II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 18 July 2007

on State aid C 27/2004 which the Czech Republic has implemented for GE Capital Bank a.s. and GE Capital International Holdings Corporation, USA

(notified under document number C(2007) 1965)

(Only the Czech text is authentic)

(Text with EEA relevance)

(2008/214/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above, and in view of these comments,

Whereas:

1. PROCEDURE

(1) On 18 December 2003, the Commission received a notification concerning measures for the benefit of Agrobanka, Praha a.s. (AGB) and GE Capital Bank, a.s. [1] (GECB), under the procedure regarding aid measures (interim mechanism) provided for in Annex IV.3 of 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, the Slovak Republic and the Adjustments to the Treaties on which the European Union is founded [2], signed on 16 April 2003 (Act of Accession).

(2) By letter received by the Commission on 30 April 2004, the Czech Republic withdrew the notification; on the same day the Czech Republic submitted a new notification concerning the same subject.

(3) By Decision dated 14 July 2004, the Commission declared that most of the notified measures were not applicable after accession but opened proceedings under Article 88(2) EC on other measures, given that the latter were considered being applicable after accession and raised serious doubts as to their compatibility with the common market. The Commission Decision to initiate the procedure was published in the *Official Journal of the European Union* [3]. The Commission invited interested parties to submit their comments.

[1] Since 17 January 2005 renamed GE Money Bank, a.s.

[2] OJ L 236, 23.9.2003, p. 23. The Czech version was published in a special edition of the *Official Journal of the European Union* of 23.9.2003.

[3] OJ C 292, 30.11.2004, p. 3. Corrigendum published in OJ C 10, 14.1.2005, p. 9.

(4) On 30 July 2004, 16 August 2004, 22 September 2005 and 18 May 2006 the Czech Republic submitted its observations on the opening decision and on 17 December 2004 GECB submitted its comments. On 19 September and 11 November 2005 GECB submitted supplementary comments. By letter of 2 May 2006 the Commission confirmed to GECB that the period during which it could submit comments had been extended until end November 2005 in accordance with Article 6(1) last sentence of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [1] (Procedural Regulation). By letter of 10 May 2006, registered on 18 May 2006, the Czech Republic informed the Commission that it had received the submissions made by GECB. On 24 June, 29 September and 25 October 2005 as well as on 11 January and 7 March 2006 meetings with representatives of the Czech Republic and GECB took place. On 13 March 2007, registered on 14 March 2007, the Czech Republic submitted further information. On 15 March 2007 the Commission confirmed to the Czech Republic in accordance with Article 6(1) last sentence of the Procedural Regulation that the period during which it could submit comments had been extended until 14 March 2007.

2. BACKGROUND FACTS

2.1. Beneficiaries of the aid

(5) AGB, which was founded in 1990, used to operate as a universal commercial bank in the Czech Republic. By 1995, it was the country's fifth largest bank and the largest privately owned bank. After financial difficulties however, AGB's banking license was withdrawn in September 1998 and it is currently in liquidation.

(6) The founding shareholders of AGB were Československá obchodní banka, a.s. (CSOB), the Ministry of Agriculture of the Czech Republic, Agropol, a.s., Agrodat, státní podnik and Stavoinvest Banská Bystrica. In 1995, the private Motoinvest Group acquired control in AGB.

(7) After the imposition of forced administration on 17 September 1996, two separate organisational units, AGB1 and AGB2, were created within AGB. AGB1 entailed AGB's core banking activities. In June 1998, AGB1 was sold to GECB in an asset deal. The remaining parts of AGB are still in the liquidation process.

(8) GECB was founded in 1998 for the purpose of acquiring AGB1. It is now operating as a universal bank in the Czech Republic. As of 17 January 2005 GECB was renamed GE Money Bank, a.s. It is entirely owned by the GE Capital International Holdings Corporation, USA (GECIH).

2.2. AGB's financial situation

(9) AGB's difficulties already started in 1993-1994. During the mid nineties the whole Czech banking sector underwent a serious economic crisis which also affected AGB. In addition to this, AGB's rapid expansion, combined with deficiencies in risk management and the lack of internal controls led to a gradual deterioration of AGB's loan portfolio. In 1993, AGB had a loss of CZK 2 000 million and the equity was negative (CZK – 515 million).

(10) In 1993, the Czech National Bank (CNB) ordered that AGB should prepare and implement a consolidation programme in order to restore its capital adequacy. The Czech Republic explained that the consolidation programme did not entail measures provided or granted by the State. It rather would have imposed a closer supervision of AGB. In 1996, AGB ceased to comply with the terms of the consolidation programme 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 led to the imposition of a forced administration on AGB on 17 September 1996.

(11) Concerning AGB's financial situation, 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) In order to avoid negative consequences for the whole Czech banking sector, the Czech Republic 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 it was considered the best way to ensure AGB's long term viability by creating a separate organisational unit, AGB1, for AGB's core banking activities. AGB2 consisted mainly of classified loans, loans extended to AGB's selected subsidiaries or other affiliated entities, a selected asset portfolio, all of the immovable assets and some of the movable assets. AGB1 was then to be sold to a strategic investor via an open, unconditional and transparent tender procedure.

[1] OJ L 83, 27.3.1999, p. 1.

2.3. **The tender**

(13) The Forced Administrator announced a public tender for the sale of AGB1 in April 1997. In the subsequent tender procedure, 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, subject to the guarantees and warranties and a put option. The guarantees and warranties are described in more detail in recitals 19 to 26 and the put option in recitals 27 to 32.

(14) One measure that need not be considered further is the Depositors' Guarantee granted by CNB in favour of all of AGB's creditors when AGB first encountered difficulties in September 1996. The Depositors' Guarantee covered all of AGB's liabilities, including interest payable, registered in AGB's accounts as at 17 September 1996. Any liabilities maturing within a fixed term were secured until maturity. Liabilities having no fixed maturity term were secured for a period of 12 months following the completion of the forced administration of AGB. Liabilities incurred by AGB after 17 September 1996 were secured until their respective maturity date or maximum of 12 months following the completion of the forced administration of AGB whichever was the earlier. The guarantee did not set any upper limit for the secured liabilities to AGB's creditors. As of 31 December 2003 however, there was only one deposit of CZK 867 882 remaining that could potentially fall under the Depositors' Guarantee ([1]).

(15) In the context of the sale, GECB's parent company GECIH assumed the CNB's obligations under the Depositor's Guarantee through a counter guarantee, which expired on 22 June 2000. From the beginning, the counter guarantee would have terminated in the event that GECIH exercised its put option right for the shares in GECB. 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.

2.4. **Financial situation of GECB**

(16) The results of AGB's banking business have substantially improved since GECB took it over.

Year	Net income (in CZK million)	Capital adequacy ratio (Tier 2)
1998	– 16 500	Negative ([2])
1999	980	74 %
2000	720	48 %
2001	840	41 %
2002	911	30 %
2003	1 988	25 %
2004	2 242	24 %

2.5. **Restructuring efforts made by AGB, GECB and GECIH**

(17) The Czech Republic and GECB submit that AGB, GECB and GECIH adopted measures to mitigate the State involvement in the restructuring of AGB. AGB's compensatory steps consisted of making AGB's own assets liquid and in particular the sale of certain AGB subsidiaries to Raiffeisen Bank. This diminished AGB's market share as measured by AGB's share of total banking assets or certain asset classes. Apart from that, AGB reduced its numbers of employees from about 3 500 in 1996 to about 2 500 employees in 1998.

(18) It was argued that GECB and GECIH had contributed to the restructuring by paying the purchase price, by the purchaser warranties in the Deed of Warranties referred to in recital 20 and by the counter guarantee in the Indemnity Agreement referred to therein by which GECIH took over CNB's liability (Depositors' Guarantee) towards the creditors of AGB. In addition, the GE group believes that it contributed by way of the Put Option as well as by its excellent reputation.

3. **DESCRIPTION OF THE MEASURES**

(19) In its Decision of 14 July 2004, the Commission assessed the measures notified to it and came to the conclusion that the majority of them fell outside the scope of the interim mechanism of the Accession Treaty. These measures did not lead to any further financial exposure of the Czech Republic after the accession date and therefore were not applicable after accession. However, two sets of measures were considered to be applicable after accession, and potentially to constitute State aid incompatible with the common market — firstly the Warranties and Indemnities and secondly the Put Option.

([1]) The Depositors' Guarantee is a measure notified by the Czech Republic under the interim mechanism. The measure was considered not being applicable after accession in the the decision of 14 July 2004 referred to in Commission Decision recital 3, as only one clearly defined claim remained under the Depositors' Guarantee. The Commission therefore considered the potential exposure of the Czech Republic clearly defined before accession.

([2]) AGB1's balance sheet as of 21 June 1998 recorded a total equity of – CZK 17 100 million. GECB was founded with CZK 500 million share capital.

The Warranties and Indemnities

(20) In the course of the sale of AGB1 to GECB, AGB as the seller of AGB1 entered into a number of guarantee arrangements in favour of GECB 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 and amended on 25 April 2004 by the Amendment No 1 to Indemnity Agreement (Indemnity Agreement) ([1]).

(21) The Czech authorities provided lists of the guarantee arrangements as part of the Rescue and Restructuring Plan that forms part of the notification.

(22) In the notification, the Czech Republic stated that the list relating to the Deed of Warranties was 'not exhaustive'. In its comments on the decision to open the formal investigation procedure, however, the Czech Republic clarified that the list indeed comprised exhaustive lists of all potential claims. The wording 'not exhaustive' merely meant that the lists did not repeat the full texts of the underlying agreements. GECB argued that in fact only the — exhaustive — list concerning the Indemnity Agreement would be relevant since the other list related only to the claims under the Deed of Warranties, which is an agreement between private parties that could not be relevant for State aid purposes.

(23) Many of the potential claims had already expired before the accession of the Czech Republic to the European Union. In its Decision of 14 July 2004, the Commission declared those measures which had already expired before accession not to be applicable after accession. With respect to the other measures the Commission opened the formal investigation procedure.

(24) The opening of the formal investigation procedure also concerns measures for which the Czech Republic did not ask for an assessment under the interim mechanism. Notably, certain Warranties and Indemnities and the Put Option, which were described in the notification but not included in the request for assessment. In its Decision to open the formal investigation procedure the Commission explained that under the interim mechanism of Annex IV.3 of the Act of Accession there was no obligation on the part of the acceding countries to notify measures and therefore it was in principle possible to limit the scope of the notification. However, the Commission considered that the Warranties and Indemnities and the Put Option were inextricably linked to the notified measures and could not be artificially separated. Consequently the Commission has to assess the measures in their entirety.

(25) The guarantee arrangements on which the Commission opened the procedure are summarised as follows:

(26) *Table 1*

Warranties and indemnities expiring on 22 June 2008

Content	Limitation of the amount
1. **Indemnification for any litigation adversely affecting the banking business**: AGB agreed to indemnify the GECIH, 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)* ([2])	Aggregate limit of CZK 2 000 million
2. **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

([1]) Unless otherwise indicated, all references to the Indemnity Agreement refer to the Indemnity Agreement as amended by the Amendment No 1 to Indemnity Agreement of 25 April 2004.

([2]) Unless otherwise indicated, all references to clauses are to clauses in the Deed of Warranties.

Content	Limitation of the amount
3. **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
4. **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
5. 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
6. 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 Jiři 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
7. 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 Jiři Klumpar. (Indemnification based on *Clause 4.1 of the Indemnity Agreement*)	Aggregate limit of CZK 15 000 million
8. 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
9. Any claim for Indemnification concerning the validity or legitimacy of the sale of AGB1 to the Purchaser brought by: — The Seller, CNB, or a shareholder, liquidator, bankruptcy trustee, auditor or forced administrator of the Seller — A member of a corporate body of the Seller or the Purchaser — An employee, borrower, client, lender, or creditor to the Seller or the Purchaser — A 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 — A Czech State prosecutor, Czech criminal authority, or Czech tax authority having jurisdiction over the Seller or the Purchaser. (Indemnification based on *Clause 4.1 of the Indemnity Agreement*)	Aggregate limit of CZK 15 000 million

Table 2

Warranties and indemnities expiring on 22 June 2010

Content	Limitation of the amount
1. **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 contemplated. *Clause 2.14(c) and (d).*	Aggregate limit of CZK 2 000 million
2. **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
3. **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
4. **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
5. **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

Table 3

Warranties and indemnities expiring on 22 June 2013

Content	Limitation of the amount
1. **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
2. **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
3. **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

Table 4

Warranties and indemnities expiring 15 years after closing

Content	Limitation of the amount
1. **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

The Put Option

(27) 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.

(28) Two events remain that permit GECIH to exercise the Put Option. These are:

(a) 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

(b) CNB elects not to provide indemnity payments under the 'Indemnity Agreement' in excess of CZK 2 000 million or CNB default in making such payments.

(29) After the clarifications made by the Czech Republic and GECB the Commission considers that the triggering event referred to in point (b) of recital (28) refers only to refusals to make payments under Clause 4.1, Clause 8.3. of the Indemnity Agreement which concern claims for invalidity of the sale of AGB1 to GECB [1].

(30) 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

(31) The 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 expires the Put Price is the greatest of the following:

(a) the adjusted unwind amount;

(b) the net asset value of GECB as of the date at which the put price is determined;

(c) 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 referred to in point (c) the events which triggered the right to exercise the Put Option will not be taken into account.

(32) The Czech Republic informed the Commission that it was CNB's and GECB's understanding that for the determination of the put price an independent third party's opinion in all circumstances had to be obtained and that such opinion was binding on the parties.

[1] Clause 8.3 of the Indemnity Agreement contains the warranty of the CNB that it has full power and authority to enter into and perform the Purchase Agreement and that the execution and delivery of the Purchase Agreement will not result in any breach of law. Clause 4.1 of the Indemnity Agreement contains the corresponding obligation to indemnify.

4. COMMENTS RECEIVED AFTER THE OPENING OF THE FORMAL INVESTIGATION PROCEDURE

4.1. Comments from the Czech Republic

(33) The Czech Republic considers that the measures under assessment are not applicable after accession. The potential liability of the State would be limited in time and amount since the maximum exposure of the Czech State is fixed and could not increase in the future. Also, the list relating to the Deed of Warranties is exhaustive. A further detailed definition of the potential exposure would not be necessary. In particular, the Czech Republic cannot see the relevance of being able to predict who might bring a claim and on what basis it might be brought. The Czech Republic also relies on the guarantee provided by the State to the benefit of *Komercni banka* where the Commission accepted a similar level of definition as sufficient to consider the measure not being applicable after accession. Also, in the case of *Slovenska sporitelna* the Commission accepted a lesser degree of definition as in that case only a closed group of potential claimants but not individual claims could be identified. In any case, with respect to the four individual claims under Clause 4.1. the Commission's requirements to consider a measure not being applicable after accession were fulfilled. In addition, in May 2006 the Czech Republic submitted a list comprising the names of all shareholders of AGB as of 30 April 2004. The Czech Republic believes that for any claims by these named shareholders under Clause 4.1 of the Indemnity Agreement, the Commission's itemisation requirement is met.

(34) With respect to the Put Option, the Czech Republic believes that the particular nature of the Put Option means that it is not susceptible to assessment under the interim mechanism or in the current procedure since it will be exercised only in the future. The Czech Republic states that it would be ready to notify the Put Option for assessment by the Commission once it is exercised. In any event, concerning the four individual claims for invalidity which are mentioned under Clause 4.1. the Put Option fulfils the Commission's requirements to consider it being not applicable after accession. The Put Price would be capped by way of a formula that is applied by an independent expert.

(35) Apart from that, the Czech Republic maintains that the measures do not constitute aid since it would have been more costly for the State to liquidate AGB than to adopt the measures it did to facilitate its sale. Also, the measures in question represent standard commercial practice which would not involve any unusual benefit and the impact on trade would be minor. In addition, since AGB1 was sold in an unconditional and open tender procedure, GECB did not receive any benefit as it paid the market price for AGB's banking business. Any benefit for the seller (AGB) would have disappeared, since AGB is in liquidation and no longer active on the market.

(36) Should the measures constitute aid, the Czech Republic argues that the aid is compatible with the common market. In view of the specific situation in the Czech Republic and the peculiarities of the accession process, the Commission had to interpret the provisions of the Treaty and the 1994 Community Guidelines on State aid for rescuing and restructuring firms in difficulty [1] (1994 Guidelines) more generously than it did in the decision to open the formal investigation procedure.

(37) The Czech Republic considers that Article 87(2)(b) EC and Article 87(3)(b) EC apply in the present context and render the measures to be compatible with the common market.

(38) With respect to the 1994 Guidelines, the Czech Republic points out that there was a general concept for the restructuring of AGB's banking business and in other cases the Commission had not insisted on a strict existence of the restructuring plan. The Czech Republic further considers that the measures could only be seen as aid to AGB but not as aid to GECB or GECIH since all measures were aimed at the single goal of ensuring the long-term viability of AGB's banking business. Apart from that, the 1994 Guidelines did not include a prohibition against aid to newly created companies. Since there was no structural excess of capacity there should be no strict requirement of reducing or closing capacity. AGB/GECB would not be left with a cash surplus, which would be the main issue under the 1994 Guidelines when considering proportionality. Also, the contributions by the investors had been sufficient. The relatively high capital adequacy ratios would just be the technical effect of the chosen method of capital contribution.

(39) The Czech Republic also considers that Article 46(2) of the Europe Agreement (EA) applies in the present context. Article 46(2) EA would not limit the type of measures which might be permissible, nor would it prevent State aid measures. In addition, in the case of *Komercni banka* the Commission applied Article 46(2) EA.

(40) Should the Commission nonetheless come to the conclusion that the measures are applicable after the accession and represent incompatible State aid the Commission should allow an adequate phase-out of the Warranties and Indemnities and the Put Option. This would be justified by the fact that the CNB and GE had legitimate expectations as to the binding character of the provisions.

[1] OJ C 368, 23.12.1994, p. 12.

(41) On 13 March 2007 the Czech Republic informed the Commission that on 28 February 2007 GECIH and GECB had unilaterally and unconditionally waived the Warranties and Indemnities under Section 3.1 of the Indemnity Agreement for any and all losses in relation to the failure of the seller of AGB1 to satisfy its obligations pursuant to the warranties and indemnities given by the seller in Clause 5(1)(a)(i), Clause 5(1)(a)(ii), Clause 5(1)(a)(iii), Clause 5(1)(a)(v), Clause 5(1)(a)(vi) and Clause 5(1)(b). These obligations correspond to the Warranties and Indemnities set out in recital 26 in:

(a) Table 1, No 1 (Indemnification for any litigation adversely affecting the banking business);

(b) Table 1, No 2 (Indemnification for any violation of law);

(c) Table 1, No 3 (Indemnification in respect of employment litigation);

(d) Table 1, No 4 (Indemnification in respect of employment litigation);

(e) Table 3, No 3 (Validity of the sale);

(f) Table 4, No 1 (Environmental losses).

(42) The waiver took effect *ab initio* of these Warranties and Indemnities and therefore renders them invalid with retroactive effect from the date of the agreement. The Czech Republic further informed the Commission that no claims for indemnification had been brought by GECIH or GECB under these provisions up to the date of the waiver.

4.2. **Comments from GECB**

(43) GECB submits arguments similar to those advanced by the Czech authorities and contests the applicability after of the measures as well as their aid character. In case that the measures constitute aid, it argues they would be compatible with the common market.

(44) GECB points out that six to eight years before accession the parties could not foresee that an interim mechanism would be introduced to control State aid granted before accession. The Commission should have taken this into account when interpreting the notion of applicability after and when applying the rules on State aid.

(45) GECB believes that the Commission's interpretation of 'applicability after' of guarantees as applied in the decision to open proceedings is too restrictive. In the present case, all potential claims would be limited by maximum amounts and limited in time. The claims provided in submitted lists are exhaustive in the sense that they list all potential grounds for claims. The wording 'not exhaustive' only means that they do not mirror the text of the underlying agreements. In addition, the Put Option would not overcome the maximum amounts specified in the Indemnity Agreement since it relates only to specific claims of the Indemnity Agreement and is itself capped.

(46) The Commission's concept of 'applicability after' as applied in its decision of 14 July 2004 would mean that only pending or threatened litigation could be considered being not applicable after accession. However, even if this narrow interpretation is applied, GECB considers that four individual claims arising under Clause 4.1 of the Indemnity Agreement fully satisfy the Commission's test. In addition, the tax claims under Clauses 2.14(c), (d) and (e) would satisfy the Commission's requirements since the future plaintiff (the Czech authorities) is known due to the nature of these claims.

(47) Also, the Put Option would be 'not applicable after accession' since the triggering events were clearly defined and the put price clearly determined. With respect to the triggering events, the Put Option would be sufficiently defined at least as far as the four specifically listed validity claims are concerned. Concerning the put price, GECB refers to the case of *Ceska sporitelna* where the Commission considered a subordinated debt and social loans not to be applicable after accession.

(48) Alternatively, if the Warranties and Indemnities and the Put Option were 'applicable after' they would not amount to State aid given that the CNB had to be considered a *de facto* owner of AGB and that it had a financial interest in the sale of AGB. Also, the Warranties and Indemnities and the Put Option were negotiated between the parties and were reflected in the price paid by GECB. Apart from that, the measures would not be selective because they were available to all bidders. There would be no distortion of competition since GECIH paid the market price after an unconditional and transparent tender and there would be no effect on trade since no other bank had been interested in AGB's share of the Czech retail market.

(49) Concerning the compatibility of the measures, GECB submits that any aid would be compatible under Article 87(2)(b), Article 87(3)(b) EC, and in the light of the Rescue and Restructuring Guidelines.

(50) GECB considers that Article 87(2)(b) EC applies in the present context since there was a serious threat to the stability of the entire banking sector which came close to a natural disaster. Also, Article 87(3)(b) EC would apply as the Commission had already qualified a systemic crisis of the banking sector as a potential 'serious disturbance in the economy of a Member State'. The requirement that the aid needs to be granted in neutral fashion to all credit institutions would have been fulfilled in the Czech Republic since the entire banking sector was in a crisis and all banks were assisted by the State.

(51) Concerning the 1994 Guidelines GECB points out that the Commission would be extending its jurisdiction in looking not only at those measures that are applicable after accession when assessing the compatibility but at the whole restructuring. Concerning the beneficiaries of the aid, the 1994 Guidelines did not contain a strict limitation concerning newly created companies. Also, the Commission had not applied the prohibition against restructuring aid to newly created companies in the former East Germany. Footnote 10 of the 1999 Community guidelines on State aid for rescuing and restructuring firms in difficulties [1] (1999 Guidelines) mentioned this explicitly.

(52) GECB further states that the Commission could not require a full restructuring plan in the present case since it was not possible to foresee this requirement when the measures were granted. In addition, there would be no undue distortion of competition in view of the fact that the 1999 Guidelines explicitly mention that in assisted areas, like the Czech Republic, the conditions for authorising aid may be less stringent as regards the implementation of compensatory measures so as to take into account the severity of the regional problems. Finally, GECB states that GECB's capital adequacy ratio would not in itself allow for the conclusion that the aid was not in proportion to the restructuring costs and benefits. The high capital adequacy ratio would rather reflect GE's conservative credit policy.

5. ASSESSMENT

5.1. Applicability after accession

(53) As outlined above, the Czech Republic and GECB contest the Commission's power to review measures granted before accession and GECB in particular maintains that the Commission would be applying law retroactively and creating an exception to the previously accepted rule that pre-accession aid granted by an acceding Member State qualifies as existing aid.

(54) Annex IV.3(1) of the Act of Accession defines as existing aid only three categories of measures:

(a) those put into effect before 10 December 1994;

(b) those that — having been examined by the Commission — were included in the list annexed to the Treaty of Accession; and

(c) those which would be approved under the so-called interim mechanism.

All the measures still applicable after the date of accession, which constitute State aid and do not fall within one of these three categories, are considered as new aid upon accession; the Commission has therefore full powers to prohibit the application of these measures and to order recovery of any sums unduly paid thereunder after accession. This application of State aid rules to the future effects of measures still applicable after accession does not entail any retroactive application of the EC State aid rules and is in any event mandated by the Act of Accession.

(55) Annex IV.3.(2) of the Act of Accession sets out the interim mechanism. 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.

(56) For a measure to be considered applicable after accession it must be liable to produce an additional benefit that was not known, or not precisely known, when the aid was granted. On the other hand, the Commission's power of review under the interim mechanism is inapplicable as regards aid measures that have already been finally and unconditionally granted for a given amount before accession.

[1] OJ C 288, 9.10.1999, p. 2.

(57) Guarantee arrangements with possible payments occurring after accession are considered to fall outside the definition of 'applicability after' to the extent that the following conditions are met [1]:

(a) the facts which give rise to the covered risks are precisely defined and included in an exhaustive list closed by the date of accession;

(b) there is an overall cap and a time-limit for the payments that the State can effect; and

(c) the guarantee/indemnification relates to events that had already occurred by the date of the granting of this guarantee/indemnification and not for any future events.

Assessment

(58) As set out in its decision of 14 July 2004, the Commission considers all Warranties and Indemnities as well as the Put Option on which the Commission opened the formal investigation procedure to be applicable after accession. As the Commission found all these measures to be applicable after accession, the subsequent waiver concerning certain Warranties and Indemnities made by GECIH and GECB therefore cannot remove the effects of these Warranties and Indemnities as established by the Commission Decision of 14 July 2004 for so long as they subsisted after accession.

(59) However, the Commission also reiterates and confirms this finding on 'applicability after' for all those measures listed in the tables in recital (26). In response to the arguments raised against the opening decision the Commission first has the following general remarks:

(60) The Czech Republic and GECB state that the potential claims are exhaustively listed in the notification and that the maximum financial exposure of the Czech Republic is defined therein. However, although the lists may include all potential grounds for claims, these grounds are — with few exceptions, as explained below — described in abstract terms. In addition, the Commission considers that a mere cap without listing (itemisation) of the specific events which might give rise to indemnity does not tie the payment of the indemnity after accession to a specific event finally and unconditionally identified prior to accession. The State has in some respects theoretically limited its financial exposure, but it has not clearly determined the specific facts directly giving rise to payments.

(61) Contrary to what the Czech Republic and GECB argue, this is also the line taken in the cases concerning *Komercni banka* [2] and *Ceska sporitelna* [3]. The guarantees in these cases, which were declared not to be applicable after accession, satisfied the criteria listed above since the guarantees concerned a well defined and closed number of ring-fenced assets, precisely and exhaustively identified prior to accession, whose value was guaranteed by the State. Also, in the case of *Slovenska sporitelna* [4] the litigation indemnification concerned specific pending or threatened litigation that was included in an exhaustive and legally binding list.

(62) In addition, as explained below, the financial exposure of the Czech Republic is not sufficiently capped with respect to the indemnifications concerning the validity of the sale in Clause 4.1 of the Indemnity Agreement as well as the Put Option.

Specific remarks concerning certain individual measures

Indemnification for tax matters and customs and excise liabilities (Table 2 Nos 1, 3 and 5)

(63) The Czech Republic and GECB argue that the indemnifications for tax matters meet the Commission's requirements for considering a measure not being applicable after accession since the future plaintiff (the Czech authorities) would be known due to the nature of these claims.

(64) The Commission considers that, if this reasoning were valid, it would apply not only to tax matters but also to the indemnifications for customs and excise liabilities. However, the indemnifications for tax matters as well as for customs and excise liabilities under Clauses 2.14(c), (d) and (e) as well as Clause 5.1(a)(iv) are not sufficiently specified. A claim for indemnification is sufficiently defined if the potential plaintiff *and* the underlying event are specifically described. In the case at hand an unlimited number of claims could be brought for indemnification so that these provisions cannot be regarded as identifying the exposure of the Czech Republic. The Commission therefore considered and still considers the indemnifications for tax matters and customs and excise liabilities to be applicable after accession.

[1] The criteria are listed in a letter to the Czech Republic dated 19 March 2004. The aim of the letter is providing further guidance on the notion of 'applicable after' in relation to indemnities and comparable measures.

[2] OJ C 72, 23.3.2004, p. 9. Corrigendum published in OJ C 104, 30.4.2004, p. 70.

[3] OJ C 195, 31.7.2004, p. 2.

[4] OJ C 137, 4.6.2005, p. 4.

Claims under Clause 4.1 of the Indemnity Agreement (Table 1 Nos 5-9)

(65) The claims as described in Table 1, No 9 concern indemnifications in case the sale of AGB1 to GECB is found to be void or invalid. The potential actions leading to this result are described in general terms and therefore do not limit the financial exposure of the Czech Republic. Even if some of the groups of the potential claimants — like the shareholders of AGB at a specific point in time — were considered as representing a closed group of individuals; despite the fact that the groups are extremely large and are supposed to cover also the legal successors of the individuals, the claims brought by these groups of individuals are not specified so that an unlimited number of potential claims can be made. Due to this, the risk of the Czech Republic cannot be qualified as precisely defined.

(66) Concerning the four claims under Clause 4.1 of the Indemnity Agreement listed in Nos 5, 6, 7 and 8 of Table 1, the Commission considers that even if they were sufficiently defined in the sense of the first criterion illustrated above as these claims refer to individual actions brought by identified claimants, the requirement of an overall cap on the State's liability is not met. This is the case for all claims under Clause 4.1 of the Indemnity Agreement as listed in Table 1, Nos 5, 6, 7, 8 and 9.

(67) The potential financial exposure of the CNB appears limited to the amount of CZK 15 000 million for each separately listed indemnification under Clause 4.1 of the Indemnity Agreement. This limitation is however removed by the fact that GECIH may exercise the Put Option in case the CNB refuses to make payments above CZK 2 000 million. In the event that the CNB refuses to make payments above this level, GECIH is entitled to exercise the Put Option. This could force the CNB to make payments even above the cap for a separately listed indemnification foreseen under Clause 4.1 of the Indemnity Agreement of CZK 15 000 million in order to avoid that the Put Option is exercised. As will be described below, the Put Option is also not sufficiently defined and capped in itself.

(68) The Commission therefore considers Clause 4.1 of the Indemnity Agreement as described in Nos 5, 6, 7, 8 and 9 of Table 1 being applicable after accession.

The Put Option

(69) As explained above, in principle two kinds of events remain under which the Put Option right can be exercised. The first one is a decision or judgment which orders or declares the sale of AGB1 to GECB void or invalid. The second triggering event is a refusal by the CNB to make payments above CZK 2 000 million in relation to validity claims under Clause 4.1 of the Indemnity Agreement.

(70) These potential triggering events are in no way specified by reference to a limited number of persons who could bring such claims so as to identify in advance the court proceedings potentially leading to a finding of invalidity etc. of the sale of AGB1 to GECB. In consequence, the risks of the Czech Republic are not sufficiently defined and clearly identified.

(71) In addition, the exposure of the Czech Republic is not capped. In the case of *Ceska sporitelna* the Commission considered the exposure of the Czech Republic concerning the compensation for social loans as sufficiently defined where the compensation was determined by the difference between the 'rate contracted for the social loan' and the Prague Interbank Offered Rate plus a fixed percentage plus a fixed payment per account per year. However, in that case, the variables were limited to a mere indexation to a single market benchmark and could not be influenced by the beneficiary.

(72) In the case at hand, the Put Price is determined by the greatest of the following:

(a) the adjusted unwind amount;

(b) the net asset value of GECB as of the date at which the put price is determined;

(c) the fair market value of GECB as of the date at which the put price is determined.

(73) The Czech Republic informed the Commission that in any case the determination will be carried out by an independent expert whose finding is binding on the parties.

(74) Notwithstanding the involvement of an independent expert, which could perhaps make for a more objective assessment, the Commission considers that the method as such for determining the price does not set a cap to the Czech Republic's financial exposure. The methods by which the price would be determined refer to parameters that are influenced by GECIH and GECB's business performance.

(75) In addition, the price payable under the Put Option is set by way of a complex calculation, including variables which were uncertain at the time of the agreement of the measures, uncertain at the time accession and which would continue to change over time. Therefore the price payable under the Put Option would depend on imponderables subject to future developments and could be determined only at a specific date after accession.

(76) In view of the foregoing, the potential exposure of the CNB is not sufficiently defined by way of a formula. In consequence of all this, the Put Option is considered applicable after accession.

Conclusions on applicability after

(77) Accordingly, the Commission confirms its decision of 14 July 2004 concerning the applicability after of the measures on which it opened the formal investigation procedure and considers that all these measures are applicable after accession. These are the Warranties and Indemnities listed in Tables 1, 2, 3 and 4 as well as the Put Option.

5.2. **State aid character**

(78) Article 87(1) EC Treaty declares any aid granted through State resources to specific undertakings incompatible with the common market if such aid distorts or threatens to distort competition in so far as it affects trade between Member States.

State resources

(79) Through the Indemnity Agreement the CNB, as a public entity, guarantees for the commitments made by AGB in the Warranty Agreement vis-à-vis GECB and GECIH. Therefore the guarantee arrangements involve State resources. Also with respect to the Put Option State resources are involved since the CNB committed itself to acquire all shares in GECB in case that GECIH exercises the Put Option.

Economic advantage

(80) The Czech Republic and GECB argue that the measures do not constitute aid given that it would have been more costly for the State to liquidate the bank than to sell it. In particular, the CNB would have been obliged under the Depositors' Guarantee, referred to in recital (14), to reimburse AGB's creditors. If AGB had not been restructured, the Czech State would have had to bear high costs under that guarantee. GECB also argues that the CNB has to be seen as *de facto* owner of AGB since under Czech law the forced administrator is appointed by and must be an employee of the CNB. Apart from that, the guarantee arrangements would represent a standard commercial practice that was reflected in the price paid for AGB1.

(81) The Commission considers that in acting as a forced administrator the CNB cannot be considered a *de facto* owner of the bank. Rather, AGB in forced administration remained the owner of the banking business. A forced administrator may have the power to sell the bank but he is acting on behalf of the bank. The CNB therefore acted to facilitate the sale of a private bank to another private bank.

(82) The Commission does not consider that taking over the Depositors' Guarantee by the purchaser could be a sufficient ground for a rational market operator to enter into the Warranties and Indemnities and the Put Option. The Czech Republic itself stated explicitly in the Assessment provided along with the notification that 'the CNB never expected to pay under the Guarantee'. The measure would have been intended only for the 'psychological' purpose of calming the public. Indeed, the Czech Republic has stated that the Depositors' Guarantee that was granted by the CNB on 17 September 1996 was never invoked and by the time AGB1 was sold to GECB it must have seemed very unlikely that claims could be brought under the Depositor's Guarantee.

(83) With respect to the Put Option the Czech Republic and GECB argue that in any case it would not represent an actual advantage but only could become an advantage once it is exercised. However, the Commission considers that the Put Option already from the day it was granted involves a right with a value to GECB. Similarly to a guarantee the advantage of a Put Option arises not only when the Put Option is exercised (the guarantee is invoked) but already with the granting of the measure ([1]).

(84) The parties to the Indemnity Agreement were the CNB, GECB and GECIH. The Parties to the Put Option Deed were CNB and GECIH. GECB, GECIH as well as AGB as the seller of AGB1 and the banking business of AGB1 owned by AGB before 22 June 1998 and by GECB afterwards are therefore the potential beneficiaries of the measures.

([1]) For guarantees see point 2.1.2 of the Commission notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 71, 11.3.2000, p. 14).

Advantage to AGB

(85) Even though AGB as the seller of AGB1 was not a party to the two agreements, it benefited from them since they allowed it to sell its banking business – to sell it at all or at least for a purchase price that was higher than the one it could have achieved without the guarantees and the Put Option provided by the CNB. AGB did not pay any remuneration and the CNB was in no way obliged vis-à-vis the parties to enter into the Indemnity Agreement and the Put Option Deed. Rather, in the light of the banking crisis in the Czech Republic, the purpose of the CNB in providing the measures was to restructure AGB's banking business in order to avoid negative consequences for the whole Czech economy.

(86) The fact that certain guarantees and indemnities may be standard in sale and purchase agreements does not alter the advantageous nature of these measures. The Deed of Warranties between the seller AGB and the purchaser GECB/GECIH may be of a standard nature. The Indemnity Agreement, which is a wide-ranging State counter-guarantee, and the Put Option provided to ease the sale of a private business are, however, not a standard practice and involve financial benefits for the seller and the business sold.

(87) With respect to the Put Option, the Czech Republic and GECB argue that its particular nature would not allow an assessment of the State aid character now, since the purchase price for which GECB may be sold to CNB will only be determined in the future. This is however merely a matter of quantification and does not detract from the fact that the Put Option represented an immediate financial advantage for AGB. It is not necessary to exactly quantify this advantage which in fact is the difference of the purchase price paid by GECB and the price AGB would have achieved for the sale of AGB1's banking business without the Put Option given by the CNB.

Advantage to the banking business of AGB1 and GECB and GECIH

(88) Concerning AGB's banking business, AGB1, that was sold in an asset deal to GECB, the Commission considers the guarantee arrangements and the Put Option as beneficial since they allowed AGB1's business to continue. The fact that AGB1's banking business was sold in an open and unconditional tender procedure to GECB did not remove the advantages since the purchase price for AGB1 was negative in that the value of the aid measures granted to AGB's banking business exceeded the amount realised by its sale.

(89) The purchase price of CZK 304 million did not compensate the CNB for the measure granted in the course of the restructuring since the CNB is not AGB1's owner and the purchase price was not paid to the CNB but to the seller (AGB).

(90) Also, the Counter Indemnity by which GECIH assumed CNB's obligations under the Depositors' Guarantee did not offset the measures granted earlier by CNB to AGB. In the Indemnity Agreement, GECB agreed to assume CNB's liabilities under the Depositors' Guarantee. The Depositors' Guarantee is a guarantee that was issued by CNB upon the imposition of forced administration on AGB on 17 September 1996 towards the creditors and depositors of AGB in order to avoid a run on the bank. The measure was notified by the Czech Republic within the interim mechanism procedure and was declared not being applicable after accession in the Commission Decision of 14 July 2004. The Commission considers that the assumption of CNB's liabilities under the Depositors Guarantee does not compensate the CNB for the granting of the Warranties and Indemnities and the Put Option since the obligations under the Depositors' Guarantee revert to the CNB in the event that GECIH exercises the Put Option. The Commission therefore considers that GECIH's commitment cannot be considered as full assumption of CNB's obligations under the Depositors' Guarantee. Moreover, by the time of the sale of AGB1 in June 1998 CNB's potential financial exposure resulting from the Depositors' Guarantee (granted on 17 September 1996) was negligible since the likelihood of a run on the bank was minimal since the imposition of forced administration on AGB dated back already almost two years. The Czech Republic itself stated in the notification that the CNB never expected to make any payments under the Depositors' Guarantee. In fact, up to the date GECB acquired the business of AGB1, no payments had been made under the Depositors' Guarantee. As there was only a theoretical exposure of the CNB, GECB cannot reasonably argue that they compensated the CNB by way of taking over the obligations under the Depositors' Guarantee in exchange for the Warranties and Indemnities and the Put Option.

(91) The maximum amounts of the Warranties and Indemnities on which the Commission opened proceedings alone sum up to CZK 126 000 million and thus by far exceed any theoretical financial exposure under the Depositors' Guarantee and also the purchase price of CZK 304 million. The Court clarified in *Germany* v *Commission* [1] that an open transparent and unconditional tender procedure does not satisfy the private market investor test and therefore entailed State aid where a business is sold at a negative price and it would have cost less to liquidate that business. The Commission therefore considers that in the present case, the sale by its owners of AGB1's banking business for their own account did not remove the economic advantages; those directly in issue here were conferred to GECB on the sale of that business. GECB and GECIH benefited from the Indemnity Agreement and the Put Option Deed since they obtained rights under those agreements; they obtained these rights for the purpose of allowing a restructuring of AGB1.

Result

(92) Accordingly, the Warranties and Indemnities and the Put Option involve economic advantages for the seller (AGB) and GECB and its parent company GECIH for the operation of the banking business of AGB1.

Selectivity

(93) GECB argues that the Warranties and Indemnities and the Put Option were not selective within the meaning of Article 87(1) EC since they were available to all bidders for AGB1. This argument cannot be accepted; the measures in question were specifically limited to the buyer of AGB1 and are thereby selective in their very nature. Furthermore, the Indemnity Agreement and the Put Option Deed were individually negotiated after GECB had become the sole bidder for AGB1, the invitation to tender making no mention of the availability of State guarantees, far less that the same guarantees would be available to any bidder. The measures are therefore selective.

Distortive effects on competition and trade between Member States

(94) Before AGB entered into forced administration, it was one of the largest banks in the Czech Republic. In view of the fact that AGB is in the liquidation process there is no longer a distortion of competition in respect of the seller (AGB). However, there is a distortion of competition in respect of the banking business of AGB1 that was sold to GECB. AGB1/GECB is active throughout the Czech Republic and 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 the banking business of AGB1 had gone into liquidation, other European and non–European banks would have been able to obtain the business GECB retained. In view of all this the Commission considers that the guarantee arrangements and the Put Option are capable of distorting competition and have an effect on the trade between the Member States [2].

(95) In conclusion, all the elements of Article 87(1) EC being met, the parts of the Warranties and Indemnities and the Put Option which are applicable after accession constitute State aid within the meaning of the Treaty to GECB, for the purpose of it taking over the banking business of AGB1.

6. COMPATIBILITY OF THE STATE AID

6.1. Article 87(2)(b) and Article 87(3)(b) EC

(96) Article 87(2) and (3) EC sets out the conditions according to which aid is compatible or may be considered compatible with the common market.

(97) Contrary to what GECB argues, it is not possible to maintain that in the present case there existed exceptional occurrences or something *'very close to a natural disaster'* pursuant to Article 87(2)(b) EC. A possible loss of confidence of the public in the banking system cannot be regarded as a 'natural disaster' within the meaning of that provision. Also, the notion of exceptional occurrences does not cover financial losses caused by commercial decisions of economic operators. The events which led to the granting of the aid cannot be said to constitute unforeseeable and exceptional occurrences.

(98) Nor can the aid be exempted on the basis of Article 87(3)(b). It was not part of a sectoral scheme applied horizontally in the same way to all Czech banks [3].

[1] Judgment of 28.1.2003, Case C-334/99 *Germany* v *Commission* [2003] ECR I-1139, paragraph 142.

[2] On the effect on trade of State aid in the banking sector, see also the judgment of the Court of Justice of 15.12.2006 in Case C-148/04 *Unicredito Italiano SpA* [2005] ECR I-11137 paragraphs 53-64.

[3] Compare the reasoning in the Commission Decision of 20 May 1998 concerning aid granted by France to the Crédit Lyonnais group (OJ L 221, 8.8.1998, p. 28).

6.2. **Article 87(3)(c) EC and the Guidelines on Rescue and Restructuring**

(99) 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.

(100) For measures adopted before 9 October 1999, the 1994 Guidelines set out the conditions under which such aid is considered compatible with the common market ([1]). The agreements concerning the Warranties and Indemnities and the Put Option were signed on 21 and 22 June 1998 ([2]). Although, as found above, those measures are still applicable after accession, and the Czech Republic may thereby yet grant aid whose nature and amount is substantially undefined, this would be done pursuant to measures adopted whilst the 1994 Guidelines were still in force and it is therefore appropriate to consider them in the light of the 1994 Guidelines ([3]).

(101) In its Decision of 14 July 2004 the Commission described its serious doubts that the requirements of the 1994 Guidelines were met. The Commission's serious doubts in particular with regard to the fulfilment of the formal criteria of the Guidelines have not been removed.

(102) The Commission has the power to review only those aid measures that are considered to be applicable after accession. However, in order to assess the compatibility of restructuring aid it is necessary to look at the full set of restructuring measures. In the present case, there was a set of interventions decided by the Czech authorities. All these restructuring measures have 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.

Eligibility of the firm

(103) 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.

(104) In September 1996 AGB had losses of CZK 8 487 million and an equity balance of minus CZK 5 476 million. On the basis of this information AGB (including the banking business which later became AGB1) was not able to recover without State intervention and was therefore in difficulties within the meaning of point 2.1 of the 1994 Guidelines. However GECB and GECIH were not in financial difficulties; in this respect the requirements of the 1994 Guidelines are thus not fulfilled.

Rescue aid

(105) 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. Since the Warranties and Indemnities and the Put Option are not temporary and exceed a period of six months, the aid does not qualify as rescue aid under point 2.1 of the 1994 Guidelines.

Restructuring aid

Restoration of viability (point 3.2.2(i) of the 1994 Guidelines)

(106) According to the 1994 Guidelines restructuring aid must be linked to a viable restructuring/recovery programme submitted to the Commission.

(107) The Czech Republic and GECB argue that the Commission may not demand a complete and comprehensive restructuring plan since at the time the measures were adopted it was not foreseeable that the EU State aid rules would be applied. In addition, also in other cases, notably in the former East Germany, this requirement was not applied strictly.

(108) The restructuring plan submitted as part of the notification is dated December 2003. In 1996, when the Czech authorities first started implementing interventions with regard to AGB, a comprehensive concept for the restructuring of AGB did not exist. The Commission therefore concludes that this formal requirement of the 1994 Guidelines was not fulfilled.

([1]) In accordance with point 101(b) of the 1999 Guidelines.
([2]) Also all other interventions that have been notified to the Commission were adopted before 9.10.1999. The Amendment No 1 to the Indemnity Agreement only modified (and limited) the measures granted earlier.
([3]) In any event, it should be noted that the 1999 Guidelines are based on the same principles as the 1994 Guidelines.

(109) At the same time it should be stressed that the aid on which proceedings were opened relates to the sale of AGB1 to GECB. It should be recalled in this context that the Commission traditionally regards the transfer of an undertaking in difficulty under the control of a private investor as a central element for solving the difficulties of the past and enabling the positive economic development of that undertaking (or its business). Indeed, it can be assumed that a company is more likely to become durably viable if it comes under the control of a new, private owner with sufficient resources to make a substantial contribution to its restructuring. Therefore, although no restructuring plan in the strict sense was available when the sale took place in June 1998 (and a *fortiori* in 1996), it is clear that the forecasts made by GE for its own purpose and the restructuring measures foreseen in this context were such as to ensure the viability of AGB in the long run. Although GECB/GECIH, as the ultimate owner of AGB1's banking business, was not itself an undertaking in difficulty, GECB was not the owner of AGB1 when it encountered difficulties and was not responsible for the deterioration of AGB1; rather, GECB's purchase of the business enabled it to be restructured, but this would not have happened had GECB's/GECIH's own restructuring efforts not also been backed by the measures comprised in the Indemnity Agreement and the Put Option.

Avoiding undue distortions of competition (point 3.2.2(ii) of the 1994 Guidelines)

(110) Pursuant to the 1994 Guidelines it is a further condition that measures are taken to offset, as far as possible, adverse effects on competitors. These measures normally consist in the reduction or closing of capacity. However, the 1994 Guidelines state that where there is no structural excess of capacity on a relevant market served by the aid recipient, the Commission will normally not require a reduction of capacity in return for the aid.

(111) The Commission is satisfied that there was no structural excess of capacity on the Czech banking market at the time the aid was granted. The Commission also acknowledges that AGB was not left with a cash surplus which would have allowed it to expand capacity except in so far as was essential for restoring viability. The Commission notes that the Czech Republic would have fully qualified as an assisted area at the time the aid was granted which justifies a relaxation of the criterion of the avoidance of undue distortions of competition. Finally the Commission observes that no competitors made comments following the opening of proceedings. The Commission therefore concludes that no conditions and obligations were necessary in the present case in order to mitigate the distortions of competition created by the aid.

Aid in proportion to the restructuring costs and benefits (point 3.2.2(iii) of the 1994 Guidelines)

(112) 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.

(113) The Czech Republic submitted that GECB had undertaken several investments and operational restructuring steps. In particular, GECB paid CZK 206 million mainly for redundancy costs. In addition, GECB directly invested a total of CZK 2 040 million between 1998 and 2002. These investments related to the upgrading of GECB's information and banking systems and related hardware costs, as well as the development of an ATM and branch network. Also, GECB invested in the optimisation of the branch network, staff training, management support and transfer of know-how.

(114) On the basis of the information provided by GECB, the Commission acknowledges that these costs relate to AGB1's restructuring.

(115) It is extremely difficult to quantify the gross grant equivalent of the aid measures contained in the Deed of Warranties and the Indemnity Agreement, as well as in the Put Option (especially taking into consideration the triggering events). The probability of claims being brought seems to be extremely low if not nil in some cases (for instance environmental matters) and higher for others (see for instance Table 1 Clause No 9).

(116) It should nevertheless be recalled that AGB1 was sold via on open, unconditional and transparent tender procedure which does not exclude in the present case the existence of aid but which normally ensures that the aid granted was the minimum necessary in order to allow the sale and consequently the continuation of the business. In any event, GECIH was the only bidder to make an offer for buying AGB1. Therefore, a sale to GECB/GECIH subject to the measures at issue appeared to be the most sensible way of restructuring AGB1.

(117) The Commission also acknowledges that the high capital adequacy ratios achieved by GECB are not caused by the Warranties and Indemnities or the Put Option as these measures do not have any effect on the bank's own capital.

Conclusion as regards the 1994 Guidelines

(118) The Commission concludes at this stage that although the criteria of the 1994 Guidelines are not fulfilled, the spirit of the 1994 Guidelines was substantially respected in the present case: the sale to a private new owner clearly aimed at restoring the long term viability of the bank; there was no need to impose specific conditions and obligations; the aid granted at the time of the sale was indeed the minimum necessary in order to achieve the restructuring in view that it took place within an open, transparent and unconditional tender procedure.

(119) Nevertheless, in particular some formal criteria of the 1994 Guidelines, which are also reflected in the 1999 Guidelines, are not fulfilled. It is therefore appropriate to assess the aid by reference to other provisions of Community law, in order to conclude on its compatibility.

7. ARTICLE 87(3)(C) EC TREATY AND ARTICLE 46(2) OF THE EUROPE AGREEMENT

(120) Article 46(2) of the Europe Agreement which was in force when the aid was granted reads as follows:

> '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.'

(121) This provision does not provide in itself a legal basis to consider any measure in the form of State aid taken in its context by the Czech Republic as compatible with the common market. Nevertheless, it is a framework which, in conjunction with all the other legal and factual elements of the case, is relevant for the assessment of the compatibility of the aid with the common market.

(122) It should be stressed in that regard that the present case cannot be seen in isolation. In fact, when the aid was granted, the Czech banking sector as a whole was facing huge difficulties and most of the banks were close to bankruptcy. The case at hand is indeed one of the sixteen cases, all notified under the interim mechanism procedure ([1]), in which the Czech State had to intervene in order to avoid a complete failure of the whole banking sector in the Czech Republic. They cover all the major Czech banks.

(123) In this context, the measures concerned clearly aimed at ensuring the integrity and stability of the financial system of the Czech Republic. They were also necessary for the stability of the financial system of the Czech Republic since, without them, the banks would have disappeared. Indeed they were taken by the CNB in its role of supervisory authority of the financial sector. They cover most of the financial services mentioned in Annex XVIa of the Europe Agreement. They did not result in discrimination on the ground of nationality.

([1]) CZ 15/2003 — Komerční banka, a.s., decision date: 16.12.2003, OJ C 72, 23.3.2004, p. 9. Corrigendum published in OJ C 104, 30.4.2004, p. 70.
CZ 14/2003 — Česká spořitelna, a.s., decision date: 28.1.2004, OJ C 195, 31.7.2004, p. 2.
CZ 47/2003 — eBanka, a.s., decision date: 3.3.2004, OJ C 115, 30.4.2004, p. 39.
CZ 48/2003 — J&T BANKA, a.s. (until 24 June 1998 Podnikatelská banka, a.s.), decision date: 3.3.2004, OJ C 115, 30.4.2004, p. 39.
CZ 50/2003 — Ekoagrobanka, a.s. and Union banka, a.s., decision date: 3.3.2004, OJ C 115, 30.4.2004, p. 40.
CZ 51/2003 — Pragobanka, a.s., decision date: 3.3.2004, OJ C 137, 4.6.2005, p. 4.
CZ 52/2003 — Universal banka, decision date: 3.3.2004, OJ C 115, 30.4.2004, p. 40.
CZ 53/2003 — Banka Haná, a.s., decision date: 3.3.2004, OJ C 242, 7.10.2006, p. 17.
CZ 54/2003 — Foresbank, a.s., decision date: 3.3.2004, OJ C 242, 7.10.2006, p. 17.
CZ 55/2003 — Moravia banka, a.s., decision date: 3.3.2004, OJ C 86, 8.4.2005, p. 10.
CZ 56/2003 — COOP Banka, a.s., decision date: 3.3.2004, OJ C 137, 4.6.2005, p. 4.
CZ 57/2003 — Bankovní dům Skala, a.s./Union Banka, a.s., decision date: 3.3.2004, OJ C 100, 24.4.2004, p. 23.
CZ 58/2003 — Evrobanka, a.s., decision date: 3.3.2004, OJ C 115, 30.4.2004, p. 40.
CZ 80/2004 — První městská banka, a.s., decision date: 19.5.2004, OJ C 137, 4.6.2005, p. 4.
CZ 46/2003 — Investiční a poštovní banka, a.s./Československá obchodní banka, a.s. (IPB/ČSOB), decision date: 14.7.2004, OJ C 137, 4.6.2005, p. 4.

8. **CONCLUSION**

(124) It results from the above that the aid granted in the course of the sale of AGB1 forms part of the wide ranging measures systematically taken by the Czech Republic in order to avoid the collapse of its banking sector. In doing so, the Czech authorities, although not complying with all the terms of the 1994 Guidelines, fully respected the spirit and the underlying principles of these Guidelines. Taking account of the extreme circumstances confronting the Czech Republic at the relevant time and Article 46(2) of the Europe Agreement, the Commission has concluded that the aid can therefore be considered compatible with Article 87(3)(c) EC as aid to facilitate the development of certain economic activities.

(125) On the basis of the foregoing, the Commission concludes that the indemnification for claims listed in Tables 1 to 4 set out in recital (26) as well as the put option, are State aid applicable after accession and compatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The State aid for GE Capital Bank a.s. and GE Capital International Holdings Corporation, USA as from 1 May 2004 in the form of indemnification for the claims listed in Tables 1, 2, 3 and 4, which is based on the Indemnity Agreement concluded between Česká národní banka and the GE Capital International Holdings Corporation, USA on 22 June 1998, as amended by the Amendment No 1 to Indemnity Agreement on 25 April 2004, and in the form of the Put Option based on the Put Option Deed signed by Česká národní banka and the GE Capital International Holdings Corporation, USA on 22 June 1998, is compatible with the common market.

Article 2

This Decision is addressed to the Czech Republic.

Done at Brussels, 18 July 2007.

For the Commission

Neelie KROES

Member of the Commission