OPINION OF THE EUROPEAN MONETARY INSTITUTE

on a consultation from the Council of the European Union under Article 109f (6) of the Treaty establishing the European Community and Article 5.3 of the Statute of the EMI;

on a Proposal for a European Parliament and Council Directive on cross-border transfers (COM(94) 436 final) ("the Directive").

CON/95/3

1 The present consultation was initiated on 2nd February 1995 by the Council of the European Union which, for this purpose, transmitted to the EMI a Proposal for a European Parliament and Council Directive on cross-border transfers ("the Directive") as laid down in document COM(94)436 final.

2 The principal objective of the Directive is to ensure that in the internal market cross-border credit transfers may be made free of any impediment. In this sense, the Directive is intended to serve as a support measure for the free movement of goods, persons, services and capital, while at the same time ensuring a high level of consumer protection. The Directive is also intended to be a sequel to the freedom of capital movements achieved during Stage One of Economic and Monetary Union (EMU) and is therefore considered by the European Commission as a further step towards the progressive implementation of EMU.

3 Under the Treaty on European Union the EMI is entrusted with the task of promoting cross-border payments with a view to Stage Three of EMU. Although the EMI's focal point is primarily large-value payments between banks, the Directive, which is mainly intended to apply to retail payments, is also felt to be important by the EMI, as these two kinds of payments are interrelated. The EMI shares the general objectives of the Commission in the field of retail cross-border payments and supports its wish to encourage the banking industry to improve the transparency and performance and reduce the costs of such payments. In this context, the EMI also shares the view of the Commission that cross-border payments are generally not yet executed efficiently enough to benefit fully from the Single Market and, at a later stage, from Monetary Union. Although it is recognised that the banking industry has made substantial

improvements in the situation over the past few years, some time will be needed before cross-border retail payments in the EU can match the performance of domestic payments. Nonetheless it is the EMI's view that a Directive is too heavy a legal instrument to address the issue at this moment. Rather a non-binding instrument (perhaps in the form of a "Charter") would be more appropriate as the issues dealt with in the Directive mainly concern the relations between banks and their customers, which in most EU Member States are governed by contracts rather than by binding statutory provisions. However, if the European Parliament and the Council choose to adopt a legally binding instrument in the form of a Directive (a political decision in their realm of competence), some amendments are needed to ensure that it does not have adverse effects on payment systems.

4 The EMI has two major remarks on the scope of the Directive. First, it should be made clear that the Directive does not apply to large-value payments, as the consequences of the implementation of the Directive for such payments have not been analysed. Indeed, discussions which have taken place so far between the Commission and commercial banks have only focused on retail payments in connection with the need to protect consumers and small businesses; in other words the Directive is predominantly about consumer protection. Moreover, it has never been seriously argued that large-value payments raise major problems for the implementation of the Single Market. Secondly, it should be made clear that the proposed Directive ought ordinarily to apply only to credit transfers in EU currencies and in ECUs, as transfers in a non-EU currency are likely to involve one or more non-EU credit institutions, to which the Directive cannot apply.

5 Finally, detailed remarks on some of the issues raised in the proposed Directive are given below:

(a) Although the EMI agrees in general with the definitions provided in the proposed Directive, the definition of "other institutions" does not specify which types of institutions are covered. In particular, it should be made clear that the definition does not cover central banks.

(b) It is suggested that the wording of Article 4 (Information subsequent to a credit transfer) be slightly amended so that the second indent reads "... the amount of any charges payable by its customer. The original amount of the credit transfer and any charges payable by the beneficiary should be separately specified".

(c) Articles 5 to 7 impose a strict liability on the originator's bank in every respect. The EMI is doubtful whether the Directive should impose on the originator's bank a strict liability to

the originator for the proper execution of a cross-border credit transfer, unless provision is made in the Directive for the following:

- first, possible contractual rights should be preserved for the originator's bank to have recourse to any intermediary bank for recovery of any sum which becomes payable to the originator (under the terms of the Directive) as a result of any error or omission by such an intermediary;
- second, the originator's bank should not be made liable for the acts or omissions of the beneficiary bank, or for an error of an intermediary bank imposed by the beneficiary bank or by the originator;
- and third, the Directive should contain a more appropriate definition of "force majeure", where the liability of the originator's bank does not apply. The insolvency of an intermediary institution is presently excluded from the definition. In this respect, it may be mentioned that the originator may choose, either directly or indirectly, the intermediary institution. A bank should be able to protect itself against liability if forced to deal with a counterparty which it considers to be of doubtful creditworthiness. This could be achieved through a provision which allows banks in such circumstances to advise the customer of the risk and to exclude liability if a customer nevertheless wished to proceed.

20th March 1995