

# **The Legislative Process in the European Community**

*by Philip Raworth*

*Associate Professor in International Business  
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*University of Alberta, Edmonton, Alberta, Canada*

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Kluwer Law and Taxation Publishers  
Dordrecht - Boston - 1993



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*Kluwer Law and Taxation Publishers*

P.O. Box 23	Tel. 31-5700-47261
7400 GA Deventer	Telex. 49295
The Netherlands	Fax. 31-5700-22244

*Distribution in the USA and Canada*

6 Bigelow Street	Tel. 617-354-0140
Cambridge, MA 02139	Fax. 617-354-8595
USA	

**Library of Congress Cataloging-in-Publication Data**

Raworth, Philip Marc, 1943-

The legislative process in the European Community / by Philip Raworth.

p. cm. (European monographs ; 4)

ISBN 9065446907

1. Legislation—European Economic Community countries.

2. Legislative power—European Economic Community countries.

I. Title. II. Series.

KJE5349.R39

342.4'052—dc20

[344.0252]

93-7393

CIP

Cover design: Bert Arts

ISBN 90-6544-690-7

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Deventer, The Netherlands

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Printed and bound by Antony Rowe Ltd, Eastbourne

## Acknowledgments

First and foremost, I should like to thank the Royal Bank of Canada for its generous fellowship that enabled me to spend sufficient time in Europe to complete the research for this book.

My thanks go as well to the English law firm of Linklaters and Paines, in whose Brussels office I worked and where this book was first started. I am much indebted to their patience and indulgence in granting me office facilities on my frequent visits to Brussels.

Lastly, but not least, I would like to thank my wife, Marie-Gabrielle, my children, Kristin, James and Pierre-Alexandre, and my step-children, Emilie and François for creating a home environment in which I was able and happy to work.

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# Chapter I. Introduction

## 1. THE EUROPEAN COMMUNITY AND EUROPEAN UNION

### 1.1. The European Community

The European Community comprises in fact three separate Communities, namely the European Coal and Steel Community (ECSC), the European Atomic Energy Community (EAEC) and the European Economic Community (EEC). The first two are restricted to the sectors to which they refer and are overshadowed in importance by the EEC. Nevertheless, the ECSC has the distinction of being the first Community, as it was founded in 1951 by the Treaty of Paris.<sup>1</sup> The other two were set up in 1957 by the Treaties of Rome.<sup>2</sup>

The European Community was initially given competence, on either an exclusive or partial basis, over the internal free market (free movement of goods, persons, services and capital), foreign trade relations, the common agricultural, fisheries and transport policies, competition policy, corporate law, social policy, taxation, economic and monetary policy, employment and vocational training, coal and steel and nuclear energy. This competence has greatly expanded over the years to embrace additional areas such as consumer protection, public health, education, intellectual property, energy, the environment, research and development, regional policy, telecommunications, and industrial policy. The authority for this considerable increase in the scope of the Community's legislative activity was found variously in the provisions on the free movement of goods,<sup>3</sup> the competition rules<sup>4</sup> the harmonization power<sup>5</sup> and, perhaps most significantly, in the residual power to act in order to attain the objectives of the three Communities.<sup>6</sup>

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1. Treaty establishing the European Coal and Steel Community, (ECSC), 261 U.N.T.S. 140. Future references to treaties are designated by the abbreviations appearing in brackets in the initial citation.

2. Treaty establishing the European Economic Community, (EEC), 298 U.N.T.S. 11; Treaty establishing the European Atomic Energy Community, (EAEC), 298 U.N.T.S. 167.

3. Arts. 30-37 (EEC).

4. Arts. 85-94 (EEC).

5. Art. 100 (EEC).

6. Arts. 235 (EEC); 203 (EAEC); 95 (ECSC). At its meeting in Edinburgh on December 11-12, 1992, the European Council, while upholding this residual power, nevertheless indicated that the principle of subsidiarity requires that it no longer be used to circumvent express restrictions placed on Community action by specific Articles of the Treaties — see Annex 1 to Part A of the Conclusions of the Presidency, (*Edinburgh Summit Conclusions*), SN 456/92, footnote 1 on p. 5. See also *infra* at p. 5-6.

## 1.2. The Single European Act

The Single European Act (SEA), which was signed at Luxembourg and The Hague in 1986,<sup>7</sup> inaugurated the 1992 process aimed at completing the internal market by January 1, 1993<sup>8</sup> and established European Cooperation in the sphere of foreign policy.<sup>9</sup> It also introduced the Cooperation Procedure, which gave the European Parliament a greater role in the legislative process,<sup>10</sup> and expanded the use of qualified majority voting.<sup>11</sup> The SEA gave official recognition for the first time to the European Council.<sup>12</sup>

As far as the legislative competence of the European Community was concerned, the SEA did not make radical changes. It set the stage for the evolution of the EEC towards an Economic and Monetary Union,<sup>13</sup> but otherwise it merely legitimized and clarified the Community's hitherto implicit authority in areas such as health and safety,<sup>14</sup> regional policy,<sup>15</sup> the environment,<sup>16</sup> consumer protection<sup>17</sup> and research and development.<sup>18</sup> Even the provision in the SEA on foreign policy cooperation reflects what had already become informal practice.

## 1.3. The Treaty on European Union

The Treaty on European Union (TEU),<sup>19</sup> which was signed at Maastricht on February 7, 1992, creates a European Union out of the three separate European Communities and changes the name of the European Economic Community to the European Community (EC).<sup>20</sup> It mirrors in some way the SEA in that it further reinforces the role of the European Parliament within the EC,<sup>21</sup> primarily through the Co-decision Procedure,<sup>22</sup> and confirms and clarifies the Community's assumption of competence over industrial policy, education, energy, public health and consumer protection.<sup>23</sup> Unlike the SEA, however, the TEU also significantly increases the jurisdiction of the

7. Single European Act, (SEA), OJ L 169/1987.

8. Arts. 8a (EEC); 13 (SEA).

9. Art. 30 (SEA).

10. Arts. 149 (EEC); 6, 7 (SEA). See *infra* at pp. 17-18 and pp. 39-40.

11. Arts. 28, 59, 84(2), 100a (EEC); 16, 18 (SEA).

12. Art. 2 (SEA).

13. Arts 102a (EEC); 20 (SEA).

14. Arts 118a (EEC); 21 (SEA).

15. Arts. 130a-130e (EEC); 23 (SEA).

16. Arts. 130r-130t (EEC); 25 (SEA).

17. Arts. 100a(3) (EEC); 18 (SEA).

18. Arts. 130f-130q (EEC); 24 (SEA).

19. [1992] 1 C.M.L.R. 573. The Treaty is published jointly by the Council and the Commission of the European Communities as ISBN 92-824-0959-7. It is popularly known as the Treaty of Maastricht.

20. **Art. G.A(1) (TEU)**. In future, references to the EEC Treaty as amended by the TEU are designated by the abbreviation (EC) and are in bold type. Corresponding references to the EAEC and ECSC Treaties will contain the word "Revised" before the normal designation and also be in bold type.

21. See *infra* in the text at p. 18 and p. 40-41.

22. **Art. 189b (EC)**.

23. **Arts 3(l),(o),(p),(s),(t), 126, 129, 129a, 130l (EC)**.

Union. It adds the issuing of visas to non-EC nationals, culture, civil protection, tourism and trans-European networks to the activities of the EC<sup>24</sup> and provides for the establishment of an Economic and Monetary Union by January 1, 1999,<sup>25</sup> which will include the adoption of a single European currency. Foreign policy cooperation under the SEA is replaced by a common foreign and security policy for the Union, and there are also provisions for cooperation in the fields of justice and home affairs.<sup>26</sup> Another important addition is a Union citizenship that gives EC nationals the right to live in any of the twelve Member States and to vote and stand there as candidates in both municipal and European elections.<sup>27</sup> All the Union's activities are to be conducted within the context of a single institutional framework.<sup>28</sup>

The TEU envisages further developments in the form of detailed provisions on energy, civil protection and tourism as well as a revision of the number of Commissioners and Members of the European Parliament (MEPs).<sup>29</sup> It also contemplates giving the EC competence over some justice and home affairs<sup>30</sup> and raises the possibility of a common defence policy.<sup>31</sup> In addition, the provisions contained in the Agreement on Social Policy will probably be incorporated into the EC Treaty, should the United Kingdom ever decide to adhere to the Agreement.<sup>32</sup> Considerable changes will also occur as the EC proceeds towards Economic and Monetary Union.

These changes are, however, likely to be the only ones in the foreseeable future. Judging from the national debates on its ratification, the TEU represents as far as the Member States are prepared or able to go at present along the road of European integration. The arrival of new members — first the applicants from the European Free Trade Association and then those from Eastern Europe — will pose enormous problems of adaptation that are likely to foreclose any other major changes. Thus, it is probable that, apart from the possibilities outlined above and some institutional streamlining, the European Union, if it comes into being, will remain in its Maastricht form well into the next century.

24. Arts. 3(n),(p),(t), 100c, 128, 129b-129d (EC).

25. This date is set out in Article 109j(4) (EC) and the 10th Protocol (TEU).

26. Arts. J, K (TEU).

27. Arts. 8-8c (EC). This is, however, all that Union citizenship bestows at present. As the Danish Government is at pains to point out in its Unilateral Declaration that is appended to the *Edinburgh Summit Conclusions* (Part B, p. 9b), "[n]othing in the Treaty on European Union implies or foresees an undertaking to create a citizenship of the Union in the sense of citizenship of a nation-state."

28. Art. C (TEU).

29. 1st, 15th Declarations (TEU), respectively. The European Council has now agreed to revise the number of MEPs and the seats allotted to Member States — see Part A, *Edinburgh Summit Conclusions*, p. 10a and *infra* at pp. 42-43.

30. Art. K(9) (TEU).

31. Art. B (TEU).

32. The Agreement on Social Policy is contained in the 14th Protocol (TEU). Originally, these provisions were intended to replace Articles 117 to 122 of the EEC Treaty, but the United Kingdom would not accept them. As a result, they are annexed to the EC Treaty in the form of an agreement binding the other eleven Member States.

#### **1.4. The Legislative Activity of the European Union**

The scope of the activities in which the European Union will be involved is very wide. Most of them, including those emanating from the Agreement on Social Policy, fall within the competence of the EC, whose already broad sphere of action is further increased by the TEU. The ECSC and the EAEC, on the other hand, remain restricted to coal and steel and nuclear energy, respectively. Responsibility for the common foreign and security policy as well as cooperation on justice and home affairs would be assigned directly to the Union.

It is important to note, however, that, like the Community before it, the Union will only have exclusive jurisdiction over certain matters. These are the internal free market, anti-competitive practices with a Community dimension, the common agricultural, fisheries, and transport policies, foreign trade relations and visas for third country nationals. Monetary policy will become an exclusive Union matter once the third stage of Economic and Monetary Union is reached. The Union will share responsibility with the Member States for social, regional, economic, industrial, environmental and foreign and security policies as well for coal and steel, nuclear energy, vocational training, consumer protection, trans-European networks and research and development. The Union will only play a very minor role in education, culture, public health and justice and home affairs.

Nevertheless, the Union, like the Community at present, will still be responsible for enacting a large and varied amount of legislation. Most of this will emanate as now from the EC<sup>33</sup> and the remainder from the ECSC and the EAEC, as the Union's direct responsibility for foreign, security, justice and home affairs does not really encompass a legislative role. This Union legislation, like the actual Community legislation, will either replace or supplement national laws in a wide array of areas and occupy a central place in the legal order of Europe. The manner in which it is enacted is thus an important issue as a constitutional phenomenon in its own right and as a means of understanding the forces at work in the European Union and, if necessary, how to influence them.

#### **1.5. The Concept of Subsidiarity (Article 3b of the EC Treaty)**

Despite the increase in the legislative competence of the Union that it brings about, the TEU nevertheless, by way of **Article 3b**, re-affirms existing limitations and introduces a new restriction on the Union's legislative activity. Even the Commission has its wings clipped and will be required to ensure that its proposals for legislation can be financed within the limits of the Community's own resources.<sup>34</sup> These provisions should ensure that, contrary to popular supposition, the TEU will actually reduce the legislative role of Brussels.

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33. This includes legislation enacted pursuant to the Social Agreement, which does not, however, apply to the United Kingdom.

34 Arts. 201a (EC); 173a (Revised EAEC).

In the first place, **Article 3b** takes up two long-standing legal principles enunciated by the Court of Justice of the Communities, namely that the Community must act within the limits of the powers and objectives assigned to it by the Treaties<sup>35</sup> (the principle of “attribution of powers”) and that its action must not go beyond what is needed to attain the objective pursued<sup>36</sup> (the principle of “proportionality”). These two principles are now enshrined in Treaty form and applied to all the legislative activities of the Union,<sup>37</sup> including those where it exercises an exclusive jurisdiction.<sup>38</sup> In addition, the European Council has set out certain guidelines for the application of the proportionality principle:<sup>39</sup>

- financial and administrative burdens in Member States should be minimized;
- as much scope as possible should be left for national action, and well-established national arrangements and legal procedures should be respected wherever possible;
- when setting standards, the Community should preferably establish minimum standards and leave Member States with the option of setting their own higher national standards;<sup>40</sup>
- other things being equal, directives should be preferred to regulations, and framework directives should be used instead of detailed measures;
- where appropriate and sufficient, the Community should content itself with encouraging cooperation between Member States, coordinating national action or complementing such action;<sup>41</sup>
- necessary Community action should not be extended to other Member States that are not affected by the problems that it addresses.

Although these principles of the attribution of powers and of proportionality are considered part of the overall concept of “subsidiarity”, the principle of subsidiarity in its strict legal sense is set out separately in **Article 3b**. It requires that the Union, in areas that do not fall within its exclusive competence, only take action “if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States *and* can...be better achieved by the Community.”<sup>42</sup> In its guidelines

35 **Art. 3b, 1st. paragraph (EC)** reads: “The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein”. This principle was established by the Court of Justice, *inter alia*, in *Balkan-Import-Export GmbH v. Hauptzollamt Berlin-Packhof*, 5/73, [1973] E.C.R. 1091 at 1107-1109.

36 **Art. 3b, 3rd. paragraph (EC)** reads: “Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.” This principle was established by the Court of Justice, *inter alia*, in *Balkan-Import-Export GmbH v. Hauptzollamt Berlin-Packhof*, 5/73, [1973] E.C.R. 1091 at 1110-1112.

37 **Art. B (TEU)**.

38 See *Edinburgh Summit Conclusions*, Annex 1 to Part A, pp. 6-8.

39 *Edinburgh Summit Conclusions*, Annex 1 to Part A, pp. 8-9.

40 This is the approach adopted in Article 118a(3) (EEC) with respect to health and safety measures and in Article 130t (EEC) and **Articles 129a(3) and 130t (EC)** with respect to consumer protection and environmental measures.

41 This is the approach that is mandated in the European Union for education, vocational training, culture, public health and industry — see **arts. 126, 127, 128, 129, 130 (EC)**.

42 **Art. 3b, 2nd. paragraph (EC)**. Emphasis added.

on the application of the principle of subsidiarity, the European Council stresses that both aspects of this principle must be met and sets out additional criteria for determining whether Community action is justified:<sup>43</sup>

- the issue being addressed must have transnational aspects and cannot be satisfactorily regulated by national action; and/or
- action by Member States alone or lack of Community action would impair the proper functioning of the Community or damage the interests of Member States; and/or
- the Council is satisfied that Community action will provide clear benefits by reason of its scale or effects compared with national action.

The principle of subsidiarity existed prior to the TEU, albeit merely in embryonic or implicit form,<sup>44</sup> but the TEU imposes it for the first time as a comprehensive limitation on the legislative activity of the Union.<sup>45</sup> In addition, the principle is reflected in certain individual Articles of the EC Treaty and the TEU.<sup>46</sup> The European Council has indicated furthermore that the residual power under the various treaties cannot be used to circumvent such specific limitations on Community action.<sup>47</sup>

The limitations placed by **Article 3b** on the Community's legislative competence are quite considerable, and they have led to the withdrawal or revision by the Commission of a number of existing proposals and pieces of legislation as well as the abandonment of certain planned initiatives.<sup>48</sup> A final report on its review of the compatibility of existing legislation with **Article 3b** is due from the Commission in December 1993.

However, the European Council was also careful at Edinburgh to circumscribe the scope of application of **Article 3b**.<sup>49</sup> It does not call into question the Commission's right of initiative or any of the powers that are conferred on the Union by the Treaties. It does not affect the primacy of Community law or the scope of the *acquis communautaire*, nor does it prevent the use of the residual powers that are granted to the three Communities as well as to the Union itself<sup>50</sup> as long as they are exercised in accordance with overall concept of subsidiarity. Member States cannot avail themselves of **Article 3b** in order to avoid fulfilling their obligations under the Treaties. Where the Community is under an obligation to act, for example in order to enforce Community law or to apply its competition rules, the Article does not apply.

With respect to the principle of subsidiarity in its strict sense, the European Council also stresses that, under **Article 3b**, it only applies where the issue in ques-

43 *Edinburgh Summit Conclusions*, Annex 1 to Part A, pp. 6-7.

44 See e.g. art. 130t(4) (EEC) with respect to environmental measures.

45 By virtue of **Article B** (TEU), **Article 3b** (EC) applies to all the activities of the Union.

46 See arts 126, 127, 128, 129, 129a, 129b, 130, 130g (EC); K.3(2)(b) (TEU); 2 (Social Agreement).

See Tables 1-3 for the subject matter covered by these Articles.

47 See fnn. 6, 50.

48 *Edinburgh Summit Conclusions*, Annex 2 to Part A.

49 *Edinburgh Summit Conclusions*, Annex 1 to Part A, pp. 3-5, 10.

50 These residual powers are set out in Articles 235 (EEC); 203 (EAEC); 95 (ECSC); F(3) (TEU). But see fn. 6.

tion does not fall within the exclusive competence of the Union. It is not clear how this restriction fits in with the requirement in **Article A (TEU)** that decisions ought to be taken in all matters "as closely as possible to the citizen," which provision would seem to echo the subsidiarity principle and apply it without any limitation of scope similar to that contained in **Article 3b**. However, **Article A** may well just anticipate the concept of subsidiarity and have itself no substantive effect.

### 1.6. The Ratification of the Treaty on European Union

The TEU was supposed to go into effect on January 1, 1993,<sup>51</sup> but this needed all Member States to ratify it,<sup>52</sup> which did not happen as Denmark and the United Kingdom failed to do so. The Edinburgh meeting of the European Council resulted in an agreement to allow Denmark to opt out of the third stage of Economic and Monetary Union as well any Union measures that have defence implications.<sup>53</sup> This concession, together with the elaboration of the concept of subsidiarity, was intended to pave the way for Danish and British ratification of the TEU during 1993. Certainly, all the leaders at the Edinburgh meeting, including the Prime Ministers of Denmark and the United Kingdom, re-affirmed their commitment to the TEU.<sup>54</sup>

If Denmark or Britain still fail to ratify the TEU, it is unlikely that any further inducements will be offered by the other Member States to secure their adherence to the Treaty. Instead, the Treaty will be abandoned or, more likely, a two-tier Community will emerge that will permit the application of the TEU by those Member States who have ratified it.

In either case, the Treaty's institutional reforms will probably survive and be applied generally. If the TEU is abandoned, the Community will continue, under the original Treaties and the SEA, to enact legislation over a wide range of subjects. Thus, the loss of authority by the national parliaments and the democratic deficit within the Community will still be issues that must be confronted, and the solutions offered by the TEU through its reinforcement of Parliament's role, the principle of subsidiarity and the democratization of the Commission would remain relevant. Moreover, it is not these parts of the Treaty that are controversial. On the contrary, it would seem from the ratification debates that many critics of the TEU do not appreciate the extent to which it reforms the undemocratic system established by the original Treaties and perpetuated by the SEA. For this reason, it is likely that, in a two-tier Community, a non-ratifying Denmark or United Kingdom would apply at least the institutional provisions of the TEU.

However, if the TEU is not ratified, it will not be possible officially to apply its institutional provisions. Nor could the Member States single them out for application by an official and binding Community act to this effect, as the Court of Justice has

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51 Art. R(2) (TEU).

52 Arts. 236 (EEC); 204 (EAEC); 96 (ECSC); R(2) (TEU).

53 Decision of the Heads of State and Government, meeting within the European Council, concerning certain problems raised by Denmark on the Treaty of European Union, *Edinburgh Summit Conclusions*, Part B, p. 4b.

54 *Edinburgh Summit Conclusions*, Part A, p. 2a.



ruled that "the essential elements of the Community structure as regards both the prerogatives of the institutions and the position of the Member States vis-à-vis one another" cannot be changed in this way.<sup>55</sup>

Pending negotiation of a new Treaty, a simple interim solution would be an informal agreement on the application of the TEU's institutional reforms.<sup>56</sup> This could take the form of a resolution or declaration by the Council, the Commission and the European Parliament under which they undertake to exercise their powers in accordance with the relevant provisions of the TEU. The conciliation procedure is applied by virtue of such an act,<sup>57</sup> and the European Council has called for a similar inter-institutional agreement on the effective application of **Article 3b (EC)**.<sup>58</sup> Moreover, the Court of Justice not only accepts the validity of such arrangements but has indicated that they may even create legal obligations as between the institutions involved.<sup>59</sup> Alternatively, the Representatives of the Governments of the Member States meeting within the Council could make a non-binding policy agreement to apply certain provisions of the TEU in the same way as they agreed under the 1966 Luxembourg Accords that the Council should act by unanimity whenever possible. Wherever the Member States are concerned directly, as with the appointment of the Commission, this latter procedure would have to be used. Otherwise, an inter-institutional agreement is probably the simplest and most effective solution. Under either procedure, the resulting arrangement would become part of the *acquis communautaire*, which new Member States would have to respect and apply.

All this means that, despite the uncertainty surrounding the entry into force of the TEU, we must take into account its provisions when discussing the legislative process in the European Community. At the same time, the form and way in which they may be applied is not yet completely clear. To deal with this ambivalent situation, we distinguish carefully in the text between the present procedures and those that are introduced by the TEU. Unless the contrary is stated, it is, however, to be assumed that there is no difference. Likewise, references to the EEC and the EEC Treaty include the EC and the EC Treaty unless there are discrepancies between the two. In the latter case, the terms EC and EC Treaty are used to refer to the amended Community set up by the TEU.<sup>60</sup> Treaty citations give both the original articles and the TEU's revisions and addenda. The latter are in bold type to alert readers to the fact that they may not yet be legally binding.

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55 *Opinion 1/76 on the draft agreement establishing a European laying-up fund for inland waterway vessels*, [1977] E.C.R. 741 at 758.

56 These types of agreements are discussed in P.J.G. Kapteyn and P. Verloren van Themaat (ed. L.W. Gormley), *Introduction to the Law of the European Communities*, 2nd. ed., Deventer, 1989, at pp. 185-188 and pp. 205-206.

57 Joint Declaration of the European Parliament, the Council and the Commission on the conciliation procedure, OJ C 89/1975.

58 *Edinburgh Summit Conclusions*, Part A, p. 3a, Annex 1 to Part A, pp. 3-4.

59 *See Andersen et al v. European Parliament*, 260/80, [1984] E.C.R. 177 at 193 and 262/80, [1984] E.C.R. 195 at 207-208.

60 *See also* fn. 20.



### 1.7. What's in a Name?

Prior to the TEU, the official name for the association of the twelve Member States was the *European Communities*. If the three Communities are subsumed into a *European Union*, it would seem logical to assume that the latter term will become the official name. This may not, however, be the case. The official gazette of the association will retain the title of *Official Journal of the European Communities*, and the Council and Commission, despite their status as part of the single institutional framework of the Union, will still be called the Council and the Commission of the *European Communities*. It is also noteworthy that the TEU speaks only of the Union being “founded on the European Communities,”<sup>61</sup> while the Commission’s draft spoke of it replacing them.<sup>62</sup> In the published record of its proceedings at Edinburgh, the European Council contributes to the uncertainty by using the term “Community” when it is clearly referring to the “Union”.

This confusion over the name of the association is not new. In its early days, it was popularly known as the *Common Market*, which it was not yet, or as the *EEC*, which was only one of its three component parts, albeit by far the most important. As the success of the 1992 initiative began to weld the association into a genuine Community, the popular name became the *European Community* (used mainly by non-Europeans) or the *Community* (used mainly by Europeans). These names are still commonly used, but the advent of the European Union should encourage the tendency to refer to the association quite simply as *Europe*.

Given the uncertain fate of the European Union and the fact that almost all legislation is enacted under the auspices of the three Communities, we have chosen in this study to stick with the popular terms *Community* and *European Community*. The former is perhaps preferable as the latter may become the new name of the *European Economic Community* and its use could lead to confusion. The terms *European Union* or *Union* will only be used where it is necessary to single out the expanded association set up by the TEU.

## 2. LEGISLATIVE POWER AND THE COMMUNITY

### 2.1. Nature of Legislative Power

Legislative power is either primary or subordinate. Primary legislative power is a universal prescriptive authority that in most nation States is vested in the legislature. It entails the right to enact for all domains of human activity rules of any type or scope, subject in some States, however, to constitutional limitations designed to protect the rights of citizens or the division of power in a federal State. Primary legislation may address specific situations or persons, but more often it applies generally to everyone that comes within its scope.

Subordinate legislation implements or applies primary legislation. Subordinate implementing power is prescriptive in that it creates new rules, but, as these cannot

61. Art. A (TEU).

62. Art. B. The draft is published in *Europe*, Nr. 1715, May 31, 1991.