INTERNATIONAL CHAMBER OF COMMERCE
The world business organization

Department of Policy and Business Practices

European Banking Authority
Floor 46 One Canada Square
London E14 5AA

By electronic delivery to
mrelreport@eba.europa.eu

2 September 2016

Re: EBA Interim Report on MREL: Third country recognition of resolution powers

Dear Sirs

1. **The ICC**

The International Chamber of Commerce ("ICC") is the world business organization, whose mission is to promote open trade and investment and help business meet the challenges and opportunities of an increasingly integrated world economy. With interests spanning every sector of private enterprise, ICC's global network comprises over 6 million companies, chambers of commerce and business associations in more than 130 countries.

The ICC Banking Commission is the largest of ICC"s commissions. With 80 years of experience and more than 600 members in over a hundred countries, the ICC Banking Commission has gained a reputation as the most authoritative voice in the field of trade finance.

2. **European Banking Authority's recent Interim Report on MREL**

The ICC is writing to you to offer its comments on the European Banking Authority's recent Interim Report on MREL[1] (the "Report"). While we note that the report covers a number of issues related to minimum requirement for own funds and eligible liabilities (MREL), in this letter we only offer comments on the section most relevant to international trade, namely "Section 6.2, Third country recognition of resolution powers"[2].

Since, in our letter to (now former) European Commissioner Jonathan Hill[3], we have raised our concerns about serious negative consequences on the real economy if trade finance liabilities continue to be in-scope for the contractual

[1] European Banking Authority (EBA). *Interim Report on MREL*. EBA-Op-2016-12. 12 July 2016.

[2] Ibid., 61.

[3] ICC Letter to European Commissioner Jonathan Hill Re: the impact of the Bail-in Tool and the requirement for Bail-in Recognition Clauses under the BRRD on trade finance in the EU of 2 April 2015, which was copied to the European Banking Authority, for the attention of Mr. Andrea Enria

recognition of bail-in requirement under Article 55 of the EU Bank Recovery and Resolution Directive (2014/59/EU) ("BRRD"), we have been heartened to see how some national resolution authorities, the European Commission and the EBA have acknowledged these concerns and are working to find a solution.

We are very grateful to the EBA for its efforts in this regard, and welcome the constructive suggestions for a solution that the Report contains.

Although the Report invites comment "on the practical difficulties faced in implementing the recognition clauses", as we listed many of these in our letter to (now former) Commissioner Hill, for the sake of brevity we will not trouble you to repeat them all here.

As you know, the Report lays out three policy approaches for potential adoption that could "narrow the scope of the requirement in Article 55 while maintaining the effectiveness of contractual recognition for MREL liabilities"[4], namely:

i. Introduce additional exemptions, in particular for CCP membership agreements, and defined categories of trade creditors.

ii. Introduce a power for resolution authorities to grant waivers from Article 55, where this would not create an impediment to resolvability. This could be limited to liabilities which are either a) not eligible for MREL or b) not eligible for bail-in. Alternatively, clarify that penalties should only be applied by resolution authorities when failure to implement Article 55 constitutes an impediment to resolvability.

iii. Limit the scope of Article 55. Under this option, Article 55 would apply only to instruments that are eligible for MREL.

3. ICC's comments on the three potential solutions in the Report

Option (iii) is the most preferable because it serves the resolution objectives of BRRD and offers a potential solution not just for trade finance but for other liability types for which BRRD has adverse consequences that outweigh any resolution benefit their inclusion in the Article 55 bail-in requirement could bring. It also has the potential to be a simple (relatively speaking and depending on the level of certainty that can be reached in defining MREL) and proportionate solution.

This preference for option (iii) is, of course, predicated in the assumption that trade finance liabilities will not be eligible for MREL. If this assumption could prove incorrect, then using option (i) to create a specific exclusion for trade finance liabilities in combination with option (iii) would be the preferred option.

As defining MREL eligibility currently allows a degree of national resolution authority discretion, it is possible the above assumption could prove incorrect for some Member States. Aligning MREL with TLAC would give greater certainty in this regard.

The preference for option (iii) is mainly based on the principle that only those liabilities that are in practice capable of being bailed in and that, if bailed in, strengthen the loss absorbing capacity of a bank should be in scope of Article 55 BRRD. In this regard we would like to repeat an important argument made before. The bail-in of trade finance liabilities (if possible at all) will not strengthen the loss absorbing capacity of a bank. Upon the bank's payment to the trade finance

[4] EBA, *Interim Report on MREL,* 62.

creditor the bank will immediately have a claim against another party (e.g. another bank or applicant/client). A bail-in of such trade finance liability will not lead to a permanent increase of the bank's capital. As a result of such bail-in the bank may get to keep what it should otherwise have paid, but it would be an unnecessary result. If that bank had paid the full amount, it would immediately be reimbursed by another bank or client. The bank does not gain anything by not paying the full amount. Therefore a bail-in of its trade finance liability does not provide additional value. Ultimately a bail-in of trade finance liabilities leads to a loss of business for the bank. Once a trade bank defaults on its trade finance liabilities, its reputation as a trade finance bank will be tarnished and it will be shunned by the trade finance world. It would in all likelihood be the end of the trade finance business for that bank. An unnecessary and disproportionate result that will directly affect the importers and exporters who did not select the bank to provide funding in return for interest (such as savers or bondholders) but to support their international trade business. That cannot be the intention and should not be the result of the BRRD's bail-in tool.

4. **<u>Conclusion</u>**

The bail-in of trade finance liabilities is difficult if not impossible. If a national resolution authority were to somehow bail in a trade finance liability, the bail-in will not strengthen the loss absorbing capacity of the bank concerned. Instead it will result in an unnecessary loss for bank's international trade clients. Therefore the requirement to incorporate contractual bail-in recognition clauses in trade finance instruments is disproportionate and unnecessarily damaging for international trade. Furthermore, Article 55 BRRD creates a non-level playing field for European banks and their customers in the competitive business of international trade.

The ICC strongly believes that the solution recommended above will prevent unnecessary damage to international traders and trade. The ICC greatly appreciates the EBA's consultation on the scope of Article 55 BRRD and hopefully the EBA will find the feedback set out in this letter clear and useful.

Naturally the ICC would be pleased to answer any questions the EBA may have on this letter or on the effect of the BRRD on international trade, whether in writing or in face-to-face meetings or otherwise.

Yours truly

Daniel Schmand
Chair, ICC Banking Commission
On behalf of the ICC Banking Commission