Czech National Bank's position on European Commission public consultation document on technical details of a possible EU framework for bank recovery and resolution

I. General opinion including principles

In view of disagreement with part of the philosophy, on which the proposed European framework is built, the CNB does not consider as useful to try to answer each of the questions contained in the EC consultation document, particularly the questions regarding details of those concepts, which CNB opposes as a whole. When formulating the positions on the individual areas the CNB builds on several general principles, which should definitely be observed within the future EU crisis management framework.

The CNB believes that the following principles must be observed when creating the future European framework for crisis management:

- Supervision of financial institutions and their crisis management are the responsibility of the Member State within the territory of which these financial institutions have their registered offices or where they have been granted a licence.

- It is inadmissible to separate supervisory and crisis management powers from responsibility. The entity that holds responsibility must also have powers.

- The European legal framework for crisis management should mainly facilitate voluntary cooperation between Member States in the preparation for crisis situations and their resolution. It should not restrict the existing powers of national authorities or transfer them to other Member States or EU authorities.

- The European framework should not apply to more entities than necessary; it is not appropriate that it should interfere with supervision and crisis management in respect of institutions that operate only at the national level or are not systemically important in any of the states in which they operate. The harmonised framework should therefore generally apply only to systemically important cross-border credit institutions. Any potential expansion of the scope of the European framework to other entities should be allowed, but not ordered, to Member States.

- It is desirable that national authorities consult their procedures and decisions in the crisis management area in the colleges of supervisors and take into account, among other factors, also potential effects of their decisions on financial markets of other Member States, but we strictly refuse any restrictions of the existing decision-making powers of national supervisory authorities.

- We cannot accept the proposals that are latently directed at EU federalisation without being supported by a clearly expressed will of all Member States, including the will to give up fiscal independence, partly or fully, in favour of the EU.

- It is inadmissible that the European framework interferes in the administrative and organisational structures of Member States, e.g. by imposing the obligation to separate supervisory and resolution activities.

- It is inadmissible that the European framework interferes in the exercise of supervision, which is the responsibility of Member States, by setting detailed procedures for the exercise of supervision.

- It is inadmissible that the rules contained in the European framework allow procedures that can result in endangering financial market stability of a Member State, e.g. through rules for providing financial support between members of financial groups (asset transfers, etc.).

- The European framework should not include any rigid trigger mechanisms for interventions by national authorities in a crisis situation. Member States, who are responsible for crisis management, must have the possibility of sufficiently wide consideration. The Member State which has made the intervention, not the European Union, will be party to the dispute in potential court disputes with shareholders, creditors or other aggrieved entities.

- It is desirable that a certain harmonisation be achieved when stipulating the set of tools and powers which all national authorities will have at their disposal. At the same time, Member States should still have the possibility to introduce also other tools and powers.

- It is desirable that a certain harmonisation be achieved when stipulating the conditions for the use of tools and powers which national authorities have or will have at their disposal. It is necessary, however, to maintain also the possibility of national authorities to react flexibly to unexpected situations.

- The authorities of Member States are accountable to their national parliaments or other national bodies. It is inadmissible that the European framework sets up the obligation for them to be accountable to the authorities of other states.

- The financing of resolution measures adopted by Member States' authorities is the responsibility of these particular Member States. It is inadmissible that the European framework sets detailed rules how to carry out this responsibility.

- It is necessary to support the proposed national discretion regarding the use of funds from the deposit guarantee schemes also for other purposes. A harmonised solution would not be desirable in this case.

- Coordination structures should be kept sufficiently operational for the case of emergency; it is not desirable to establish numerous coordination mechanisms with overlapping tasks or powers.

II. The CNB's opinion on certain areas of the Consultation Document

1. Scope and authorities

Scope of the crisis management framework

In the CNB's opinion, harmonisation of the crisis management framework can only be supported in the case of systemically important cross-border credit institutions. There are no reasons to introduce enhanced cooperation between national supervisors for institutions operating only domestically and institutions that are not systemically important; in such cases single EU solution would not be in line with the subsidiarity principle. It is appropriate to allow all Member States to extend the framework to other entities (investment firms, holding companies), but the decision on making use of this possibility should be left to the discretion of each Member State. As regards systemically important and cross-border operating credit institutions, the CNB agrees with the introduction of enhanced cooperation only to a limited extent, as follows from the comments outlined below.

Authorities responsible for resolution

The separation of resolution authorities from supervisory authorities is inappropriate and counter-productive in the CNB's opinion. In addition, dealing with some specific tasks in the resolution of financial institutions in the individual Member States may involve various national bodies. While in the Czech Republic the imposing of forced administration is in the competence of the supervisor, it need not be the case in other jurisdictions. Differences may be also in the manner of establishing and financing a "bridge bank", etc. This issue should be left to national discretion. In the CNB's opinion, supervisory authorities will have the best information about the activities of supervised institutions, while separate resolution authorities would acquaint with the situation in detail only under time pressure in the crisis situation. The CNB also does not consider as useful to increase (or even double) personnel capacities and other administrative expenses, which would probably arise if the supervisory and resolution authorities are separated. As regards the conflict of interests mentioned by the Commission, it is not clear, where the Commission sees it or why such a conflict should arise at all.

The CNB disagrees with entrusting the EBA with the tasks associated with the preparation of recovery and resolution plans. The CNB sees the EBA's role in the crisis management area particularly in the identification of most effective and proven procedures for crisis management applied by the individual Member States and in facilitating the sharing of such findings and experience between Member States. The EBA has no powers to carry out the day-to-day supervisory activities. On the contrary – the responsibility for the exercise of supervision remains at the national level. The CNB disagrees with the settlement of potential disputes between resolution authorities by the EBA. Resolution is the responsibility of national authorities and could significantly affect the financial system and the real economy of Member States. For this reason, if there is a disagreement between the individual national resolution authorities, these must be able to take measures at their discretion. The CNB agrees, however, that when taking the decisions, they should take into account also potential impacts on other Member States.

2. Supervision, preparation and prevention

2.A Supervisory programme and enhanced supervision

The CNB considers as generally inadmissible that the EU legislation interferes in the specific supervisory procedures applied by national supervisors. The decision on the frequency of on-site inspections and on other measures is in the competence of national supervisory authorities with whom lies sole responsibility for the exercise of supervision and for crisis management.

The proposed principles of enhanced supervision are, nonetheless, in line with the existing practice of CNB supervision, which is based on the principles of risk-based supervision. The situation of the individual supervised entities is regularly assessed and the decision on the direction of supervision is made accordingly (e.g. on-site inspection, information-gathering visit, commissioning of a request for a system audit by an external auditor, etc.). Regular stress testing and the use of additional reporting duty are also part of supervision. For this reason the CNB assumes that enhanced supervision as described in the consultation document would not mean a significant increase in CNB supervision costs. However, long-term presence of CNB staff in supervised entities could lead to an inadmissible weakening of the capacities of on-site supervision, which would probably generate pressures for increasing funds and the subsequent growth in wage costs in particular.

Stress testing

In the CNB's opinion, stress tests are a useful instrument of supervision, but they should be treated with caution and their results must not be overestimated. We can generally agree with the proposal that the supervisory authority carries out micro-stress tests on the supervised institutions (bottom-up tests). From the nature of the matter, however, this should apply only to systemically important institutions, not all institutions subject to supervision. At the same time, the supervisory authority should carry out macro-stress tests of the entire sector (top-down tests). The CNB carries out both types of stress tests, i.e. on key institutions (so called common stress tests currently carried out semi-annually on the sample of 8 banks) and aggregate tests of the whole sector (at quarterly frequency).

The CNB believes that the tests carried out by the institutions themselves (e.g. within their risk management systems or for the ICAAP purposes) cannot substitute the tests that the supervisory authority should carry out itself, even if the methodology of internal tests of the individual institutions is approved by the supervisor. It is possible, however, to recommend the practice of such bottom-up tests, where some calculations are made by banks themselves (with a certain validation by the supervisor), but the total calculation is finalised at the supervisory authority.

As regards the disclosure of test results, the CNB recommends to proceed with maximum prudence and publish only aggregate results, not the results for individual institutions, particularly in the case of coordinated exercises at the EU or euro area level. Even if aggregated results are disclosed, it is naturally necessary to consider a possible market reaction and always supplement potential unfavourable results with an information about the measures taken to increase the resilience of the institutions or the sector as a whole, or the measures that have been prepared for this purpose and approved for use. We can imagine a situation, e.g. during the banking crisis, where the disclosure of stress test results of individual

banks as part of transparent communication of the manner of crisis resolution may be meaningful. These cases may be very specific, however, should be exceptional and should be applied only at the level of national supervisors of individual Member States. We can also support the conclusions of previous discussions, which confirm that the disclosure of individual results of financial institutions is possible only if there are funds in place to be provided to those institutions, that may need help in connection with reaction of the public.

In the CNB's opinion it is not necessary to harmonise the stress test methodology across the EU. Banking sectors of the individual Member States are not identical. Consequently, the risks they face and the degree of depth and detail of the tests are not identical as well. Expert debates on appropriate methodologies for stress testing within the EU are constantly under way and the individual methodologies are thus subject to (informal) mutual verification and peer review. The CNB believes that subject to harmonisation should be the "target" variable – capital adequacy – in the sense that Core Tier 1 capital according to Basel III should become the key measure of capital. We can also agree with the harmonisation of the basic elements of stress scenarios and the methods of reflecting the risks identified in the case of stress tests focused on the euro area or the EU as a whole.

2.B Recovery planning

The CNB supports the requirement for the preparation of recovery plans by systemically important financial institutions and groups. However, in case of disagreement between supervisory authorities regarding the group recovery plan, each national supervisory authority must have the right to proceed independently. We agree that in case of independent action supervisory authorities should take into account, among other things, also potential impacts of their steps on the other Member States. However, as a priority, each national supervisory authority must ensure the fulfilment of the obligations stipulated by its national law.

In connection with the introduction of recovery plans we do not expect any sizeable one-off costs (of the IT investment type). It is difficult to estimate additional ongoing costs of the assessment of resolution plans of financial institutions, but some increase in personnel capacities would probably be needed. This task should be covered mainly by the capacities of off-site supervision. The need of coordination within the supervisory colleges can also be expected, as most domestic banks are part of European financial groups.

2.C Intra-group financial support

In the CNB's opinion, the setting of conditions under which intra-group financial support might be provided, must remain in the competence of individual Member States. It is a measure which can strongly affect financial stability of Member States, especially those, where there operate mostly subsidiaries of financial institutions from other Member States. Moreover, the harmonisation of the framework for providing intra-group support is very difficult, as legal systems of numerous Member States do not recognise the concept of group interest. Compulsory introduction of such concept would have significant impact on the existing legal relations and other legal institutes and would lead to a weakening of legal certainty of minority shareholders and creditors of financial institutions. Should the framework be harmonised across the EU, the CNB considers as crucial that the provision of intra-group support be possible only if both the supervisor responsible for the supervision of the provider of the intra-group support and the supervisor responsible for the supervision of the beneficiary of the intra-group support give their consent to providing (receiving) the

support. The decision (consent or refusal) of the national supervisors must be final, without a possibility of being overruled by the decision of the consolidating supervisor, group level resolution authority, in the supervisory college, ESA mediation, or any other forum.
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The CNB strongly disagrees with incorporating any binding mediation procedures in coordination processes between national supervisors. Responsibility for financial market supervision and crisis management lies on the individual Member States, not on EU bodies. If the authorities of Member States fail to agree on a common procedure, they must be left – to the full extent – the possibility to adopt their own decision. For the same reason the CNB considers as completely unacceptable that the decision of a supervisor on a consolidated basis should be binding for supervisors of other Member States.

The CNB believes that it is not necessary to introduce the supervisor's power to require a regulated institution to request intra-group support. If the supervisor sets e.g. an obligation of a regulated institution to reach a certain level of capital adequacy, it is up to the regulated institution how it will achieve it.

2.D Resolution plans

The CNB believes that the preparation of resolution plans is a useful measure, but it is not in favour of the obligation that resolution plans should be prepared by resolution authorities – the preparation should be made by financial institutions themselves.
Resolution authorities should adopt the plans or require changes or amendments. In line with the above position, the CNB does not deem it appropriate that the European framework should apply obligatorily to other than cross-border operating systemically important credit institutions; the same thus applies to the obligation to prepare resolution plans. The extension of this obligation to another type of institution should remain to discretion of Member States. Any resolution plan must be accompanied by an agreement of all Member States involved on sharing the costs that will arise in connection with restructuring in the individual Member States. Of course, the agreement must not be replaced by a decision of the EBA or some other EU body, not speaking about the decision of a consolidated supervision authority.

We consider the proposed requirements on the content of resolution plans as sufficient in general. However, the resolution authority should have the right to claim more requirements depending on a specific situation, organisational and legal structure of a financial institution, etc.

The estimate of additional ongoing costs of the creation of resolution plans of financial institutions is difficult to make at the moment, but some increase in personnel capacities would probably be needed. As for the assessment of recovery plans, this would mean especially an increased burden on off-site surveillance staff in connection with these new tasks. An increased volume of work can be expected especially in the first year, when the plans would be created for the first time (also concurrently with the assessment of recovery plans). In the following years the plans would "only" be updated, if there were no significant changes in the activities of an institution or in the group's structure, or in the market situation or legal environment. We do not expect any sizeable one-off costs (of the IT investment type).

In addition to the proposed list, preparatory and preventative powers should include also other powers aimed at the limitation of dependence of financial group members on other members

of the same group, e.g. the limitation of intra-group guarantees and providing of further activities by the entities that have no links with this financial group. Such measures can help reduce the risk of contagion within the financial group.

The CNB agrees that national resolution authorities should take into account, among other things, the impacts of the measures they impose on stability in other Member States, but it strictly refuses any restrictions of decision-making powers of national resolution authorities. It is an inadmissible interference in the powers of Member States to reduce the scope of the decision that the national resolution authority may adopt, or even to completely deprive national authorities supervising subsidiaries of decision-making powers in favour of the authorities of the Member States supervising the parent company. In view of significant economic and fiscal impacts of the activity of resolution authorities, such reduction in powers would mean a gross interference with fiscal independence of Member States. If resolution authorities fail to adopt a joint decision, each national authority must be left all powers to adopt a decision relative to the entities operating within the territory of the Member State concerned. For the same reason, the CNB does not deem it admissible to involve the EBA's mediation mechanism.

The proposed protective measures for financial institutions, particularly judicial review, are sufficient in the CNB's opinion, but it is necessary to allow Member States – in view of their potential liability for damage – to adopt their own regulations.

3. Early intervention

Early intervention powers and special management

The CNB agrees to enhancement of powers of national authorities towards the institutions falling within the field of their competence. However, it is necessary that Member States continue to have the option to confer to their authorities also other powers. The CNB further agrees that the stipulation of conditions for the appointment of a special manager is described only demonstratively in the European framework (i.e. no list of mandatory conditions). However, the decision and transposition of one or more of the supposed conditions, or the decision on legal anchoring of other conditions, including a possibility of supervisory authority to have discretionary powers, should be left within the competence of Member States. This will also ensure, that Member States will be able to set an appropriate maximum length for a mandate of a special manger. Our experience shows, that the proposed two-year period may be insufficient.

Implementation of a recovery plan, group treatment and assessment of group level recovery plans

The CNB strongly disagrees with restrictions of decision-making powers of national supervisory authorities. It is a completely inadmissible interference in the powers of Member States to deprive the supervisory authorities of Member States supervising subsidiaries of decision-making powers in favour of the authorities supervising the parent companies. If the supervisory authorities fail to adopt a joint decision, each national authority must be left all powers to adopt decisions concerning to the entities operating within the territory of the Member State concerned. For the same reason, the CNB does not consider it admissible to transfer the decision-making powers to the EBA through the binding mediation mechanism.

4. Resolution tools and powers

4.F Conditions for resolution, notification requirements and resolution objectives

In the CNB's opinion, conditions for application of resolution powers and tools could be a combination of all the three proposed options, however Member Sates must have a possibility to adopt their own conditions. The European framework, therefore, should contain only a list of example conditions (i.e. no list of mandatory conditions). Furthermore, the supervisory authority should be granted only the power to state failure of the financial institution and to adopt necessary measures, but not an obligation to do so. All possible situations and their variants cannot be predicted and therefore flexibility to adopt exactly the measures, which are the most appropriate at the given moment, must be maintained for national supervisory authorities.

4.G Resolution tools, powers, mechanisms and ancillary provisions

The CNB considers the proposed resolution tools and powers to be acceptable, however, they must not constitute a closed list of options. Further it is necessary to leave to the discretion of each Member State, whether it will transpose these tools and powers to its national legislation or whether it will put in place different tools and powers. The same principle should be applied also to other questions, as is e.g. an independent use of the asset separation tool, the maximum period for an activity of a bridge entity etc.

Transfer powers: Ancillary provisions

The proposed measures could have significant effects on the existing legal institutes and legal relationships and these effects would differ depending on the individual Member States and their legislation. The CNB believes that, same as for resolution powers and tools, Member States must have the possibility to choose what further consequences they link with their use.

The CNB also considers that it is inappropriate to allow resolution authorities to require other members of one financial group to continue providing services or equipment. The continuation or replacement of such activities should be regulated in advance within resolution plans, i.e. primarily on a contractual basis, not in the form of orders by resolution authorities, which would interfere with the rights of third parties.

Transfer of foreign property

In the CNB's opinion, if the existing creditors (and third parties) operating in the same Member State are not to be subject to unjustified discrimination (some would be subject to compensation under the law of this Member State, and some other to compensation under the law of a different Member State), it would be necessary to harmonise also the mechanisms and the calculation of compensation across all Member States. In our opinion, the Commission should supplement the above proposal with a thorough legal analysis taking into account the law of all Member States. Without such analysis, it is not possible to properly assess the consequences of the measures suggested. At present the CNB sees as problematic any other than contractual application of the law of the state where the resolution authority is based to entities, assets, rights and liabilities subject to the law of other Member States.

Resolution mechanisms

The CNB considers that it is inadmissible to order Member States, which resolution mechanism they should apply. Many Member States already have well-established resolution mechanisms in place and it would be counter-productive to reject them only for the purpose of EU harmonisation. This issue therefore must be left to the discretion of Member States.

Procedural obligations of resolution authorities

The CNB considers that the proposed requirements are too extensive and would burden resolution authorities to an inappropriate extent. In the CNB's opinion, it would be sufficient to publish a notification on the websites of the resolution authority and the EBA and notify the operators of those organised markets, where the respective shares or debt instruments are accepted for trading.

Protection of stakeholders: compensation

The CNB considers as an unacceptable interference with Member States' powers, if the European framework is to stipulate the rules for the payment of compensation to shareholders and creditors. This is an issue with evident fiscal implications for Member States. The Member State, not the European Union, will be a defendant side in a potential lawsuit. The CNB further notes that in practice it will probably never be possible to determine accurately, what would be the result of an insolvency proceeding for each shareholder and creditor affected by the resolution.

Temporary suspension of rights

Limited suspension of certain obligations

The CNB believes that it is necessary to assess, whether the proposed measures do not collide with the settlement finality principles under Directive 98/26/EC of the European Parliament and of the Council on settlement finality in payment and securities settlement systems.

Temporary suspension of close out netting

The CNB believes that this is a potentially useful power of resolution authorities. However, the Commission should incorporate in an impact study accompanying the potential legislative proposals of the crisis management framework also the simulations of alternatives, which can be expected when this tool is applied, including partial transfers of assets and liabilities and their impacts on the residual entity. The CNB also believes that it is necessary to assess, whether the suggested measures do not collide with the settlement finality principles under Directive 98/26/EC of the European Parliament and of the Council on settlement finality in payment and securities settlement systems. The decision on introducing this power into Member States' law, as well as the setting of deadlines and entities which will be affected by the suspension, should be left to the discretion of Member States.

Scope of rights to challenge resolution

In the CNB's opinion, the respective provisions and powers of resolution authorities are potentially useful, but the decision on introducing them into Member States' law must be left to the discretion of Member States. They also must have the possibility of introducing other

powers in the legal disputes area. Should, however, a harmonised solution be adopted, the Commission must supplement its proposal with a thorough legal analysis taking into account the law of all Member States and an impact study which would deal also with fiscal impacts on Member States. The CNB also recalls that a number of disputes regarding investment protection and compensation may take place before the courts of arbitration, which need not decide according to the law of any EU Member State.

4.H Safeguards

In the CNB's opinion, the European framework should not interfere with Member States' powers as regards partial transfers of assets, rights and liabilities and compensation paid to creditors or other counterparties. The responsibility for resolution lies with national resolution authorities and creditors will solve potential legal disputes with the individual Member States (national authorities). Member States should therefore have the possibility to set these (and other) resolution rules independently.

5. Group resolution

Resolution colleges

In the CNB's opinion, the very concept of resolution colleges is problematic. We consider it inappropriate that a new team (resolution college), which will be less acquainted with activities of the financial institution and will have less experience with mutual cooperation, would take over the management just in an emergency situation. Coordination of measures should also in this phase (and particularly in this phase) be secured by colleges of supervisors under the CRD. In accordance with the set-up in the individual states concerned, also national resolution authorities, if they differ from the national supervisory authorities, can be newly engaged in this activity. Participation of the individual college members in the specific meetings should ensue from general rules, and not from a decision of one of the college members.

Group resolution

The CNB agrees that the national authority, which does not intend to follow a group resolution scheme, should inform other supervisory authorities concerned, and that it should do so even in advance, if it is technically viable. However, the CNB does not agree that the authority should be obliged to substantiate its decisions to other supervisory authorities. National resolution authorities are liable to their national governments, or parliaments, but not to authorities of other Member States or EU authorities.

Multilateral arrangements with third countries

The CNB agrees that the EBA may pre-negotiate agreements with third states, but their conclusion must rest with the decision of each Member State. The European framework should not lay down obligation to conclude these agreements.

6. Financing arrangements

Since the Member States are responsible for the crisis management, the CNB does not agree that they are obliged to establish resolution funds. Such a decision should be left to the discretion of Member States, as well as a decision on the parameters of these funds.

The task of the EU legislation should be to ensure only, that contributions (levies, taxes) in each Member State are set in such a way that they do not have adverse effects on the financial institutions operating in other Member States and fall under crisis management powers of these Member States. They are typically subsidiaries of banks from other Member Sates. Foreign branches, as is the current situation, should fall primarily under the crisis management powers of the Member State, in which the institution, whose branch office is in question, has its registered office.

III. The CNB's opinion on annexes to the Consultation Document.

1) Debt write-down as an additional resolution instrument (Annex 1).

The CNB welcomes and supports activities aimed at finding as many measures as possible, which will enable the competent authorities to maintain credibility and stability of credit institutions, with a minimum, or even, without any adverse impact on public budgets/finance. The application of these measures should thus be conductive for safeguarding financial stability as a whole. However, only the general proposals have been discussed so far, without simulating the results of their use. Given the current situation of information, the CNB therefore cannot express an unambiguous support to any of the potential approaches. The CNB thus recommends that a detailed impact study be conducted, the results of which will suggest where to focus further activities in this area.

The CNB believes that in the case of the comprehensive approach it is desirable, that specific groups of debt are excluded from the application of the measure. In particular insured client deposits and debts to funds, whose clients are consumers (e.g. pension funds, standard UCITS funds), if it exceeded the extent, to which they are authorized to take equity risk. By contrast, the CNB believes that in terms of debts to persons from the same consolidation group or persons closely linked within the meaning of the Capital Requirements Directive (CRD) it is admissible, that no protection applies to them.

The CNB considers that the total financial costs for the credit institution, immediate and future, related to issuance of instruments, and further impacts on the maintenance/ improvement of solvency and a need to manage liquidity risk, to be the key factors for the amount of write-downs or conversion. The CNB has no objections to the possibility to contractually set debt write-downs, provided that such a contract will be absolutely transparent, unambiguous and easily understandable.

In the CNB's opinion, a failure of a credit institution can be considered an appropriate trigger mechanism, provided that the criteria indicating failure will be sufficiently specific and clear. We believe that new investors will appear, who will be willing to purchase these instruments. It will always depend on the fact, what will be the ratio of potential yields and investment loss risk. The prohibition to purchase these instruments should apply to: i) funds, whose clients are consumers (e.g. pension funds, standard UCITS funds), or ii) persons managing assets of

retail clients, if it exceeds the extent, to which these funds or persons are authorized to take equity risks.

The CNB is of the opinion, that putting in place of any further compensation measures would weaken the primarily pursued purpose of the proposal.

The CNB considers it significant that the power to decide to issue "bail-in" instruments, or, to write down or to convert debts, belongs to the authorities exercising supervision on a solo basis of an entity from the group. Mutual awareness of supervisory authorities can be ensured through supervisory a college established for a relevant group.

The CNB does not believe that it is necessary to introduce a special group of creditors with a 'super-senior' status.

Provided that the above-mentioned case studies confirm a practical usability and legal viability of some of the proposed approaches, the CNB agrees that this type of measure is applicable also to the persons, which are not a joint-stock company. In the case of credit unions, only members of the issuer should be enabled to invest in bail-in instruments.

2) Possible changes to Company Law directives (Annex 2)

Use of resolution powers

The CNB agrees that the proposals for resolution of powers, anticipated in the consultation document, would require the changes to Company Law directives identified in the consultation document. Nevertheless, Czech law already contains some of the specific measures, e.g. under the Czech Act on Takeover Bids, the authority conducting supervision over takeover bids may decide, that the acquirer of controlling holdings does not have to make a takeover bid, if he has acquired holdings as a result of proceedings aimed to avert bankruptcy, or in order to meet the statutory obligation to maintain capital adequacy. Pursuant to the Act on Banks, if the amount of the capital of the bank falls below the required limit and the bank therefore convenes a general meeting in order to increase capital, the time for publishing the invitation to the general meeting can be shortened.

The CNB considers the proposed changes broadly sufficient, nevertheless, we point out the necessity of an analysis and formulation of an exception, in terms of takeover bids, particularly in connection with "poison pills [1]". It is necessary to eliminate measures adopted by the current shareholders, or the board of directors, which in their consequence, should prevent takeover bids (see Article 10 of Directive 2004/25/EC).

Early intervention

[1] They are defence measures against a hostile takeover bid, which are activated during takeover of control. If necessary to overtake the troubled bank by another entity, such measures could prevent this takeover, they could make it more complicated or strikingly more expensive. These "poison pills" may assume the most miscellaneous forms, e.g. to guarantee acquisition of new shares to existing shareholders of the target company after a successful takeover, another example includes limitation of the voting rights to above a certain percentage, various shareholders´ agreements and mutual pre-emptive rights, options for transfer of significant assets, financial liabilities arising conditionally after the takeover (the debt becoming due), powers of the members of the board of directors to issue or purchase shares of the company.

As regards the establishment of a mechanism for rapid capital increase in an emergency situation, when the credit institution fails to meet capital requirements, two possibilities are proposed in the document. The CNB considers none of the proposed alternatives appropriate and points out that the both alternatives carry the risk, that a general meeting will not take a relevant decision in the prior-to-emergency phase (an arrangement for convening the general meeting in the articles of association or a mandate for a statutory body will be then missing). At the "option 2" it is necessary to consider a possibility of a non-cooperative statutory body. The CNB considers as most appropriate such an arrangement, under which the terms for convening a general meeting to approve a proposal for raising capital are shortened directly in the law, in case that i) an emergency situation arises, or, ii) if the capital amount falls below the level laid down in the CRD. Specification is not necessary, but, on the other hand, when it is inappropriately formulated, it may be contra-productive (doubts will be cast, whether the mechanism might have been used). At the same time, further exceptions from the general rules necessary in such a situation (e.g. exclusion of preferential rights of the current shareholders for subscription of new shares) can be laid down by the law.