴⁷ St.prp (2001-2002).

¹⁴⁸ There were no indications that market operators have been against the gradual opening up of the market.

be achieved via tendering out the easiest contracts first and the most challenging contracts (involving roads in hard climate areas and changing weather conditions) last. Finally, the Norwegian authorities argue that it was legitimate to provide financing to Mesta AS for the costs of the transitional contracts. It would be unreasonable to impose the obligation on Mesta AS to provide services under the transitional contracts without covering the costs as Mesta AS has higher costs than its competitors.¹⁴⁹

Any aid granted via the transitional contracts was proportional because the duration was limited to maximum four years and the price was a fixed price which gives an incentive to improve efficiency. Moreover, in view of the much better than anticipated earning ability during the first three years of operation, the Norwegian authorities made it clear in 2007 that no further funding would be awarded to Mesta AS for the restructuring measures. This shows that Mesta AS' performance was monitored in order to control against overcompensation.

On this basis the authorities submit that the transitional operation and maintenance contracts were necessary "to achieve a sound market opening and fair competition". Reference is made to the Commission's decision in Destia in which the Commission found that the opening of the Finnish road service market to competition was a positive development and an important Community policy objective.¹⁵⁰ Considering that the purpose of the reorganisation of Mesta AS is the same, the Norwegian authorities submits that the considerations in the Destia case are valid also in the present case. The transitional contracts have not had the effect of strengthening Mesta AS' position in an unreasonable manner. The approach taken was necessary and not disproportionate in order to achieve the opening up of the market.

As regards Article 59(2) the Norwegian authorities submit that the transitional operation and maintenance contracts imposed a public service obligation on Mesta AS specified in the contracts (by specifying the nature, geographic coverage, frequency and duration of services to be provided). In line with the State aid Guidelines on public service compensation, state ownership of enterprises and aid to public enterprise (the "State aid Guidelines on public service compensation") the amount of compensation does not exceed what was necessary to cover the costs, taking into account a reasonable profit.¹⁵¹ Paragraph 8 of the State aid Guidelines on public service compensation provides that the national authorities has a wide margin of discretion regarding the nature of services classified as services of general economic interest.

On this basis the Norwegian authorities submit that the transitional operation and maintenance contracts included tasks which could not at the time be sufficiently supplied by the market to ensure sufficient road safety and were therefore imposed on Mesta AS. Legislative preparatory works provide that road safety had to be ensured both during and after the opening of the market. Mesta AS was the best means to ensure the responsibility of the national authorities to maintain road safety. Mesta AS could not reject the authorities' imposition of this duty but was under a legal obligation to perform the services defined in the transitional contracts.

¹⁴⁹ Reference is made to the Commission's approach in the Destia case on the restructuring of a Finnish road administration agency, OJ L 270, 10.10.2008, p. 1.

¹⁵⁰ The Destia case on the restructuring of a Finnish road administration agency, OJ L 270, 10.10.2008, p. 1, at points 307-309.

¹⁵¹ Even if paragraph 25 provides that in the case of non-notified aid the Authority will apply the provisions in force at the time of the grant of the aid (which means that the guidelines are not directly applicable) they may be applied by analogy.

4.3. Exemption from document duty

The Norwegian authorities argue that since the evaluation of the contribution in kind (in the opening balance) was based on the premise that Mesta AS would not pay this, the exemption from document duty and registration fee do not constitute an economic advantage for Mesta AS. The exemption did therefore not have any effect on the solidity or capital structure nor did it have an impact on the total values in Mesta AS. If no exemption could have been granted, payment of the duty would have been compensated by a corresponding contribution in cash forming part of Mesta AS' equity. This would have led to the same result as if an exemption would have been granted. The authorities have further stated that it seems as if Decision 318/05/COL was based on the absence of a link between the exemption and the extent of equity in Entra (cf. page 26 of the Decision).¹⁵² The Norwegian authorities argue that this is not the case in the present case since there was no doubt that, in the absence of an exemption, the duty would have been offset by a contribution in cash for a corresponding amount. It follows from the preparatory works that the size of the equity was set with regard to Mesta AS' short-term liquidity situation. Aside from this the Norwegian authorities argue that the exemption from document duty is not selective by reference to the continuity principle which intends to facilitate implementation of measures which are socio-economically desirable.

II. ASSESSMENT

1. The presence of state aid

1.1. 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.

1.2. Economic Advantage

1.2.1. Restructuring and reorganisation 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) costs of paying pension contributions corresponding to that of a civil servant between 1 January 2003 and the end of 2007; (ii) costs involved in maintaining employees' entitlement to a special (early) retirement age;

¹⁵² In other words, it was not a prerequisite that the advantage (resulting from the exemption) would result in a higher assessment.

and (iii) costs relating to early pension packages offered between 1 January 2003 and the end of 2005.

As a preliminary point, the Authority will comment on certain specific arguments put forward by the Norwegian authorities. First, the Norwegian authorities have argued that since a potential buyer of the Production Department would have demanded a reduction in the purchase price proportionate to the disadvantages of the restructuring measures, the compensation by the authorities of such disadvantages does not qualify as state aid. The Authority observes that the present transaction involves the grant of funding (in the context of an investment), not a sale, and the assessment of whether state aid is involved depends therefore, not on the behaviour of a potential buyer, but on whether such funding results in an economic advantage for Mesta AS.

The Norwegian authorities have also argued that instead of reducing the value of the contribution in kind, the authorities chose rather to compensate Mesta AS for the costs related to the disadvantage of the restructuring measures. Since reducing the value of the assets would not involve an advantage, neither does the cost compensation. The Authority observes that the existence of such a choice does not necessarily mean that Mesta AS did not receive an economic benefit from the funding provided.

As to the substance of the issues the Norwegian authorities contest the fact that any of the abovementioned measures involve an economic advantage. Rather, they claim that the measures were adopted to compensate for a structural disadvantage imposed on Mesta AS and make up for the costly employment conditions resulting from civil servant status. In this respect, the Norwegian authorities rely on the *Combus* judgment.¹⁵³

In this regard the Norwegian authorities have pointed out that account should be taken of the terms on which the previous employer, i.e. the State, employed the relevant workers and the State obligations arising from such arrangements. The costs of paying additional sums to compensate (during a temporary period) for pension rights granted to civil servants should be considered to be an obligation of the State because it was a direct consequence of the employees' state employment as civil servants. Since State financing of such additional sums is limited to funding the difference between the cost of an ordinary pension scheme and the cost of a civil servant pension scheme (or alternative measure), the State pays only the additional costs resulting from the previous employment relationship. The Norwegian authorities have argued with reference to the *Combus* judgment, that if the relevant costs are considered to be an obligation of the State the provision of State funding to cover such costs would arguably not constitute an economic advantage.

In *Combus* the Court stated that the measure in question had been "introduced to replace the privileged and costly status of the officials employed by Combus with the status of employees on a contract basis comparable to that of employees of other bus transport undertakings competing with Combus. The intention was thus to free Combus from a structural disadvantage it had in relation to its private-sector competitors."¹⁵⁴

Even if it is true that, as in the *Combus* case, the present case involves compensation for the purposes of relieving a company (Mesta AS) from a structural disadvantage it would suffer in relation to its private sector competitors, some of the material facts of the present case differ from those in the *Combus* case. The Authority is of the opinion that an

¹⁵³ Case T-157/01 *Danske Busvognmænd v Commission* [2004] ECR II-917.

¹⁵⁴ Case T-157/01 *Danske Busvognmænd v Commission*, cited above, paragraph 57.

important difference with regard to the state aid assessment is that in *Combust* the compensation was paid directly to the employees, whereas in the present case the Norwegian State pays Mesta AS directly. In addition, in *Combust*, the payment was made to the employees in compensation for giving up their privileged status when transferring to the new company. As of the transfer, the employment relationship between the employees and the company was therefore not influenced by the employees' previous status. However, in the present case, former civil servants transferred to Mesta AS continued to benefit from certain civil servant rights temporarily through their employment contract with Mesta AS.

Consequently, the Authority finds that the judgment by the Court of First Instance in *Combust* addresses a different situation from the one in the present case.¹⁵⁵

The Court of Justice has, for its part, constantly ruled that the existence of aid must be assessed in relation to its effect and not the causes or objectives behind the state intervention.¹⁵⁶ Therefore, the Authority considers that in order to determine whether the three above mentioned measures involve an economic advantage the starting point is to examine whether the public financing of the costs of such measures relieves Mesta AS from what may be considered as normally included in the budget of an undertaking.¹⁵⁷

All of the measures have been introduced in order to make possible the transfer of the activities of the Production Department to Mesta AS. As already described, measures needed to be put in place in order to (i) encourage employees to transfer to the new company; and (ii) reduce the work force.

In the present case, in order to be able (temporarily) to maintain civil servant pension and special retirement age rights, Mesta AS was effectively required to become member of the SPK. As a result of membership of SPK, Mesta AS came under a legal obligation to pay pension contributions to SPK for transferred employees. Mesta AS was prepared to accept that obligation because it would be reimbursed by the State for the costs thereof. Consequently, the cost of the pension rights linked to the SPK membership (temporarily maintenance of civil servant pension rights and of special retirement age) was effectively imposed on Mesta AS.¹⁵⁸ Moreover, the Authority observes that the legislative preparatory works (i.e., the Government's proposal to the Parliament) made it clear that the funding for the pension measures at issue would be granted on the basis of the understanding that Mesta AS would pay the relevant costs for the employees.¹⁵⁹ The overall framework (i.e., the proposal and subsequent endorsement thereof by Parliament) adopted by the Norwegian State was therefore based on the prerequisite that Mesta AS pays the pension costs. These circumstances could indicate the presence of a legal obligation for Mesta AS to cover the relevant pension costs and, thus, be considered as normally included in the budget of the undertaking.

In addition, with regard to the early pension entitlement, this measure was to be used at the discretion of the company to reduce excess staff. However, the alternative downsizing

¹⁵⁵ See also the position taken by the European Commission argumentation put forward in the *Destia* case on the restructuring of a Finnish road administration agency, OJ L 270, 10.10.2008, p. 1.

¹⁵⁶ Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 13; Case C-310/85 *Deufil* [1987] ECR 901, paragraph 8; Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraph 20.

¹⁵⁷ Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraphs 13 and 14, Case 222/04 *Cassa di Risparmio di Firenze and others* [2006] ECR I-289, paragraph 131.

¹⁵⁸ See for example *La Poste* OJ L 63 7.3.2008, p. 16 and *France Télécom* C 25/2008 of 20 August 2008.

¹⁵⁹ St.prp.nr.1Tillegg nr.1 (2002-2003).

measure also ensured protection for the employees in the case of redundancy. Costs related to measures introduced to reduce the workforce or reorganise the company should be considered as normal cost, even if the measures chosen are more costly than what the company is obliged to provide under the applicable labour law or collective agreement.¹⁶⁰ The fact that Mesta AS only makes recourse to the more costly measures because they are guaranteed state funding does not change the nature of the cost. The state funding with regard to the early pension could also therefore be considered as relieving Mesta AS of its normal cost of doing business.

Moreover, from a general point of view financial obligations linked to labour costs form part of a company's production cost and should thus, constitute normal costs of the company regardless of whether the obligations are imposed on the company by law, collective agreement or undertaken voluntarily. Hence, any relief from such obligations is normally considered as state aid.¹⁶¹

A company's labour costs comprise not only salary, but also remuneration in a broader sense, and covers pensions costs and other costs linked to the company's work force, such as unemployment benefits.¹⁶² In the present case, the fact that the measures would be funded through State grants, does not prevent the transitional right given to the employees from being a labour cost normally incurred by that undertaking.¹⁶³

Furthermore, the state funding of the pension obligations entailed additional advantages for the company. Although it was perhaps not in Mesta AS' direct commercial interest to take over the whole work force of the Production Department, it was crucial for the company to have sufficient staff, including key personnel, to ensure the efficient operation of the business from the start. The state funding ensured the achievement of that objective. In addition, the Authority finds it likely that the presence of the state funding for the particular pension rights entailed that Mesta AS was relieved of costs for other types of supplementary pensions. This is so because at least a certain number of the former employees would possibly have been able to negotiate other more favourable supplementary pension arrangements than an ordinary private pension scheme.

As the employees benefitting from the relevant pensions measures were part of the work force of Mesta AS at the point when the costs were accrued, the Authority finds that the effect of the contested measures was therefore to mitigate Mesta AS' normal budgetary burdens. Therefore, the Authority considers that the state funding of the abovementioned measures entailed elements of economic advantages for Mesta AS.

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 results from a range of incentives offered to previous leading or administrative personnel in the Public Road Administration (such as, moving costs, commuting, double rent of domiciles, travel costs etc.) in order to induce them to take up employment at Mesta AS.

¹⁶⁰ Case C-5/01 *Belgium v Commission*, cited above, paragraph 40 and Case C-241/94, *France v Commission*, cited above, paragraph 12.

¹⁶¹ See for example 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. See also Commission decisions OTE, OJ L 243, 11.9.2008, p.7; *La Poste* OJ L 63 7.3.2008, p. 16 and *France Télécom* C 25/2008 of 20 August 2008.

¹⁶² Case C-241/94 *France v Commission* [1996] ECR I-4551.

¹⁶³ Case C-5/01 *Belgium v Commission* [2002] ECR I-11991, paragraph 40.

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 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 accepted 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. The latter costs should thus be borne by the new company. However, given that the cost items have involved tasks such as cleaning out old offices of the Road Administration to be used by the new company, sorting out archives of the Road Administration in order to identify which files are relevant for the new company, it is difficult to separate the tasks from each other. Based on these considerations the Authority takes the view 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. Since the new company, Mesta AS, was established on 1 January 2003, costs incurred prior to that date must be borne by the State while costs incurred after that date must be covered by Mesta AS. On this basis the various cost items will be allocated (to the State or Mesta AS) in accordance with when the costs were incurred.

Finally, as regards the cost item of renovation of machines, Mesta AS has been compensated for cleaning out previous work sites of the Production Department. Mesta AS has therefore provided a service to the Public Road Administration.¹⁶⁴ The question is therefore whether the price of the service provided by Mesta AS to the Public Road Administration corresponds to the market price for such a service. The Authority observes that part of the work has been carried out by sub contractors on commercial terms and another part by Mesta AS itself at an hourly cost based rate.¹⁶⁵ The Authority has taken the view that the engagement of a variety of subcontractors on commercial terms is evidence that market based prices were applied and that the State compensation to Mesta AS in this regard does therefore not involve an economic advantage. Moreover, since the work carried out by Mesta AS itself was on the basis of cost prices, exclusive of any profits, the Authority takes the position that there is no reason to question the submission of the Norwegian authorities that such prices are below market prices. On this basis the

¹⁶⁴ The identification of unusable machines and other equipment was 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 (which are based on legislative preparatory works such as St. prp. nr. 1 Tillegg nr. 1 (2002-2003)).

¹⁶⁵ Cf. Annex 3 to the letter of the Norwegian authorities of 6 July 2009 (Event No: 523766).

Authority considers that Mesta AS has not benefitted from an economic advantage in the context of the prices paid by the Road Administration for “cleaning up” services provided by Mesta AS.

(i). *Other restructuring and 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 it 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.

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, the Authority considers that 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.

As to whether State financing of costs incurred for purposes of offering compensation for salary constitutes an economic advantage, the Authority recalls that, as stated above (under (i)), costs on undertakings arising from labour legislation are costs that from part of the budget of undertakings. Since the financial obligations arising out of compensation for salary have been legally imposed on Mesta AS by the Mesta Act,¹⁶⁶ the costs constitute the “normal costs” of the company. Mesta AS has therefore received an economic advantage in the form of funds to cover the costs related to compensation for salary.

(ii). *Surplus funding*

The Norwegian authorities have required Mesta AS to repay any funding in excess of the amounts spent for purposes of the restructuring costs. Hence, any issues raised in the Opening Decision as regards the spending of excess funding is no longer of relevance.

1.2.2. Contribution of assets

Mesta AS qualifies as a public undertaking within the meaning of the Transparency Directive.¹⁶⁷ In determining whether a financial transaction by the owner of a public

¹⁶⁶ Cf. Section 4 of the Mesta Act.

¹⁶⁷ Commission Directive 2006/111/EC on the transparency or financial relations between Member States and public undertakings as well as on financial transparency between certain undertakings (the

undertaking involves an economic advantage the Authority applies the “market economy investor principle” which has been confirmed several times by the Court of Justice.¹⁶⁸ According to this principle, if public authorities contribute capital or 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.¹⁶⁹ 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.¹⁷⁰ 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.¹⁷¹ 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.

It is in the light of these considerations that the Authority has examined the value assessment of assets in the context of establishing Mesta AS.

As a preliminary point, it can be inferred from case law that the Authority’s duty to establish the facts of the case extends to, where relevant, an obligation to examine expert evaluations in order to establish its evidentiary value.¹⁷² It is also clear from such case law that in case of uncertainties the Authority is entitled, but not bound, to engage outside consultants for purposes of establishing the facts of the case.¹⁷³ Finally, the Court has stated that it is the exclusive competence of the Authority to ensure that Article 61 is observed and not that of the experts.¹⁷⁴

In the present case the value of the assets contributed to the establishment of Mesta AS has been the subject of assessments carried out by Ernst & Young and Deloitte & Touche. Based on the auditor reports the Authority found in its Opening Decision that there were uncertainties as regards the assessment of assets and the application of the evaluation methods. Following the Opening Decision, the Norwegian authorities have submitted explanations from the auditor, Ernst & Young. In the view of the Authority such

“Transparency Directive”); OJ 1980 L 195/35, as amended by OJ 1985 L 229/20; OJ 1993 L 254/16; and OJ 2000 L 193/75. The Directive is incorporated into the EEA Agreement by means of Point 1a of Annex XV.

¹⁶⁸ For example joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale, Land Nordrhein-Westfalen v Commission* [2003] ECR II-435.

¹⁶⁹ 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’).”

¹⁷⁰ See first indent paragraph 6(c) of the State Aid Guidelines on rules on state ownership of enterprises and on aid to public enterprises.

¹⁷¹ 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 First Instance; 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.

¹⁷² Case T-17/02 *Olsen v Commission* [2005] ECR II-2031 at paragraph 264 (on appeal: C-320/05 P; OJ C 271, 29.10.2005, p. 14) and Case T-366/00 *Scott v Commission* [2007] ECR 2007-II-797 at paragraph 134 (on appeal: C-290/07 P; OJ C 183, 4.8.2007, p. 25).

¹⁷³ T-366/00 *Scott v. Commission*, cited above, paragraph 137.

¹⁷⁴ Case T-274/01 *Valmont v Commission* [2004] ECR II-3145 at paragraph 72.

explanations have clarified the following uncertainties first identified in the Opening Decision:

First, Ernst & Young have clarified that as of October 2002 the principle applied for determining the value of the assets is “real value” and hence the initial evaluations based on book value or simulated book value were no longer relevant.

Secondly, the identification of the real value of assets was based on a combination of the results of (i) evaluating the total value of the business (i.e., the discounted cash flow method); and (ii) assessing individual assets (or groups thereof) separately.

Thirdly, based on the fact that the total value of the business (resulting from the discounted cash flow) was less than the total value of assets (resulting from evaluating assets individually) and that Norwegian company law stipulates that equity may not exceed the total value of the business, it was necessary to reduce the value of certain assets.

On this basis the real value of assets was reduced with NOK79m divided between (i) real estate (reduced with NOK 54 million from NOK 335 million to NOK281m); and (ii) machinery (reduced with NOK25mn from NOK572m to NOK547m).¹⁷⁵ This also means that machinery was not adjusted downwards with NOK200 (from NOK747m to NOK547m) as has been alleged by the complainants. The NOK747m value did not constitute the basis for the downward assessment as it was a value based on the “simulated continuity” principle, no longer applied.¹⁷⁶ Ernst & Young have confirmed that early calculations made for purposes of explaining any connection between the value based on simulated continuity (of NOK747m) and the real value (of NOK572m) of machinery are misleading and have not formed part of the process for assessing the real value of assets.

Fourthly, as regards allocating value to the transitional contracts, it has been clarified that while the transitional contracts formed part of the discounted cash flow (and were therefore taken into account when assessing the total value of the business) the value of the contract portfolio was too low to be allocated any value and the contracts were therefore not included in the opening balance.¹⁷⁷

As is evident from the process, the Authority has thoroughly examined the material presented in the auditor reports by inquiring and requesting further material and on that basis clarified initial doubts and uncertainties. Since, as appears from above, such doubts and uncertainties have been resolved, and considering that the evaluations have been carried out on the basis of generally accepted valuation methods, the Authority has not found reason to doubt the evidentiary value of the auditor reports in relation to the value assessment of fixed assets set out in the final opening balance of Mesta AS. It has therefore not been deemed necessary to obtain another expert opinion.

Based on the above the Authority considers that there is no reason to question the value assessment of assets in the final opening balance of Mesta AS.

¹⁷⁵ Not taking account of subsequent purchases of NOK 44 million.

¹⁷⁶ The exercise undertaken by Deloitte & Touche in this regard was to terminate a task engaged on prior to the change in evaluation principles.

¹⁷⁷ As stated in section 2.4(F) of Part I, the discounted cash flow included both existing and future contracts over the 10 year period of the discounted cash flow.

1.2.3. *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.¹⁷⁸ However, the private market investor principle applies equally when the State is purchasing goods and services.¹⁷⁹ Thus, if the State enters into a contract for purposes of having services provided by a market operator, no state aid will 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.¹⁸⁰ One way for the State to obtain an indication of the market price is to launch a non-discriminatory public tender. Another way is to obtain an expert evaluation. In any event all circumstances of the transaction must be taken into account 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 a 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.

For the sake of completeness, it should be pointed out that the fact that the Authority has assessed elements relevant for determining whether the State has acted as a private market investor (by contributing the transitional contracts) to its fully owned company, does not exclude the Authority from assessing the presence of aid in other transactions between the State¹⁸¹ and that company. On the contrary, such an assessment is even more pertinent where the State is a customer in one of its own companies. As explained above, when the State is a procurer of services from an undertaking (including one of its 100% owned undertakings) it must act like a “private market investor” and pay the market price.

(i). *Construction contracts*

Following the Opening Decision the Norwegian authorities have clarified the circumstances in which the prices of the existing construction contracts were transferred to Mesta AS.

The contracts were transferred to Mesta AS at the prices originally fixed for the individual contract. The Authority has taken account of all the information provided, in particular, the internal guidelines of the Public Road Administration on how to price internal contracts. The guidelines show that the price of the contracts were fixed directly on the basis of market prices (namely the prices resulting from public tenders) or at premises which should ensure that prices ultimately reflect a market price (i.e., estimates adjusted to be in line with market price). Account has also been taken of the fact that it was an overall condition of the Road Administration for entering into agreements with the Production

¹⁷⁸ The State Aid Guidelines on state aid elements in sales of land and buildings by public authorities.

¹⁷⁹ See for example T-14/96 *Bretagne Angleterre Irlande v Commission* ECR [1999] II-319.

¹⁸⁰ T-14/96 *Bretagne Angleterre Irlande v Commission*, cited above and T-98/00 *Linde v Commission* 2002 ECR II-3961. See also Commission decision N 44/2004 (UK) National Fallen Stock Scheme of 12 August 2004, paragraph 33; and N 110/2008 (Germany) Port infrastructure – Public financing of the JadeWeserPort Project, paragraphs 75-80.

¹⁸¹ That is, the Public Road Administration.

Department that the prices reflect market prices and that for this purpose the Production Department had obtained price experience from public tenders in the construction market – which was a well functioning and developed market. The Norwegian authorities have further clarified that there were no ex-post adjustment mechanism, nor regulatory requirements which had an affect on the price at which the contracts were transferred.

Considering all circumstances together the Authority is of the opinion that the construction contracts were transferred at market price. The Authority finds that the Road Administration had, through its internal guidelines, put in place a system for pricing contracts that together with its market knowledge to a sufficient degree ensured market prices. However, to exclude that the prices fixed in the construction contracts in each and every contract deviated somewhat from market prices, would require an in-depth assessment of all the contracts. Thus, it cannot be excluded that a limited economic advantage may have been conferred on Mesta AS via the prices of (some of) the construction contracts. However, as will appear from the reasons set out below, potential state aid involved in this context would be considered compatible with the functioning of the EEA Agreement.

(ii). *Operation and maintenance contracts*

a) *Temporary public service obligation*

As a preliminary point the Authority recalls that the Norwegian authorities have argued that the measures in favour of Mesta AS in relation to the operation and maintenance contracts constitutes compensation for costs that Mesta AS had to bear due to public service obligations imposed on it. Although this argument has been made to support a submission that the measures may be considered compatible on the basis of Article 59(2) EEA, for the sake of completeness, the Authority has considered whether the presence of a public service obligation would exclude the presence of state aid all together on the basis of the criteria established in the Altmark judgment.¹⁸²

In the Altmark judgment the Court of Justice held that compensation for public service obligations does not constitute state aid when four cumulative criteria are met. First, the recipient undertaking must actually have public service obligations to discharge and such obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Finally, where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have incurred. When these four criteria are met cumulatively, the State funding does not entail an advantage to the undertaking.

As to the present case the Authority observes that Mesta AS has not been selected in a public procurement procedure. Furthermore, the Norwegian authorities have neither argued that (nor provided the Authority with information enabling a verification of whether) the costs incurred by Mesta AS correspond to the costs of a typical undertaking, well run and adequately equipped. The public service obligation has in the case of Mesta AS therefore not been discharged at the required cost efficiency established by the fourth

¹⁸² Case C-280/00 Altmark Trans and Regierungspräsidium Magdeburg [2003] ECR I-7747. See also Case T-289/03 BUPA and Others v Commission [2008] ECR II-81.

criterion of the Altmark judgment. Already for that reason the presence of state aid can therefore not be excluded on the basis of a reference to the Altmark judgment.

b) *General*

The Authority observes that all operation and maintenance contracts were transferred to Mesta AS on 1 January 2003 at prices which had been established on the basis of costs within the Production Department. The prices were therefore not resulting from public tenders and not based on expert evaluations.

The Norwegian authorities and Mesta AS have argued that by establishing Mesta AS on 1 January 2003 and awarding Mesta AS all operation and maintenance contracts in relation to the national road network the authorities established a, de facto, monopoly. There was therefore no “operation and maintenance” market yet and hence no market price. That market was only opened gradually by putting 25% of the contract portfolio up for public tender on an annual basis. Since there was no market price there was no other alternative but to transfer the contracts at cost based prices.

This argument is based on the contention that the activity of operating and maintaining roads was not open for competition on 1 January 2003. However, the Authority observes that not only was some of the operation and maintenance work of the Public Road Administration carried out by subcontractors prior to 2003,¹⁸³ but municipalities also tendered out operation and maintenance works in respect of municipal roads long before January 2003.¹⁸⁴ In other words, the activity of “operating” and “maintaining roads” was already open for competition prior to January 2003 and that did not change with the establishment of Mesta AS. On the contrary, Mesta AS was placed on the operation and maintenance market as an operator by the Norwegian authorities and has, as of its establishment, been competing with other undertakings without being constrained from participating in public tenders or taking on road operation and maintenance assignments for other contracting authorities than the Public Road Administration.¹⁸⁵

Hence on 1 January 2003 the operation and maintenance service market was open for competition and this can therefore not be a reason for stating that there was no market price. It is true that operation and maintenance work in respect of one part of that market, namely in respect of “the national road network” has been reserved for the Production Department, but this does not alter the conclusion as regards the operation and maintenance market in general.

However, even as regards operation and maintenance work *on the national road network itself*, the Norwegian authorities had – prior to 1 January 2003 – obtained prices resulting from tendering out five test/pilot projects in 1998-2001. These prices formed part of a comparative analysis of 2000 (issued by the Public Road Administration itself) on the ability to compete which showed that the cost share of the contract price was 23% points higher in the case of the Production Department than in the case of the test/pilot contracts

¹⁸³ As stated by the Norwegian authorities prior to 1.1.2003, “some private operators were engaged by NPRA Production to carry out certain tasks, for example snow clearance in some areas.” These private operators were merely subcontractors.

¹⁸⁴ For example, Oslo municipality have, via the Agency for Road and Transport (“Samferdselsetaten”) which is in charge of winter road maintenance (snow removal and salting) of 1240 km municipal roads and streets as well as pavements along such roads, awarded contracts to companies such as Oslo Vei, ISS Landscaping and Mesta AS to carry out the work:

<http://www.samferdselsetaten.oslo.kommune.no/article4242-8963.html>

¹⁸⁵ For example, Mesta AS has entered into a contract for carrying out winter road maintenance for Oslo municipality.

entered into by market operators. Moreover, a price analysis carried out in Akershus (prior to 2000) showed that the price level of the operation and maintenance contracts was about 20-25% above that of the contracts entered into by market operators.

The Authority observes that the test/pilot projects were indeed prices resulting from public tenders, and not only did such tender contracts cover the national road work, but they even involved the very same road stretches as the operation and maintenance contracts carried out by the Production Department.¹⁸⁶ In the view of the Authority a market price level had therefore been identified by the test/pilot tender prices for comparable contracts prior to 1 January 2003.

As regards the argument of the Norwegian authorities that the prices resulting from the test/pilot tenders were not reliable due to the significant difference between the highest and lowest bids, the Authority points out that in a public tender it is the winning bid which represents the market price, not the range of bids. If this would not be the case there would never be a way to establish a market price via public tenders. Indeed, to argue that the test/pilot contracts (based on public tenders) are not indicative of market value would be to contend that public tenders do not result in market prices. Moreover, contrary to what has been argued by the Norwegian authorities the fact that the test/pilot tenders were launched with a different purpose than obtaining information of the market price (namely to “educate” the Public Road Administration as a contracting authority), or that the tenders represented only a small part of the national road network, do not disqualify the resulting tender prices from representing market prices. In this regard the Authority recalls that the Commission has recently referred to prices resulting from public tenders in the road operation and maintenance market as representing market prices.¹⁸⁷

The Authority also recalls that the Norwegian authorities have argued that the public tender test/pilot contract subsequently involved additional works. Such additional works were included in the price of the transitional contracts and therefore pushed up the price of the transitional contracts. The Authority notes that, in any event, the work which were subject to public tenders and thus to competition was exclusive of additional works and it is thus the price for this work which represents the market price. The additional works are awarded to whoever the winner of the public tender is without being subject to a new tender round. So, even if the additional works might have been part of the reason for a higher price of the contracts transferred to Mesta AS it does not change the assessment of whether the price, exclusive of additional works, represents the market price.

As stated above, the Authority considers that a market price level had been identified by the test/pilot tender prices 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 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 difference¹⁸⁸ – the authorities did not take steps to renegotiate the transitional contracts.

¹⁸⁶ One example of this was the price identified for the Bærum contract (with a value of approximately NOK 75 million).

¹⁸⁷ The Destia case on the restructuring of a Finnish road administration agency, OJ L 270, 10.10.2008, p. 1, at point 234.

¹⁸⁸ Cf. the ViaNova report which revealed that the cost level of the transitional contracts which had been subject to subsequent public tenders during 2003 was about 32% below the original cost level of comparable transitional contracts transferred to Mesta AS.

Whether or not the transitional conferred an economic advantage in favour of Mesta AS, the contracts constitute a public service obligation within the meaning of Article 59(2) EEA. The remuneration paid for the services have therefore been assessed under this provision with a view to determine the presence of any overcompensation.

1.2.4. Document duty and registration fee

An economic advantage may be provided through a reduction in the undertaking's tax burden in various ways, including 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.¹⁸⁹ 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. The Authority considers therefore that Mesta AS received an economic advantage which it would not have received during the normal course of business. In this regard the Authority observes that the fact that, in the absence of an exemption, the Norwegian authorities would have increased their initial contribution in cash (corresponding to the amount of the duty), does not alter the assessment of whether the grant of the exemption involves an economic advantage for Mesta AS. This position is also in line with the Authority's conclusion in the Entra case adopted on 14 December 2005.¹⁹⁰

1.3. 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 1468 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 Directive¹⁹¹ 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 making 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.¹⁹²

(iii). *Transfer of transitional contracts*

¹⁸⁹ See point 2 of Section 3 of the State Aid Guidelines regarding state aid measures on direct business taxation.

¹⁹⁰ On 14.12.2005 the Authority adopted a negative decision (318/05/COL) 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. In this decision the Authority considered that the exemption did not form part of an administrative practice, qualifying as a general measure, because the application of an administrative practice (the "continuity principle") to the reorganisation of companies was not an administrative practice at the point in time when Entra was established.

¹⁹¹ Commission Directive 2006/111/EC on the transparency or financial relations between Member States and public undertakings as well as on financial transparency between certain undertakings (the "Transparency Directive").

¹⁹² See for example Commission Decision on state aid implemented by Germany for Landesbank Schleswig-Holstein – Girozentrale, now HSH Nordbank AG; OJ 2006 L 307, p. 134.

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 2005.¹⁹³

1.4. 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 administrative practice of the "continuity principle" which provided for an exemption from payment of document duty and registration fee. In this regard the Authority recalls that until the end of June 2005 the First Circular provided that the application of the continuity principle was limited to cases of transfer of ownership in the context of mergers between limited liability companies. The Second Circular extended this practice to de-mergers and conversions as of 1 July 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 the transaction to establish Mesta AS cannot be considered a merger, the exemptions established by means of either of the circulars are not applicable to the case of Mesta AS.

Hence, the exemption of Mesta AS from payment of the document duty and registration fee is selective and it 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 2005.¹⁹⁴

1.5. Distortion of competition and effect on trade between Contracting Parties

The international character within the EEA of the road construction, operation and maintenance markets are evidenced both by the fact that Norwegian 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 market (such as Lemminkäinen Norge AS, Skanska Norge AS, NCC Construction AS). In such circumstances, the contribution of funds to one operator active on this market, i.e., 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, operation

¹⁹³ Decision no 318/05/COL.

¹⁹⁴ Section 1.2.1 in Part II of Decision 318/05/COL.

and maintenance markets.¹⁹⁵ 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, overpricing of services or in the form of an exemption from a duty) will distort competition and affect trade.

1.6. Conclusion

Based on the above, the Authority concludes that the conditions for the presence of state aid within the meaning of Article 61(1) of the EEA Agreement are met with respect to state funding for all of the work force reducing measures (that is, early pension, temporary maintenance of civil servant pension rights and special retirement age as well as compensation for salary (or alternative measures)). The conditions for the presence of state aid are also met with respect to state funding of the costs of (i) moving and commuting; (ii) moving offices/support and maintenance offices and transfer of archives incurred after 1 January 2003; and (iii) the exemption of Mesta AS from paying document duty and registration fee. Finally, the Authority finds that whether or not the transitional contracts conferred an economic advantage in favour of Mesta AS, the contracts constitute a public service obligation within the meaning of Article 59(2) EEA.

2. 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 prior to the measures taken in relation to the transfer of the activities of the Production Department to Mesta AS. The Norwegian authorities have therefore not respected their notification obligation pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement. State aid granted in relation to measures take in the context of transferring activities from the Production Department to Mesta AS constitutes therefore ‘unlawful aid’ within the meaning of Article 1(f) of Part II of Protocol 3 to the Surveillance and Court Agreement.

3. Compatibility of the aid

3.1. Restructuring and reorganisation measures

As regards the restructuring and reorganisation measures necessary in order to set up Mesta AS as a going-concern, namely early pension, temporary maintenance of civil servant pension rights and special retirement age, as well as compensation for salary (or alternative measures), the exception laid down in Article 61(3)(c) EEA on the compatibility of aid which facilitates the development of certain economic activities or areas is relevant.

In its decisional practice, the Commission has consistently considered that the relief of financial burdens resulting from structural disadvantages suffered by a company due to its former status as a state entity, including pension rights and measures linked to downsizing the work force, can be declared compatible when such costs are incurred in the

¹⁹⁵ See in this respect Case 730/79 Philip Morris v Commission [1980] 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.”

context of liberalisation of a sector and the opening up of a sector to competition.¹⁹⁶ The Commission's conclusions in that regard have resulted from the fact that state funding for restructuring and reorganisation measures has been linked to removing barriers to entering a market and the fact that the financial burden of inherent structural disadvantages would affect the competitiveness of a company once the market was open for competition.

The Authority observes that in the present case the reform of the previous state entity of the Production Department and its transformation into an efficient company implied that the transfer of its staff to the new company formed an integrated element of the liberalisation of the national road market. In fact, the liberalisation would not have taken place without a sufficiently staffed company. The measures at issue are of a transitional nature and have been introduced partly to encourage the employees to transfer to Mesta AS and relinquish their status as civil servants, and partly to facilitate the down-sizing of the work force necessary to ensure a viable commercial undertaking.

Although the market for road operation and maintenance has been open to competition (in respect of municipal roads for example), the Production Department was not on the market as it merely served the State in-house in respect of the national road network. Thus the specific status of employees of the Public Road Administration was therefore granted in a framework not exposed to competition.¹⁹⁷

The Authority considers that state funding for the relevant measures is in the common interest. The transitional measures allowed for the opening to competition of the state segment of the road services market. By relieving Mesta AS of additional costs it must bear in the capacity of having taken over a former state integrated department, Mesta AS will be able to operate freely for purposes of providing road construction, operation and maintenance services and adjust in response to the market. The company will therefore be relieved from a barrier to entry. Overall, the transformation of a previous monopoly service provider on the national road network (i.e. the Production Department) into a private company (Mesta AS) which is subject to the same legal framework as other private operators in Norway is beneficial in the long-term for end-users. Information submitted by the Norwegian authorities shows that competition in the relevant market has increased and consequently led to lower prices both for road operations and maintenance and has, as such, benefited tax payers and the economy as a whole.

The Authority has also taken the view that state aid is the appropriate instrument. As the Production Department was never intended to be a commercial entity operating on the open market, it was able to bear the higher pension costs connected with civil servants without suffering any significant economic disadvantage. However, when opening the market for service providers on the national road network and in this context transforming the former state integrated department into a commercial company, the costs of its work force had to be aligned to that of its competitors. Against this background state aid is an appropriate instrument for relieving the commercial company of costs incurred when reorganising a former state department. As regards incentive effect and necessity, the Authority observes that in the absence of state funding Mesta AS' costs would not be aligned to those of its competitors and the company would have difficulties competing on the merits. State funding is therefore necessary and the incentive effect is fulfilled.

¹⁹⁶ See for example the considerations in EDF (France) OJ L 49 22.2.2005, p. 9; Destia (Finland) OJ. L 270 10.10.2008, p. 29; OTE (Greece) OJ L 243, 11.9.2008, p.7; La Poste (France) OJ L 63, 7.3, p. 16; and Royal Mail (the UK) C/2007 of 8.4.2009.

¹⁹⁷ This is the conclusion in the Authority's decision 349/07/COL of 18.7.2007 on the on the Norwegian Road Administration Møre and Romsdal District Office.

In this regard the Authority observes that compared to the initial staff transferred (of 4750 employees) in 2003, the work force has been gradually reduced to 3296 in 2005, and further down to 3237 in 2006 in order to be 3032 in 2007.¹⁹⁸ This means that the measures have had the desired effect.

Finally, the state funding for the relevant measures is proportionate since it is limited to the additional costs beyond those which Mesta AS would have had to bear (on average) for employees employed on private market terms.

However, as regards the state funding of the remaining restructuring and organisation costs, i.e., those related to moving, commuting, moving offices/support offices and the transfer of archives as of the start-up date of Mesta AS, the Authority has not been able to identify elements showing that the measures are linked to burdens which were acquired when the market was still closed. On the contrary, the measures relate to costs which are normally incurred when companies start-up businesses and taking on such costs would therefore not affect Mesta AS' competitiveness on the market compared to any other company. Since there is no other provision on the basis of which the Authority can find the measures, which involve operating aid, compatible, the Authority has therefore concluded that the measures (that is, moving, commuting, moving offices/support offices and the transfer of archives) are not compatible with the functioning of the EEA Agreement.

3.2. Transitional contracts

(i). Construction contracts

The Authority considers that to the extent that the prices at which the construction contracts were transferred to Mesta AS exceeded market price and hence involved state aid, such aid is compatible with the functioning of the EEA Agreement. This conclusion is based on the fact that the alternative of obtaining market prices by launching open tenders with respect to semi-finished construction projects is not a practical solution. The ongoing work would have to be ceased and potentially taken over by new contractors which would not only make the overall project considerably more costly but also potentially involve significant delays. Secondly, a number of subcontractors had been engaged by the Road Administration to carry out parts of the ongoing construction projects. If public tenders would have been launched such sub contractors would have to be terminated which would imply yet further costs. Thirdly, all construction projects were of a rather limited duration and would all expire within a short time frame of two years.

For all these reasons taken together the Authority considers that the limited amount of potential state aid involved in the context of the prices of the construction contracts transferred to Mesta AS is compatible with the functioning of the EEA Agreement by reference to Article 61(3)(c) of the EEA Agreement.

(ii). Operation and maintenance contracts

The Norwegian authorities have argued that the measures in favour of Mesta AS constitutes compensation for costs that Mesta AS had to bear due to public service obligations imposed on it by reference to Article 59(2) EEA.

It appears from the State aid Guidelines on the rules on public service compensation, state ownership of enterprises and aid to public enterprises (the "Public Service Compensation

¹⁹⁸ Cf. the website of Mesta; www.mesta.no and the Mesta AS' annual report of 2008 at p. 2.

guidelines”) that in order for compensation for public services to be declared compatible with the EEA Agreement the public service obligation must be (i) genuine and clearly defined; (ii) entrusted in an instrument specifying the public service obligation; and (iii) the amount of compensation may not exceed what is necessary to cover costs incurred in discharging the public service obligation (that is, it must be proportional), taking into account the relevant receipts and reasonable profit for discharging those obligations.¹⁹⁹

As also reiterated in the Public Service Compensation Guidelines, the Authority recalls that the EFTA States have a wide margin of discretion regarding the nature of services that could be classified as being services of general economic interest.²⁰⁰

The Authority considers that Mesta AS has been subject to genuine and clearly defined public service obligations which have been entrusted in an instrument specifying the relevant obligations.

The Authority observes that the transitional operation and maintenance contracts have been imposed on Mesta AS for a limited period in order to ensure that upon opening the operation and maintenance market (on the national road network) for competition, the activities would be carried out in a manner which permits the Public Road Administration to maintain sufficient control of road and traffic safety. The duties imposed on Mesta AS are clearly identified and described in the Standardisation Report issued by the Public Road Administration via concrete requirements for the level of standard and/or actions with respect to the public service task. The operation and maintenance of the national road network is a legitimate public service task of the State and in line with the Commission’s decision practice on road tunnel maintenance as public service obligations.²⁰¹ Moreover, in the present case the public service obligations are imposed only for a transitional period (until 2006) in order to ensure that the Public Road Administration maintains the necessary level of road and traffic security control thereby confirming the link between the public service task and the control responsibility of the Public Road Administration. Finally, in terms of entrustment the obligation to carry out the operation and maintenance work according to the standards has been entrusted to Mesta AS via a provision in each contract between Mesta AS and the State (in the capacity of the Public Road Administration).²⁰²

As regards the amount of compensation the overall rule in the Public Service Compensation guidelines is that the amount of compensation may not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account a reasonable profit for discharging those obligations.

¹⁹⁹ The Public Service Compensation guidelines entered into force on 20 December 2005. Paragraph 25 of the guidelines provides that in the case of non-notified aid the Authority applies the provisions in force at the time of the grant of the aid unless the aid was granted after the adoption of the guidelines - in which case the guidelines must be applied. Since the services provided by Mesta AS under the transitional contracts covered the period between 2003 to 2006 which is a period both before and after 2005, the Public Service Compensation guidelines are applied by analogy.

²⁰⁰ Case E-9/04 *The Bankers’ and Securities’ Dealers Association of Iceland v EFTA Surveillance Authority* [2006] EFTA Court Report page 42, paragraph 65.

²⁰¹ Commission decisions involving maintenance of roads and connecting tunnels: N 562/2005 (Italie) *Società Italiana del Traforo del Monte Bianco (SITMB)* of 16.5.2006; N 420/2005 (France) *Tunnel du Mont Blanc et Tunnel Maurice Lemaire* of 22.2.2006; and N 321/ 2001 (France) *Tunnel Routière du Fréjus* of 20.6.2001. See also *Destia* case, OJ L 270, 10.10.2008, p. 1, at points 214-216.

²⁰² This is similar to the manner in which public service obligations were entrusted in the Commission decisions referred to in the footnote above.

In this regard the Public Service Compensation guidelines require, that only the costs associated with public service obligation is taken into consideration, and that a cost separation be made between services of general economic interest and any other activities. Moreover, costs linked to investments may be taken into account when necessary for providing the public service obligation.

Based on the information submitted, the Authority considers that since Mesta AS had separate accounts for the transitional operation and maintenance contracts the costs submitted for providing the public services have been correctly allocated. Furthermore, the fact that Mesta AS allocated capital investments in proportion to revenue obtained from such contracts is also in line with the rules set forth in the Public Service Compensation guidelines. On this basis the Authority considers that 100% funding for cost coverage of the provision by Mesta AS of public services under the transitional operation and maintenance contracts is in line with the Public Service Compensation guidelines.

With respect to determining a reasonable profit the Public Service Compensation guidelines provide that the rate of return actually obtained by the public service provider must not exceed the average rate of return for the sector concerned in the recent years. In other words, the level of the rate of return actually obtained by Mesta AS must be compared to a benchmark or common denominator in the sector.

The Authority has examined the “reference rate of return” of 8.42% submitted by the Norwegian authorities (table below) to be used as a yardstick for the rate of return in the operation and maintenance sector. The Authority has taken the view that the components of the reference rate of return is based on market oriented elements. First, the Authority has taken into account that the beta value of 1 is the average beta value of 15 other companies in the operation and maintenance sector. Secondly, the market rate risk premium of 5% is within the range used by other operators in this market (of between 3-6%) and within the range of the risk premium used by PWC in a report of 2008 on Mesta AS. Thirdly, the rate of return is based on the same methodology as the rate of return of 6.7% which the State requires on its overall investments in Mesta AS (including both construction and operation and maintenance activities). Fourthly, the beta value is an average calculated over 2002-2007 which is the period during which the public services have been provided by Mesta AS.

Composition of reference rate of return
Weighted average cost of capital (WAAC)

Risk free interest ²⁰³ before tax	3.85 %
Market rate risk premium ²⁰⁴	5.00 %
Total capital beta	0.90
Net debt/equity	
Equity beta	1
Cost of equity after tax	8.85 %

²⁰³ Rate of risk free interest of 3.85% is based on the return of 5 year-state bonds (of 2003-2007) cf. Central Bank of Norway.

²⁰⁴ The market rate risk premium shows the return operators require for stocks compared to investments free of risk. A market rate risk premium of 5% is based on the fact that operators generally require 3-6%. It is 0.5% higher than the rate set in PricewaterhouseCoopers 2008 report entitled “*Mesta AS – Entrepriseverdi pr. 1 januar 2008*” (the “PWC 2008 report”). The PWC report was issued in the context of establishment of the Mesta group and was verified by the auditors BDO Noraudit.

Cost of outside capital	
Risk free interest before tax	3.85 %
Premium on loan	2.50 %
Cost of outside capital after tax	6.35 %
Tax rate	28 %
Cost of outside capital after tax	4.57 %
Weighted average cost of capital (WAAC)	
Cost of equity	8.85 %
Share of equity	90 %
Weighted cost of equity after tax	8.00 %
Cost of outside capital after tax	4.6 %
Share of outside capital	10 %
Weighted cost of outside capital after tax	0,5 %
WAAC cost of total capital after tax	8.42 %

The reference rate of return of 8.42% is based on a beta value of 1 which has been fixed by reference to:

- Observations of the beta value over a 40 month period (2002-2007) of 15 comparable companies (such as Veidekke ASA, Skanska AB-B SHS, PEAB AB);²⁰⁵
- the rate of return is correlated on the basis of Morgan Stanleys “All Country World Index”;²⁰⁶
- the equity share has been considered to be in line with the sector average (based on 15 comparable companies).²⁰⁷

A comparison between the actual rate of return obtained by Mesta AS and the reference rate of return (of 8.42%) during the years 2003-2006 (see table below) shows that Mesta AS obtained NOK66.4m in excess compensation. The Authority has therefore taken the view that this amount is to be considered as over-compensation within the meaning of the Public Service Compensation guidelines. The Authority observes that the calculation of this amount in over-compensation has already taken account of the possibility for Mesta AS (in line with the Public Service Compensation guidelines) to carry forward over-compensation²⁰⁸ obtained in one year to the next year.

Rate of return in million NOK

	2003	2004	2005	2006	Total
Mesta AS: rate of return	10.86%	6.15%	9.98%	14.5%	
Reference rate of return	8.42 %	8.42 %	8.42 %	8.42 %	
Surplus return in %	2.44 %	-2.27 %	1.56 %	6.08 %	
Surplus return NOK	44.8	-46.4	22.5	45.5	66.4

²⁰⁵ It is in line with PriceWaterhousecoopers best practice on value assessments; cf. the PWC 2008 Report.

²⁰⁶ Cf. the PWC 2008 Report.

²⁰⁷ Cf. the PWC 2008 Report.

²⁰⁸ The carry forward from 2003 to 2004 represented less than 10% of the annual compensation in line with section 20 of the Public Service Compensation guidelines.

On the basis of the above the Authority considers that the conditions of Article 59(2) of the EEA Agreement are fulfilled as regards the existence of a public service obligation and the entrustment thereof in relation to the transitional operation and maintenance contracts. However, since Mesta AS has been over-compensated with NOK 66.4 million the Authority has concluded that the compensation for Mesta AS of the public service obligations is not proportional and that this amount of over-compensation is therefore not compatible with Article 59(2) of the EEA Agreement.

3.3. Document duty and registration fee

As to state aid involved as a result of an exemption from the payment of document duty and registration fee in favour of Mesta AS, the Norwegian authorities have not argued that such aid is compatible with the functioning of the EEA Agreement. Nonetheless, the Authority has considered the possibilities for considering the aid compatible. The Authority observes first that none of the exceptions in Article 61(2) EEA apply as the aid at issue is not aimed at the objectives listed in those provisions: The exemption from document duty and registration fee is not an aid of a social character granted to individual consumers nor is it aid to make good the damage caused by natural disasters or exceptional occurrences. Secondly, an aid measure may be considered to be compatible under Article 61(3)(a) EEA 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, as there are no such areas defined by the Norwegian regional aid map this provision is not relevant. Thirdly, the exception in Article 61(3)(b) EEA does not apply since the aid in question is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of Norway. Finally, the Authority has found no reason to consider that the exception laid down in Article 61(3)(c) EEA, 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 without affecting trading conditions to an extent contrary to the common interest, is applicable to the aid in question.

Since none of the exemptions apply the Authority has considered that the aid granted via exemptions from document duty and registration fee is not compatible with the functioning of the EEA Agreement. This conclusion of the Authority is in line with the position taken in the decision adopted on 14 December 2005 in which the Authority also considered that exemptions from document duty and registration fee were not compatible with the functioning of the EEA Agreement.²⁰⁹

4. Conclusion

On the basis of the foregoing assessment, the Authority takes the view that the restructuring measures consisting of early pension, temporary maintenance of civil servant pension rights and special retirement age, as well as compensation for salary (or alternative measures) involve the grant of state aid within the meaning of Article 61(1) of the EEA Agreement which is compatible on the basis of Article 61(3)(c) EEA.

For the reasons set out above, the Authority considers that state aid in favour of Mesta AS for the following measures is not compatible with the EEA Agreement:

- (i) moving and commuting costs;

²⁰⁹ Decision 318/05/COL.

- (ii) costs for moving offices/support and maintenance offices and transfer of archives incurred after 1 January 2003;
- (iii) exemption of Mesta AS from document duty and registration fee; and
- (iv) over-compensation in relation to the provision of public services by Mesta AS under the transitional operation and maintenance contracts of an amount of NOK 66.4 million.

As these measures were not notified to the Authority, such aid constitutes unlawful aid within the meaning of Article 1(f) of Part II of Protocol 3 to the Surveillance and Court Agreement. It follows from Article 14 of 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.

HAS ADOPTED THIS DECISION:

Article 1

The state aid in relation to early pension, temporary maintenance of civil servant pension rights and special retirement age, as well as compensation for salary (or alternative measures) in favour of Mesta AS is compatible with the functioning of the EEA Agreement.

The state aid in favour of Mesta AS in relation to (i) costs for moving and commuting; (ii) costs for moving offices/support and maintenance offices and transfer of archives incurred after 1 January 2003; (iii) the exemption of Mesta AS from paying document duty and registration fee; and (iv) over-compensation with NOK 66.4 million in relation to the provision of public services by Mesta AS under the transitional operation and maintenance contracts, is not compatible with the functioning of the EEA Agreement.

Article 2

The Norwegian authorities shall take all necessary measures to recover from Mesta AS the aid referred to in Article 1(2) and unlawfully made available to Mesta AS.

Article 3

Recovery shall be affected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest and compound interest from the date on which it was at the disposal of Mesta AS until the date of its recovery. Interest shall be calculated on the basis of Article 9 in the EFTA Surveillance Authority Decision No 195/04/COL.

Article 4

The Norwegian authorities shall inform the EFTA Surveillance Authority, within two months of notification of this Decision, of the measures taken to comply with it.

Article 5

This Decision is addressed to the Kingdom of Norway.

Article 6

Only the English version is authentic.

Done at Brussels, 7 October 2009.

For the EFTA Surveillance Authority

Rakel Surlien
College Member

Kurt Jaeger
College Member