

**PARANDUSED**

**Riigiabi – Tšehhi Vabariik — Riigiabi nr C 27/04 (ex CZ 49/03) - Agrobanka Praha, a.s./ GE Capital Bank, a.s. —  
Kutse selgituste andmiseks vastavalt EÜ asutamislepingu artiklile 88 punkt 2, parandus**

(Euroopa Liidu Teataja C 292, 30. november 2004)

(2005/C 10/08)

Kirja tekst leheküljel 5 on järgmine:

“The Commission wishes to inform the Czech Republic that, having examined the information supplied by your authorities on the notified measures referred to above, it has decided that a series of them are not applicable after accession. With respect to certain guarantee measures and a put option the Commission has decided to raise objections in accordance with section 3, paragraphs 1 (c), 2 and 3 of Annex IV to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (“the Act of Accession”) and to initiate the procedure laid down in Article 88(2) of the EC Treaty.

**I. PROCEDURE**

1. By letter dated 18 December 2003, registered on 23 December 2003, the Commission received a notification concerning measures for the benefit of Agrobanka, Praha a.s. (“AGB”) and GE Capital Bank, a.s. (“GECB”), under the “interim mechanism” procedure, provided for in Annex IV.3 of the Act of Accession, which forms part of the Accession Treaty to the European Union. After a review of the documentation the Commission requested additional information on 12 February 2004. The answers to the request for information arrived on 9 March 2004. A series of meetings with the Czech authorities and the beneficiaries took place in the months of March and April. By letter received by the Commission on 30 April 2004, the Czech authorities withdrew the notification; on the same day they submitted a new notification.
2. The Commission has received several complaints concerning State aid granted by the Czech authorities to all Czech banks, including AGB and GECB.

**II. BACKGROUND****1. Beneficiaries of the aid**

3. AGB, which was founded in 1990, used to operate as a universal commercial bank in the Czech Republic. In 1995, it was the country's fifth largest bank and the largest privately owned bank. After financial difficulties AGB's banking license was withdrawn in September 1998 and it is currently in liquidation.
4. The founding shareholders of AGB were Československá obchodní banka, a.s. (“CSOB”), the Ministry of Agriculture of the Czech Republic, Agropol, a.s., Agrodát, státní podnik and Stavoinvest Banská Bystrica. In 1995, the Motoinvest Group acquired control in AGB.
5. After the imposition of forced administration on 17 September 1996, two separate entities, AGB1 and AGB2, were created within AGB. AGB1 entailed AGB's core banking activities. In June 1998, AGB1 was sold to GECB. The remaining parts of AGB are still in the liquidation process.
6. GECB, was founded in 1998 for the purpose of acquiring AGB1. It is now operating as a universal bank in the Czech Republic. GECB is entirely owned by the GE Capital International Holdings Corporation, U.S.A. (“GECIH”).

**2. AGB's financial situation**

7. According to the information in the notification AGB's difficulties already started in 1993/1994. During the mid nineties the whole Czech banking sector underwent a serious economic crisis. The Czech authorities state that this crisis also affected AGB. In addition to this, AGB's rapid expansion, combined with deficiencies in risk management and the lack of internal controls would have led to a gradual deterioration of AGB's loan portfolio.
8. The Czech authorities have informed the Commission that in 1993 AGB had a loss of CZK 2,000 million and that the equity was negative (CZK -515 million).

9. In 1993, the Czech National Bank ("CNB") ordered that AGB should prepare and implement a "Consolidation Program" in order to restore its capital adequacy. The Czech authorities submit that the "Consolidation Program" would not have entailed measures provided or granted by the State. It rather would have imposed a closer supervision of AGB.
10. The Czech authorities state that in 1996, AGB ceased to comply with the terms of the "Consolidation Program" and engaged in high risk operations and faced liquidity problems and the deterioration of its assets. The liquidity crisis and the shareholders' unwillingness to take appropriate remedial actions would have led to the imposition of a forced administration on AGB on 17 September 1996.
11. Concerning AGB's financial situation the Czech authorities state that the audit carried out after the imposition of the forced administration (balance sheet date 16 September 1996) revealed a loss of CZK -8,487 million and an equity balance of CZK -5,476 million. The regular annual audit with the balance sheet date 31 December 1996 would have recorded a loss of CZK -10,097 million and an equity balance of CZK -6,328 million.
12. The Czech authorities state that, in order to avoid negative consequences for the whole Czech banking sector, they started to implement measures with the aim of ensuring the rescue and restructuring of AGB. However, since the above mentioned audits of AGB that were carried out after the imposition of forced administration revealed losses in excess of the bank's capital the Czech authorities considered it the best way to ensure AGB's long term viability by creating a separate organisational unit, AGB1, for AGB's core banking activities. AGB1 was then to be sold to a strategic investor via an open, unconditional and transparent tender procedure.

### 3. The tender

13. The Forced Administrator announced a public tender for the sale of AGB1 in April 1997. In the following tender procedure which — according to the Czech authorities — was open transparent and unconditional, GE Capital Corporation remained as the sole party interested in the purchase of AGB1. AGB1 was then sold to GECB on 22 June 1998 for about CZK 304 million.
14. After the sale of AGB1 to GECB, the rest of AGB including AGB2 went into liquidation. In the ongoing liquidation process CNB is the sole creditor of AGB.

### 4. Present financial situation of GECB

15. GECB's results have substantially improved since it took over AGB's banking business. The net income has increased from ca. CZK - 16,500 million in 1998 when GECB was founded and acquired AGB1 to about CZK 980 million in 1999, ca. CZK 720 million in 2000, ca. CZK 840 million in 2001 and ca. CZK 910 million in 2002. The capital adequacy ratio of GECB was 74 % in 1999, 48 % in 2000, 41 % in 2001 and 30 % in 2002.

### 5. Efforts made by AGB, GECB and GECIH

16. The Czech authorities submit that AGB, GECIH and GECB have adopted measures to mitigate the state involvement in the restructuring of AGB.
17. AGB's compensatory steps would have consisted of making AGB's own assets liquid and in particular the sale of certain AGB subsidiaries to Raiffeisen Bank. This would have also meant to diminish AGB's market share as measured by AGB's share of total banking assets or certain asset classes. Apart from that, AGB would have reduced its numbers of employees from about 3 500 in 1996 to about 2 500 employees in 1998.
18. GECB and GECIH would have contributed to the restructuring by paying the purchase price, by the purchaser warranties in the "Deed of Warranties" and by the counter guarantee in the "Indemnity Agreement" by which GECIH took over CNB's liability ("Depositors' Guarantee") towards the creditors of AGB. In addition, the GE group would have contributed by way of the "Put Option" which is described further below, as well as by its excellent reputation.

## III. DESCRIPTION OF THE MEASURES

19. The Czech authorities have submitted information concerning the following measures:
20. "Depositors' Guarantee": Upon the imposition of forced administration on AGB on 17 September 1996, the CNB issued a guarantee to all of AGB's creditors and depositors in order to stop a run on the bank.
21. The guarantee covered, first of all, all of AGB's liabilities including interest payable thereof, registered in AGB's accounting records at 17 September 1996. Any liabilities maturing within a fixed term were secured until maturity. Liabilities with no fixed maturity were secured for a period of twelve months following the completion of the forced administration of AGB. In addition to that, all securities incurred by AGB after 17 September 1996 were secured until the earlier of their maturity or twelve months after the end of the forced administration. The guarantee did not set any upper limit on the secured liabilities to AGB's creditors. The Czech authorities have informed the Commission that the only potential claim remaining under the Depositors' Guarantee is a deposit of CZK [...] (\*). This deposit matures in 2005.

(\*) Confidential information.

22. "Liquidity Assistance": CNB provided financial assistance to AGB in form of a credit line. The initial credit line which was granted on 18 September 1996 amounted to CZK 6,000 million. On 15 January 1998 the credit line reached a maximum of CZK 22,500 million. The maximum drawdown occurred in February 1998 with CZK 22,100 million. The liquidity assistance terminated at the end of the forced administration and upon withdrawal of the banking license on 17 September 1998.
23. On 17 September 1998, the CNB and AGB agreed that AGB has to repay its liability to the CNB from the liquidation proceeds by 31 December 2004. However, CNB may prolong the period for repayment. The liability to repay the amounts drawn from the credit line remained with AGB after the sale of AGB1.
24. "Unsuccessful attempt to increase AGB's capital": The CNB instructed its subsidiary Česká finanční s.r.o. ("Česká finanční") to participate in a capital increase in AGB through the subscription of a new issue of AGB shares. On 2 April 1998 Česká finanční subscribed the new shares for a consideration of CZK 9,000 million. The consideration was paid to AGB on 6 April 1998.
25. However, the capital increase was challenged by a minority shareholder of AGB and a Czech court discontinued the capital increase process in May 1998. After the end of the forced administration, the General Meeting of shareholders cancelled the decision to increase AGB's capital and consequently Česká finanční did finally not become a shareholder in AGB. If the capital increase and the subscription of the shares by Česká finanční had been successful, Česká finanční would have acquired 68 % ownership in AGB.
26. Česká finanční tried to recover the amount of CZK 9,000 million before a court on grounds of unjust enrichment. The CNB, which took over the receivable from Česká finanční in 2002 tried to recover it. However, in March 2004, CNB withdrew from the litigation against AGB because CNB considered it commercially more reasonable not to continue with the litigation.
27. "Purchase Price": The purchase price initially offered by GECB was CZK 2,000 million in cash in return of an adjusted net asset value of AGB1 of CZK 4,000 million. Since the net asset value of AGB1 was in fact lower the net asset value had to be increased to attain the purchase price. It was decided by the parties that this should be done in form of an increase in the share capital of GECB, paid for by the CNB, after the purchase of AGB1.
28. Following negotiations between the CNB and GECB the purchase price and the adjusted net asset value were both reduced by the same amount to avoid unnecessary cash exchanges. Firstly, the purchase price was reduced to CZK 500 million in return for an adjusted net asset value of AGB1 of CZK 2,500 million. The purchase price was subject to further adjustment in the light of the calculation of the adjusted net asset value as of the transaction date. The purchase price finally paid was CZK 304.154 million.
29. "Increase in GECB's capital": This measure has to be seen against the background that the purchase price for AGB1 was dependant on achieving the target-adjusted net asset value of AGB1 of CZK 2,500 million because the Czech authorities agreed to compensate GECB for assuming obligations in excess of the value of the assets acquired in the purchase of AGB1.
30. As the net asset value of AGB1 as of 21 June 1998 was negative, the targeted net asset value of AGB1 was attained by a capital injection by the CNB. This capital injection was made through a capital increase in GECB.
31. Under the "Framework Agreement" between CNB, GECB and GECIH, entered into on 22 June 1998, CNB agreed to make a capital contribution of CZK 19,717.5 million to GECB's equity to increase the adjusted net asset value of AGB1 to the required level of CZK 2,500 million. This was done in the way that CNB subscribed for ten shares in GECB for a total price of 19,717.5 million. After difficulties in registering the capital increase it was finally registered on 25 March 2003 in the Prague Commercial Register. Subsequently, in 2003, CNB sold the 10 shares to GECIH for a total consideration of CZK 1,000.
32. "Warranties and indemnities": In course of the sale of AGB1 to GECB, AGB as the seller of AGB1 agreed to a number of guarantee arrangements which are set out in the "Deed of Warranties", signed on 21 June 1998. CNB was not a party to this agreement. However, the commitments made by AGB in the "Deed of Warranties" were backed by the CNB in the "Indemnity Agreement", signed on 22 June 1998. The "Indemnity Agreement" was amended on 25 April 2004 by the "Amendment Number 1 to Indemnity Agreement" <sup>(1)</sup>. The Czech authorities have provided a list of the guarantee arrangements in Appendix 23 to the Rescue and Restructuring Plan ("Appendix 23") that forms part of the notification. However, it is stated that this list is not exhaustive.
33. According to the information provided by the Czech authorities many of the guarantees under the "Deed of Warranties" and the "Indemnity" Agreement have already expired on 22 June 2001. This concerns the following guarantee arrangements of the "Deed of Warranties" as summarised in No A.1-A.18 in Appendix 23:
  - Clause 2.2. (Organisation)
  - Clause 2.3 (Integrated Investments and AVE Leasing)
  - Clause 2.5 (Consents)
  - Clause 2.5 (No violation)
  - Clause 2.6. (Financial Statements)

<sup>(1)</sup> Unless otherwise indicated, all references to the "Indemnity Agreement" refer to the Indemnity Agreement as amended by the "Amendment Number 1 to Indemnity Agreement" of 25 April 2004.

- Clause 2.9. (Loans)
- Clause 2.10 (Real Property)
- Clause 2.11 (Tangible Assets)
- Clause 2.12 (Contracts)
- Clause 2.13 (Regulatory Compliance)
- Clause 2.15 (Severance Arrangements)
- Clause 2.16 (Employees, Benefit Plans)
- Clause 2.17 (Insurance)
- Clause 2.18 (Litigation)
- Clause 2.19 (Intellectual Property Rights)
- Clause 2.21 (Creation of New Agrobanka and Old Agrobanka)
- Clause 2.23 (Broker and Finders)
- Clause 2.7 (No Undisclosed Liabilities)

34. Based on the information provided by the Czech authorities, the guarantee arrangements that have not expired before the accession of the Czech Republic to the European Union are summarised as follows:

"Warranties and Indemnities" expiring on 22 June 2008:

| Content                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | Limitation of the amount              |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------|
| Indemnification for any litigation adversely affecting the banking business: AGB agreed to indemnify the GECH, GECB and other purchaser's indemnified persons (the Purchaser) in respect of any losses resulting from any claims brought against the Purchaser as a result of any matter occurring prior to the Closing Date which adversely affects the banking business. Clause 5.1(a)(i) <sup>(1)</sup>                                                                | Aggregate limit of CZK 2,000 million  |
| Indemnification for violation of law: AGB agreed to indemnify the Purchaser in respect of any losses resulting from any violation by the Seller prior to the closing date of any applicable law or regulation which adversely affects the banking business. Clause 5.1(a)(ii)                                                                                                                                                                                             | Aggregate limit of CZK 2,000 million  |
| Indemnification in respect of employment litigation: AGB agreed to indemnify the Purchaser in respect of any losses resulting from any claims brought against GECB by any of the employees in relation to any actual or alleged act or omission by the Seller prior to the Closing Date. Clause 5.1.(a)(v)                                                                                                                                                                | Aggregate limit of CZK 2,000 million  |
| Indemnification in respect of employment litigation: AGB agreed to indemnify the Purchaser in respect of any losses resulting from any claims relating to any contract duty or liability of employment with any retained employee or any former, existing or future employee of the Seller who is an employee relating to AGB2. Clause 5.1.(a)(vi)                                                                                                                        | Aggregate limit of CZK 2,000 million  |
| Action for the declaration of invalidity of the agreement concerning the sale of AGB1 to GECB brought on 27 July 1998 with the Regional Commercial Court in Prague by Václav Sládek against AGB in liquidation and the Purchaser; and with the association of minority shareholders of AGB as a side plaintiff. (Indemnification based on Clause 4.1 of the Indemnity Agreement)                                                                                          | Aggregate limit of CZK 15,000 million |
| Action for the declaration of invalidity of the agreement concerning the sale of AGB1 to GECB brought on 22 June 2001 with the Regional Commercial Court in Prague by Petr Maur, František Vysloužil, Pavel Tykač, Karel Tománek, Pavel Šimek and Tomáš Fohler against AGB in liquidation, the Purchaser and Jiří Klumpar; and with the association of minority shareholders of AGB as a side plaintiff. (Indemnification based on Clause 4.1 of the Indemnity Agreement) | Aggregate limit of CZK 15,000 million |

| Content                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Limitation of the amount              |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------|
| Action for Declaration of the Validity of the Agreement on the sale of AGB1 brought on 18 June 2002 with the Municipal Court in Prague by HZ Praha, spol. s.r.o. against AGB in liquidation, the Purchaser and Jiří Klumpár. (Indemnification based on Clause 4.1 of the Indemnity Agreement)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | Aggregate limit of CZK 15,000 million |
| Application for Registration of the Sale of AGB1 in the Commercial Registry made on 18 October 1999, and in which the applicant is currently AGB in liquidation and the Prague Municipal State Prosecutor Office has joint as a party to the proceeding. (Indemnification based on Clause 4.1 of the Indemnity Agreement)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | Aggregate limit of CZK 15,000 million |
| Any claim for Indemnification concerning the validity or legitimacy of the sale of AGB1 to the Purchaser brought by: <ul style="list-style-type: none"> <li>— The Seller, CNB, or a shareholder, liquidator, bankruptcy trustee, auditor or forced administrator of the Seller</li> <li>— A member of a corporate body of the Seller or the Purchaser</li> <li>— An employee, borrower, client, lender, or creditor to the Seller or the Purchaser</li> <li>— An heir, legal successor or assignee, liquidator, bankruptcy trustee, receiver, trustee, administrator or forced administrator (or a person having similar powers), or association of one or more of the above-listed individuals and entities, or</li> <li>— A Czech state prosecutor, Czech criminal authority, or Czech tax authority having jurisdiction over the Seller or the Purchaser.</li> </ul> (Indemnification based on Clause 4.1 of the Indemnity Agreement) | Aggregate limit of CZK 15,000 million |

(<sup>1</sup>) Unless otherwise indicated, all references to Clauses are to Clauses in the 'Deed of Warranties'.

"Warranties and Indemnities" expiring on 22 June 2010:

| Content                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | Limitation of the amount              |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------|
| Taxes: AGB warrants that it has (i) complied with the relevant withholding tax requirements imposed by all applicable laws, (ii) it has disclosed to the Purchaser the existence of any taxes claimed by any tax authority to be due and owing by AGB, (iii) no tax audit is pending or, to AGB's knowledge, threatened with respect to any taxes due from AGB, and (iv) it has not been nor is in violation of any applicable tax law, which would create a liability for the Purchaser and (v) no tax will be imposed on the Purchaser as a result of the consummation of the transactions contemplate. Clause 2.14(c) and (d) | Aggregate limit of CZK 2,000 million  |
| Environmental matters: AGB warrants that, as far as it is aware, no hazardous substances are located on any premises of AGB1 in concentrations exceeding those allowed by the applicable law. Clause 2.20.                                                                                                                                                                                                                                                                                                                                                                                                                       | Aggregate limit of CZK 5,000 million  |
| Taxes in connection with transaction: AGB warrants that no taxes will be imposed on the Purchaser as a result of the consummation of the sale. Clause 2.14(e)                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | Aggregate limit of CZK 15,000 million |
| Non-business assets and liabilities: AGB agreed to indemnify the Purchaser in respect of any losses resulting from any claims relating to any non-business assets or non-business liabilities. Clause 5.1.(a)(iv)                                                                                                                                                                                                                                                                                                                                                                                                                | Aggregate limit of CZK 5,000 million  |
| Customs and excise liabilities: AGB agreed to indemnify the Purchaser in respect of losses resulting from claims brought against it by the Czech customs and excise authorities in relation to AGB Customs Guarantee. Clause 5.1.(a)(iv)                                                                                                                                                                                                                                                                                                                                                                                         | Aggregate limit of CZK 5,000 million  |

"Warranties and Indemnities" expiring on 22 June 2013:

| Content                                                                                                                                                                                                                       | Limitation of the amount             |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------|
| Operations of AGB1: AGB warrants that, except as set forth in disclosure schedules of the transaction documents, no other asset or liability forms part of AGB1. Clause 2.22.                                                 | Aggregate limit of CZK 2,000 million |
| Authorisation: AGB warrants its full power and authorisation to sign the contractual documentation and implement the transaction. AGB further warrants that the contracts are binding and enforceable against it. Clause 2.4. | Aggregate limit of CZK 2,000 million |
| Validity of the sale: AGB agreed to indemnify the Purchaser in respect of any loss resulting from any claim concerning the validity or constitutional legitimacy of the sale of AGB1. Clause 5.1.(a)(iii)                     | Aggregate limit of CZK 2,000 million |

"Warranties and Indemnities" expiring 15 years after closing:

| Content                                                                                                                                                                                                                                       | Limitation of the amount             |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------|
| Environmental losses: AGB agreed to indemnify the Purchaser in respect of any environmental loss which the purchaser may incur in respect of any premises of AGB1 and which arises from a condition existing prior to closing. Clause 5.1.(b) | Aggregate limit of CZK 5,000 million |

35. "Put Option": On 22 June 1998, CNB and GECIH entered into the "Put Option Deed" which provides that, under certain circumstances, GECIH is entitled to require that CNB purchases from GECIH all its shares in GECB.
36. The Czech authorities have explained that currently only two events remain that would permit GECIH to exercise the Put Option. This would be 1) a decision or judgment which orders or declares the transactions by the Purchase Agreement void or invalid or that they be unwound or that any portion of the assets of AGB1 be returned or that 2) CNB elects not to provide indemnity payments under the "Indemnity Agreement" in excess of CZK 2,000 million or a default by CNB in making such payments.
37. The CNB has the right to remedy an event which gives rise to the Put Option by putting GECB and GECIH in the same position as they would have been if such event had not occurred. It is stated that this could involve payments or the transfer of assets to GECB. The put option right expires on 22 June 2008.

#### *The Put-Price*

38. The put price for which CNB has to purchase all of the shares in GECB varies depending on the date on which the Put Option is exercised. From June 2003 until the date when the put option right will expire the put price is the greatest of the following:
- the adjusted unwind amount,
  - the net asset value of GECB as of the date at which the put price is determined, or
  - the fair market value of GECB as of the date at which the put price is determined. In case that the purchase price is determined by the fair market value the events which triggered the right to exercise the Put Option will not be taken into account.

#### **IV. REQUEST FOR ASSESSMENT**

39. In their notification the Czech authorities have asked the Commission to take a decision under the Interim Mechanism of Annex IV.3 of the Act of Accession only in respect of the "Depositors' Guarantee", the "Liquidity Assistance", the "Unsuccessful attempt to increase AGB's capital", the "Purchase Price", the "Increase in GECB's capital as well as to certain Warranties and Indemnities". These "Warranties and Indemnities" are listed in Appendix 4 to the Notification ("Appendix 4") and comprise the following:

"Warranties and Indemnities" expiring on 22 June 2008:

| Content                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | Limitation of the amount              |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------|
| Action for the declaration of invalidity of the agreement concerning the sale of AGB1 to GECB brought on 27 July 1998 with the Regional Commercial Court in Prague by Václav Sládek against AGB in liquidation and the Purchaser; and with the association of minority shareholders of AGB as a side plaintiff. (Indemnification based on Clause 4.1 of the Indemnity Agreement)                                                                                          | Aggregate limit of CZK 15,000 million |
| Action for the declaration of invalidity of the agreement concerning the sale of AGB1 to GECB brought on 22 June 2001 with the Regional Commercial Court in Prague by Petr Maur, František Vysloužil, Pavel Tykač, Karel Tománek, Pavel Šimek and Tomáš Fohler against AGB in liquidation, the Purchaser and Jiří Klumpar; and with the association of minority shareholders of AGB as a side plaintiff. (Indemnification based on Clause 4.1 of the Indemnity Agreement) | Aggregate limit of CZK 15,000 million |
| Action for Declaration of the Validity of the Agreement on the sale of AGB1 brought on 18 June 2002 with the Municipal Court in Prague by HZ Praha, spol. s.r.o. against AGB in liquidation, the Purchaser and Jiří Klumpar. (Indemnification based on Clause 4.1 of the Indemnity Agreement)                                                                                                                                                                             | Aggregate limit of CZK 15,000 million |

| Content                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | Limitation of the amount              |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------|
| Application for Registration of the Sale of AGB1 in the Commercial Registry made on 18 October 1999, and in which the applicant is currently AGB in liquidation and the Prague Municipal State Prosecutor Office has joint as a party to the proceeding. (Indemnification based on Clause 4.1 of the Indemnity Agreement)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | Aggregate limit of CZK 15,000 million |
| Any claim for Indemnification concerning the validity or legitimacy of the sale of AGB1 to the Purchaser brought by:<br>— The Seller, CNB, or a shareholder, liquidator, bankruptcy trustee, auditor or forced administrator of the Seller,<br>— A member of a corporate body of the Seller or the Purchaser,<br>— An employee, borrower, client, lender, or creditor to the Seller or the Purchaser,<br>— An heir, legal successor or assignee, liquidator, bankruptcy trustee, receiver, trustee, administrator or forced administrator (or a person having similar powers), or association of one or more of the above-listed individuals and entities, or<br>— A Czech state prosecutor, Czech criminal authority, or Czech tax authority having jurisdiction over the Seller or the Purchaser.<br>(Indemnification based on Clause 4.1 of the Indemnity Agreement) | Aggregate limit of CZK 15,000 million |

“Warranties and Indemnities” expiring on 22 June 2010:

| Content                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | Limitation of the amount              |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------|
| Taxes: AGB warrants that it has (i) complied with the relevant withholding tax requirements imposed by all applicable laws, (ii) it has disclosed to the Purchaser the existence of any taxes claimed by any tax authority to be due and owing by AGB, (iii) no tax audit is pending or, to AGB's knowledge, threatened with respect to any taxes due from AGB, and (iv) it has not been nor is in violation of any applicable tax law, which would create a liability for the Purchaser and (v) no tax will be imposed on the Purchaser as a result of the consummation of the transactions contemplate. Clause 2.14(c) and (d) | Aggregate limit of CZK 2,000 million  |
| Taxes in connection with transaction: AGB warrants that no taxes will be imposed on the Purchaser as a result of the consummation of the sale. Clause 2.14(e)                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | Aggregate limit of CZK 15,000 million |

40. This limited request for assessment leaves thus out the other guarantee arrangements under “Warranties and Indemnities” as well as the “Put Option”.
41. First of all, it has to be stated that under the Interim Mechanism of Annex IV.3 of the Act of Accession there is no obligation on the part of the acceding countries to notify measures. With a view of their potential inclusion in the list of existing aid within the meaning of Article 88(1) of the EC Treaty the acceding countries can decide what measures they wish to notify.
42. However, the Commission considers that the guarantee arrangements notified for a decision by the Commission, are inextricably linked to the other Warranties and Indemnities excluded by the Czech authorities from the scope of their request for assessment. The rights and obligations enforceable under the guarantee arrangements, whether falling under the request for assessment or not, stem all out of the same contracts: the “Deed of Warranties” and the “Indemnity Agreement”. Therefore they cannot be artificially separated. Consequently, the Commission will assess all “Warranties and Indemnities” in their entirety.
43. Although the Put Option might appear to be at first sight an arrangement detachable from the “Warranties and Indemnities”, since it was entered into under a separate protocol, its provisions fixing an appropriate compensation for GECIH in case that the Czech authorities decide to refrain from paying indemnities beyond a certain threshold, qualify and complement those of the Warranties and Indemnities with which it is then closely inter related. Consequently, though not requested, the Commission is obliged under the present decision to assess also the Put Option.

## V. ASSESSMENT

## 1. Applicability after Accession

## 1.1. Legal Framework – The “interim mechanism” procedure

44. Annex IV.3 of the Accession Act sets out the “interim mechanism” procedure. It provides a legal framework for the assessment of aid schemes and individual aid measures put into effect in a new Member State before the date of accession and still applicable after accession; this procedure applies to those schemes and measures which have not already been included in the list of ‘existing aid’ measures attached to Annex IV and which were put into effect from 10 December 1994 onwards. Measures that are applicable after accession, which were put into effect before 10 December 1994 are regarded upon accession as existing aid within the meaning of Article 88(1) of the EC Treaty. In this respect, the relevant criterion is the legally binding act by which the competent national authorities undertake to grant aid <sup>(7)</sup>.
45. Under the interim mechanism, the compatibility with the common market of the aid measures applicable after accession must in the first instance be assessed by the national authority responsible for monitoring State aid (the Office for Protection of Economic Competition (“OPC”) in the Czech Republic).
46. The “State monitoring authority” can seek legal certainty by notifying the measures to the European Commission. Upon notification, the Commission will consider the compatibility with the common market of notified measures.
47. If the Commission has serious doubts regarding the compatibility of the notified measures with the *acquis communautaire*, it can raise objections within three months from the date of receiving a complete notification.
48. On the contrary, if the Commission does not object to notified measures within this deadline, the notified measures will be regarded as existing aid from the date of accession.

## Aid measures not applicable after accession

49. Aid measures that are not applicable after accession cannot be examined by the Commission under the procedures laid down in Article 88. Given that the interim mechanism only determines whether a given measure constitutes existing aid for the purpose of State aid procedures taking place after accession, it neither requires nor empowers the Commission to review aid measures, which are not applicable after accession.
50. On the basis of the outlined legal framework, a first assessment on whether the notified measures are applicable after accession is thus critical.
51. Only such measures that can still give rise, after accession, to the grant of additional aid or to an increase in the amount of aid already granted, may qualify as existing aid by virtue of the interim mechanism — if they fulfil the relevant conditions — and are therefore subject to it. On the other hand, the interim mechanism is devoid of any purpose in respect of aid measures that have already been finally and unconditionally granted for a given amount before accession. Here again, in order to determine whether this is the case, the relevant criterion is the legally binding act by which the competent national authorities undertake to grant aid.
52. This interpretation is consistent with the aim, purpose and logic of the interim mechanism and of State aid control in general. Furthermore, in recognising the immediate economic impact of such state aid interventions, a new measure must be assessed at the point in time when the aid is granted; it is the legal commitment of the state that is synonymous with the granting of aid and not the mere payment thereof. Any payment, current or future, under a legal commitment is an act of simple implementation and cannot be construed to be new or additional aid. Therefore, the Commission considers that for a measure to be considered as applicable after accession it must be shown that it is liable to produce an additional benefit that was not known, or not precisely known, when the aid was granted.
53. On the basis of this criteria, the Commission considers the following aid measures to be applicable after accession:
  - Any aid schemes that entered into effect before the date of accession and on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner after accession,
  - Aid that is not linked to a specific project and that is awarded before accession to one or several undertakings for an indefinite period of time and/or an indefinite amount,
  - Individual aid measures for which the precise economic exposure of the State is not known on the date the aid is granted.
54. In its letter of 4 August 2003 to the Mission of the Czech Republic to the EU, the Commission’s services have informed the Czech Republic about its understanding of the notion “applicable after accession” in respect to individual aid measures:

<sup>(7)</sup> Judgment of the Court of First Instance of 14 January 2004 in Case T-109/01, *Fleuren Compost v Commission*, nyr, paragraph 74.

55. "Individual aid measures as defined in Article 1 (e) of the Procedural Regulation are regarded as applicable after accession if they are likely to increase the liability of the state after the day of accession. DG Competition considers that this condition would in particular apply in the case of exemptions from or reductions of compulsory charges (e.g. exemptions from or reductions of taxes, compulsory social security contributions), where the benefit is still in force after accession, in guarantees or financial constructions like credit lines and "drawing rights" that extend beyond the date of accession. In all such cases, these measures can be regarded as still applicable after accession: even though the measure has been formally adopted, the total liability for the state is not clearly known at the time the aid was granted."
56. The Commission considers individual measures to be applicable after accession in the meaning of Annex IV.3 of the Act of Accession if the precise economic exposure of the State is not known on the date the aid is granted and still unknown on the date of accession.
57. With respect to guarantees the following conditions have to be met in order to consider a measure not to be applicable after accession,
- The risks are precisely defined and included in an exhaustive list closed by the date of accession,
  - There is an overall cap for the payable amounts.
  - The litigation relates to events that had already occurred by the date of the granting of the indemnities and not for any future events.

#### 1.2. *The individual measures*

58. "Depositors' Guarantee": The Depositors Guarantee by which the CNB secured the liabilities of all creditors of AGB was assumed by GECB after the sale of AGB1 to GECB. However, in the event that GECIH exercises the Put Option the CNB may be liable again under the Depositors Guarantee. Yet, only one claim, which is clearly defined, remains under the Depositors' Guarantee. The Commission therefore considers the potential exposure to be clearly defined before accession and the measure not to be applicable after accession.
59. "Liquidity Assistance": CNB provided a credit line for AGB of finally CZK 22,500 million. This liquidity assistance terminated in September 1998. It is intended that the liability should be repaid by AGB from the proceeds of the liquidation procedure by 31 December 2004. Since the liquidity assistance terminated in September 1998 it does not lead to any further exposure of the Czech Republic. The repayments from the proceeds of the liquidation procedure will only diminish the exposure of the Czech Republic. In consequence of this, the measure is considered not to be applicable after accession.
60. "Unsuccessful attempt to increase AGB's capital": In 1998, CNB's subsidiary Česká finanční tried to participate in a capital increase in AGB in buying new shares for a consideration of CZK 9,000 million. The CZK 9,000 million was paid to AGB on 6 April 1998. After court proceedings and a final decision of AGB's general shareholders' meeting not to increase the capital, CNB tried to recover the money paid. However, the attempt to recover the money was given up in March 2004.
61. The attempt to increase AGB's capital was a one-off measure that took place before accession and that will no longer increase the exposure of the Czech Republic. Also the attempt to recover the money was given up before accession of the Czech Republic to the European Union. In this respect the exposure of the Czech Republic can thus not further increase after accession either. In consequence, the unsuccessful attempt to increase AGB's capital, including the attempt to recover the money paid, is considered not to be applicable after accession.
62. "Purchase Price": The final purchase price for AGB1 paid by GECB/GECIH was fixed at CZK 304.154 million. The measure does not lead to any further exposure of the Czech Republic. In consequence, it is considered not to be applicable after accession.
63. "Increase in GECB's capital": In July 1998 the CNB subscribed for ten new shares in GECB and it paid CZK 19,717.5 million for them. This was a one-off measure which will not lead to any further exposure of the Czech Republic. It is therefore considered not to be applicable after accession.
64. "Warranties and Indemnities": In the "Indemnity Agreement" the CNB accepted to back the commitments made by AGB as the seller of AGB1 in the "Deed of Warranties". Both agreements contain various guarantee arrangements in favour of GECB and GECIH.
65. The following guarantee arrangements of the "Deed of Warranties" as summarised in No. A.1-A.18 in Appendix 23, i.e.: Clause 2.2. (Organisation), Clause 2.3 (Integrated Investments and AVE Leasing), Clause 2.5 (Consents), Clause 2.5 (No violation), Clause 2.6. (Financial Statements), Clause 2.9. (Loans), Clause 2.10 (Real Property), Clause 2.11 (Tangible Assets), Clause 2.12 (Contracts), Clause 2.13 (Regulatory Compliance), Clause 2.15 (Severance Arrangements), Clause 2.16 (Employees, Benefit Plans), Clause 2.17 (Insurance), Clause 2.18 (Litigation), Clause 2.19 (Intellectual Property Rights), Clause 2.21 (Creation of New Agrobanka and Old Agrobanka), Clause 2.23 (Broker and Finders), Clause 2.7 (No Undisclosed Liabilities) have already expired on 22 June 2001. Therefore the exposure of the Czech Republic cannot increase after the accession of the Czech Republic to the European Union concerning these guarantees. The Commission therefore considers these specific guarantees not being applicable after accession.

#### Non-exhaustive list

66. With respect to guarantee arrangements that have not expired before accession, the conditions set out above in Section V.1.1. have to be met to consider the guarantees not to be applicable after accession. In particular, the scope of the guarantees must be precisely defined before accession by way of an exhaustive list of claims.
67. The Czech authorities have submitted a list of claims in Appendix 23. However, the Czech authorities have explicitly stated that the list is not exhaustive. In consequence, the Commission has serious doubts that this criterion is fulfilled.

#### Lack of precise definition of the risks

68. Another criterion for considering a guarantee not to be applicable after accession is that the risks for the acceding country are precisely defined. The Commission considers that the risks for the Czech Republic are not sufficiently defined under the "Warranties and Indemnities" that have not expired before accession.
69. For instance, concerning the indemnification for any litigation adversely affecting the banking business under Clause 5.1(a)(i) the exposure of the Czech State may increase because it cannot be predicted how many claims may arise under the abstract terms of the provision. The Commission therefore considers that the risks of the Czech State are not precisely defined and the measure being applicable after accession. The same reasoning holds true for all other measures listed by the Czech authorities in Appendix 23, including those guarantee arrangements to which the Czech authorities try to limit their request for a decision under the Interim Mechanism Procedure.
70. Concerning the tax claims in Clauses 2.14(c), (d) and Clause 2.14(e) of the "Deed of Warranties" the exposure of the Czech Republic may increase after accession. The provisions concerning the tax guarantees do not specify the individual events that could trigger indemnification. Furthermore, as a result, the potential exposure of the Czech State resulting from those events cannot be quantified.
71. Also with respect to Clause 4.1 of the "Indemnity Agreement" the risk for the Czech Republic is not sufficiently defined. The Czech authorities describe five "claims" under this provision. Four of the claims concern specific legal proceedings concerning Clause 4.1 of the "Indemnity Agreement". The fifth claim describes in an abstract manner the procedures that can arise under Clause 4.1, which allows to add further claims. It therefore cannot be determined how many claims in total can arise under Clause 4.1 of the "Indemnity Agreement". In result, the Commission considers that the risks for the Czech Republic are not precisely defined.

#### Lack of cap for the payable amounts

72. The guarantees listed by the Czech authorities are subject to different caps which limit the maximum exposure of the Czech Republic under the individual guarantees. However, GECIH may exercise the "Put Option" in case that the CNB refuses to make any payments above CZK 2,000 million. In result, "Put Option" could invalidate the caps concerning the "Warranties and Indemnities".
73. In sum, under the guarantee arrangements that have not expired before accession the exposure of the Czech Republic is not precisely defined, the potential claims are not included in an exhaustive list closed by the date of accession and the claims lack a sufficient cap.
74. "Put Option": In the event that the purchase of AGB1 is declared void or found to be invalid or be unwound GECIH may exercise a put option with the effect that the CNB is obliged to purchase all of the shares in GECB. The same applies if the CNB decides not to make any payments concerning the "Warranties and Indemnities" above a limit of CZK 2,000 million. The purchase price for the shares in GECB has then to be determined which could either be the unwind amount, the net asset value or the fair market value of GECB without taking into account the event which triggered the right to exercise the "Put Option".
75. The Commission considers that the potential exposure of the Czech Republic is not sufficiently defined. In particular, the put price that the CNB has to pay varies depending on factors which are not foreseeable including the fact that the event that triggers the right to exercise the Put Option is not taken into account for the calculation of the price. The Commission therefore considers that the exposure of the Czech Republic is not clearly defined before accession and that the "Put Option" is applicable after accession.

#### 1.3. Conclusions

76. Accordingly, the Commission considers that:
- a) the following measures are not applicable after accession:
- "Depositors Guarantee",
  - "Liquidity Assistance",

- “Unsuccessful attempt to increase AGB’s capital”,
  - “Purchase Price”,
  - “Increase in GECB’s capital”,
  - “Warranties and Indemnities” in so far as summarised in No. A.1-A.18 in Appendix 23 to the Rescue and Restructuring Plan, i.e.: Clause 2.2. (Organisation), Clause 2.3 (Integrated Investments and AVE Leasing), Clause 2.5 (Consents), Clause 2.5 (No violation), Clause 2.6. (Financial Statements), Clause 2.9. (Loans), Clause 2.10 (Real Property), Clause 2.11 (Tangible Assets), Clause 2.12 (Contracts), Clause 2.13 (Regulatory Compliance), Clause 2.15 (Severance Arrangements), Clause 2.16 (Employees, Benefit Plans), Clause 2.17 (Insurance), Clause 2.18 (Litigation), Clause 2.19 (Intellectual Property Rights), Clause 2.21 (Creation of New Agrobanka and Old Agrobanka), Clause 2.23 (Broker and Finders), Clause 2.7 (No Undisclosed Liabilities).
- b) The remaining “Warranties and Indemnities” as well as the “Put Option” are measures applicable after accession.

## 2. State Aid in the meaning of Article 87(1) EC Treaty

77. According to Article 87(1) EC Treaty, there is State aid when aid granted by a Member State or through State resources in any form whatsoever distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade between Member States.
78. Through the “Indemnity Agreement” the CNB, as a public entity, guarantees for the commitments made by AGB vis-à-vis the GECB and GECIH. Therefore, the guarantee arrangements involve state resources. Also concerning the “Put Option” state resources are involved since the CNB committed itself to acquire all shares in GECB.
79. The Commission considers that the guarantee arrangements under the “Warranties and Indemnities” and the “Put Option” favour GECB and GECIH. The Czech authorities acted to facilitate the sale of a private bank to another private undertaking. The Czech authorities were not the owners of the bank and the purchase price for AGB1 was paid to AGB. The purchase price does therefore in no way offset the disbursements made by the Czech authorities. The Czech authorities and the CNB in particular, were not obliged to back the commitments made by AGB or to agree to the “Put Option”. Contrary to the Czech authorities’ views such behaviour cannot be seen to be in line with the market investor principle. Furthermore, the “Put Option” appears to constitute a safety net for GECIH to cover an eventual loss produced either by a decision to declare void the purchase of the bank or the difficulties it could face in connection with the bank in case that the State refrains from paying aid beyond a certain threshold under the indemnities arrangements.
80. Before AGB entered into forced administration it used to be the fifth largest bank and the largest privately owned bank in the Czech Republic. After the sale of AGB1, GECB is active in all of the Czech Republic and it belongs to the GE-group which is a global player. The Czech authorities themselves state that banks from the EU were looking closely at the Czech market for investment purposes at the relevant time. If AGB had gone into liquidation other European banks might arguably have been able to obtain the business GECB retained. In view of all this the Commission considers that the guarantee arrangements distort competition and have effect on the trade between the Member States.
81. Therefore, the guarantee arrangements that have not expired before accession and that were granted by the CNB in favour of AGB, GECB and GECIH as well as the “Put Option” are considered State Aid in the meaning of Article 87(1) EC Treaty.

## 3. Derogations under Article 87(2) and (3) EC Treaty

82. Since those “Warranties and Indemnities” that have not expired before accession and the “Put Option” are considered as being applicable after accession and constitute state aid within the meaning of Article 87(1) of the EC Treaty, a compatibility assessment pursuant to Article 87(2) and (3) EC Treaty has to be carried out in this respect.
83. The exemptions in Article 87(2) of the EC Treaty do not seem to apply to the present case because the aid measures neither have a social character and are granted to individual consumers, nor do they make good the damage caused by natural disasters or exceptional occurrences, nor are the aids granted to the economy of certain areas of the Federal Republic of Germany affected by its division.
84. Further exemptions are laid out in Article 87(3)(a), (b) and (c) of the EC Treaty.
85. As the primary objective of the aid concerns the restoration of the long-term viability of an undertaking in difficulty, only the exemption of Article 87(3)(c) EC Treaty provides for the authorisation of State aid that is granted to promote the development of certain economic sectors, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

### 3.2. 1994 R & R Guidelines

86. The current Community Guidelines on state aid for rescuing and restructuring firms in difficulty <sup>(3)</sup> (1999 Guidelines) entered into force on 9 October 1999. For measures adopted before 9 October 1999 the Community guidelines on State aid for rescuing and restructuring firms in difficulty <sup>(4)</sup> ("1994 Guidelines") set out the conditions under which such aid is considered compatible. The agreements concerning the "Warranties and Indemnities" and the "Put Option" were signed on 21 and 22 June 1998 <sup>(5)</sup>. The Commission therefore considers that the 1994 Guidelines apply in the present context. It should be noted that the decision taken by CNB in March 2004 to withdraw from the litigation against AGB concerning the recovery of sums paid in connection with the unsuccessful capital increase does not give rise to measures applicable after accession and its compatibility shall not be assessed here. In any event, the Commission considers that the reasoning set out below and based on the 1994 Guidelines would remain valid if the 1999 Guidelines were applicable to this case.
87. As explained above, the Commission does have the power to review only those aid measures that are considered being applicable after accession. However, the Czech authorities have notified the measures as restructuring aid. In order to assess the compatibility of restructuring aid it is necessary to look at the restructuring concept endorsed by the authorities. This restructuring concept, made out of different measures, was indistinctly financed by the whole set of interventions decided by the authorities within the framework of the sale, regardless whether they are applicable after or not. Consequently, it is the entirety of the restructuring aid measures that has to be taken into account when assessing the compatibility of measures still applicable after accession against the criteria set out in the 1994 Guidelines, such as restoration of viability, proportionality of the aid and avoidance of undue distortions of competition.

### 3.3. Eligibility of the firm

88. The 1994 Guidelines consider a firm to be in difficulties if it is unable to recover through its own resources or by raising the funds it needs from shareholders or borrowing.
89. In September 1996 AGB had losses of CZK -8,487 million and an equity balance of CZK -5,476 million. On the basis of this information it seems that AGB was not able to recover without state intervention.
90. Apart from AGB, GECB and its mother company GECH are also beneficiaries of the "Warranties and Indemnities" and the "Put Option". This raises the question whether GECB and GECH can be considered as companies in difficulties.
91. GECB is a company newly created in 1998 for the purpose of acquiring AGB1. As a newly created enterprise GECB would not have qualified as a company that is entitled to support under the 1999 Guidelines. In addition, GECB belongs to GECH and the GE group which was not in difficulties. The Commission therefore has serious doubts whether GECB and GECH qualify as firms in difficulties under the 1994 Guidelines.

### 3.4. Rescue or Restructuring aid

92. The 1994 Guidelines describe rescue aid as measures which temporarily maintain the position of a firm that is facing a substantial deterioration in its financial position. The measures should generally not continue for a period of more than six months. The "Warranties and Indemnities" and the "Put Option" exceed a period of six months. The Commission therefore considers that the aid does not qualify as rescue aid under the 1994 Guidelines.

### 3.5. Restructuring aid Restructuring Plan

93. The 1994 Guidelines describe restructuring aid as being part of a feasible, coherent and far-reaching plan to restore a firm's long-term viability.
94. The restructuring plan submitted as part of the notification dates December 2003. In 1996, when the Czech authorities started implementing the interventions with regard to AGB, a comprehensive plan for the restructuring of AGB did not exist. The Czech authorities adopted a series of ad-hoc measures and had to adapt to the fact that the losses of AGB were even higher than expected. The Commission therefore has serious doubts whether the "Warranties and Indemnities" and the "Put Option" belong to a single, coherent plan for the restructuring of AGB.

### Restoration of viability

95. In order to consider a measure compatible under the 1994 Guidelines it is necessary that the restructuring plan sets out the means by which to restore the long-term viability and health of the firm within a reasonable timescale. This has to be done on the basis of realistic assumptions as to future operating conditions.
96. In the case at hand the measures were adopted in the past. In principle the Commission has to look at the situation at the time the aid was granted and consider whether at that precise point in time the plan was feasible. However, since no plan was adopted at that time the Commission can only carry out a de-facto assessment in light of the present situation of the firm.
97. On the basis of the information the Commission has received, the Commission's preliminary view is that the banking business of AGB was successfully restored.

<sup>(3)</sup> OJ C 288, 9.10.1999, p. 2.

<sup>(4)</sup> OJ C 355, 31.12.1995, p. 1.

<sup>(5)</sup> Also all other notified measures were adopted before 9.10.1999.

#### Avoiding undue distortions of competition

98. Pursuant to the 1994 Guidelines it is a further condition that measures are taken to offset, as far as possible, adverse effects on competitors.
99. The Czech authorities have stated that AGB's compensatory steps consisted of making AGB's own assets liquid to cover the deposit outflow during the forced administration period to the maximal possible extent. This effort would have included the sale of certain AGB subsidiaries to Raiffaisen Bank. This would have led to a reduction of AGB's market shares and also to a reduced number of AGB personnel.
100. With respect to GECB and GECIH, the Czech authorities mention as compensatory steps the purchase price paid by for AGB1 as well as warranties provided by them in the "Deed of Warranties". In particular GECIH would have taken over CNB's obligations under the "Depositor's Guarantee".
101. In addition to that, the value of GECB, in case the "Put Option" is exercised, is mentioned as a contribution by the investor. Finally, a special contribution by the GE Capital Group would consist in the turnaround of reputation. The fact that the GE Capital Group became an investor in AGB's banking business in itself would have restored a high level of confidence among AGB1 creditors.
102. The different efforts made by AGB and the acquirer are not quantified in terms of value and, additionally, the Commission has serious doubts that these measures go beyond what was necessary for a restructuring of AGB's banking business and include compensatory measures for competitors.

#### Aid in proportion to the restructuring costs and benefits

103. The amount and intensity of the aid must be limited to the strict minimum needed to allow the restructuring of the firm. Therefore, the aid beneficiaries are expected to make a significant contribution to the restructuring from their own resources or from external commercial financing.
104. The Czech authorities submit that GECB has undertaken several investments and operational restructuring steps. In particular, GECB would have paid CZK 206 million mainly for redundancy costs. In addition, GECB would have further directly invested a total of CZK 2,040 million between 1998 and 2002. These investments would relate to the implementation of certain new, and the development of old, information and banking systems and related hardware costs, as well as the development of an ATM and branch network. Also, GECB would have invested in the optimisation of the branch network, staff training, management support and transfer of know-how.
105. The Commission has serious doubts that these investments can be taken as contributions by the investor to the restructuring of AGB. The Commission rather considers these investments as normal course of business of GECB in order to optimise its benefits.
106. Additionally, on the basis of the information provided by the Czech authorities, the Commission has serious doubts that the aid was strictly limited to the level necessary for the restructuring of AGB. Thanks to the aid granted by the Czech authorities GECB achieved very high capital adequacy ratios (74 % in 1999, 48 % in 2000, 41 % in 2001 and 30 % in 2002) what casts serious doubts whether the aid was limited to the minimum. The Commission therefore has serious doubts that the aid is in proportion to the restructuring costs and benefits.

### VI. ARTICLE 46(2) OF THE EUROPE AGREEMENT

107. Article 46(2) of the Europe Agreement provides that:

"In respect of financial services, described in Annex XVIa, this Agreement does not prejudice the right of the Parties to adopt measures necessary for the conduct of the Party's monetary policy, or for prudential grounds in order to ensure the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed, or to ensure the integrity and stability of the financial system. These measures shall not discriminate on grounds of nationality against companies and nationals of the other Party in comparison to its own companies and nationals."

108. The Czech authorities state that the notified measures were intended to tackle the banking crisis in the Czech Republic and they believe that Article 46(2) of the Europe Agreement should be applied to the present case in order to justify the measures granted in favour of AGB/GECB.
109. However, the Commission has serious doubts that Article 46(2) of the Europe Agreement can be applied in the present context.
110. First of all, the Commission has serious doubts that Article 46(2) of the Europe Agreement applies at all to state aid measures, since it forms part of the "Establishment Chapter" of the Europe Agreement, whereas the provisions concerning state aids are listed in Article 64 et seq. of the Europe Agreement.
111. In addition, the Commission has serious doubts that the conditions of Article 46(2) of the Europe Agreement itself are met. Article 46(2) of the Europe Agreement allows measures concerning the monetary policy or for prudential grounds. The Commission considers that this limits the potential measures to those with a general scope of application which are adopted by a financial supervisory authority.
112. The Commission believes that the guarantee arrangements and the Put Option are individual measures in favour of AGB/GECB and GECIH which cannot be seen as means to prevent a banking crisis in the Czech Republic. Even if the whole package of measures may have been intended to avoid a run on the bank and to prevent general crisis of the Czech banking system, the Commission has serious doubts that the "Warranties and Indemnities" and the "Put Option" on top of the other measures granted were necessary to achieve this goal.

## VII. CONCLUSION

The Commission has accordingly decided the following:

- the following measures in favour of Agrobanka Praha, a.s./ GE Capital Bank, a.s as notified by the Czech Republic under the interim mechanism pursuant to Annex IV.3 of the Accession Act, are not applicable after accession: “Depositors’ Guarantee”, “Liquidity Assistance”, “Unsuccessful attempt to increase AGB’s capital”, “Purchase Price”, “Increase in GEGB’s capital” as well as the “Warranties and Indemnities” in so far as summarised in No. A.1-A.18 in Appendix 23 to the Rescue and Restructuring Plan, i.e.: Clause 2.2. (Organisation), Clause 2.3 (Integrated Investments and AVE Leasing), Clause 2.5 (Consents), Clause 2.5 (No violation), Clause 2.6. (Financial Statements), Clause 2.9. (Loans), Clause 2.10 (Real Property), Clause 2.11 (Tangible Assets), Clause 2.12 (Contracts), Clause 2.13 (Regulatory Compliance), Clause 2.15 (Severance Arrangements), Clause 2.16 (Employees, Benefit Plans), Clause 2.17 (Insurance), Clause 2.18 (Litigation), Clause 2.19 (Intellectual Property Rights), Clause 2.21 (Creation of New Agrobanka and Old Agrobanka), Clause 2.23 (Broker and Finders), Clause 2.7 (No Undisclosed Liabilities),
- In the light of the foregoing considerations, the Commission, acting under the procedures laid down in section 3, paragraphs 1 (c), 2 and 3 of Annex IV to the Act of Accession and in Article 88(2) of the EC Treaty, requests the Czech Republic to submit its comments as may help to assess the remaining “Warranties and Indemnities” and the “Put Option” within one month of the date of receipt of this letter.

It should be noted that this decision is adopted after the accession of the Czech Republic, that Article 88 (2) EC fully applies to State aid granted by the Czech authorities and that, therefore, the Commission is entitled to open the formal investigation procedure in respect of a measure that, although not notified, might constitute illegal State aid.

It requests your authorities to forward a copy of this letter to the potential recipients of the aid immediately.”

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