Europe’s Caribbean Borders: The Peculiar Case of the Sint Maarten/Saint Martin Border

H.G. HOOGERS
G. KARAPETIAN

ABSTRACT

One of the fascinating aspects of the European integration project has always concerned the circumstance that Europe’s borders have never been confined to the continent itself. Along the eternal discussion on the depth of the integration and the scope of enlargement, this too has contributed to the EU’s peculiar ‘limitlessness’. Through the overseas territories of inter alia France, the Kingdom of the Netherlands and the United Kingdom, the Union comprises of a number of territories scattered far and wide across the globe: thus, the European Union and, accordingly, its values and principles reach from the estuary of the Saint Lawrence river to the shores of Antarctica and from the Caribbean Sea to the Eastern Pacific. These extra-European areas have their own specifics and dynamics, that also shape and form the borders and the identity of the European Union. In this paper, we will focus on the EU’s legal framework from the perspective of the peculiar case of Sint Maarten/Saint Martin; one island with two political identities – a Dutch one and a French one. Nonetheless, the inhabitants of both parts of the island are European Union citizens. Yet, as we will show, the political division not only leads to numerous specific problems and challenges, but even more paradoxical, the very fact that both parts of the island form part of the European Union has widened the divisions between them and has created the possibility that the Dutch respectively French border on the island becomes a true reality for the first time in over three centuries. Consequently, the project of an ‘ever-closer Union’ instead of removing borders within the Union, has the potential of creating a real and physical border within the European body politic.

1. Introduction

Saint Martin of Tours (316 or 336 – 397 AD) was a bishop of Tours, a place currently located in the French province of Touraine. Initially, he was a Roman soldier. However, after he was baptised at the age of 18, he was acclaimed bishop of Tours in 371 AD. Each year’s November 11 marks Saint Martin’s Day, the French bishop’s name day. The current island of St Martin², located in the northeast Caribbean Sea is named after Saint Martin of Tours. The reason for this is simple: the island of St Martin was discovered by Christopher Columbus on November 11, 1493. Explored, thus, under the auspices of the Spanish Crown. Since then various other European nations were interested in the island due to its

¹ Prof. Dr. H.G. Hoogers is Senior Lecturer at the department of constitutional law, administrative law and public administration of the University of Groningen, the Netherlands, and Professor (hon.) for comparative constitutional law at the Carl von Ossietzky-University of Oldenburg, Germany; G. Karapetian, LL.M., is a Ph.D.-candidate and Lecturer at the department of constitutional law, administrative law and public administration of the University of Groningen, the Netherlands.
² In this paper, the term ‘St Martin’ is used to designate the whole island, ‘Sint Maarten’ for the island’s Dutch part and ‘Saint Martin’ for the island’s French part.
protected waters and large natural salt deposits. Besides the Spanish, also the French, Dutch, Portuguese and English coveted St Martin. However, due to among others the small territory of the island (87 km²) many lost their interest in the island. Not the French and the Dutch, however. Approximately a hundred and fifty years after being discovered, on 23 March 1648, the Treaty of Concordia (named after the island’s Mount Concordia where it was signed) was agreed between France and the Republic of the United Netherlands in order to divide the island of St Martin into two parts: a French part in the north and a Dutch part in the south. In so doing, the dual character of the island was legally recognised. Nonetheless, the Treaty, which is still in force today, made it clear that the French and the Dutch shall live on the island as friends and allies. This entailed the absence of a physical border separating the two parts. Additionally, the Treaty established a free movement of (Dutch and French) persons and goods between the two zones of the island. The two 17th century’s major powers agreed, therefore, to emphasize the unity of the island by creating a legal structure which made it possible that both parts of the island treat each other as equals under similar economic and social conditions. As a result of this, St Martin is presently the smallest island in the world that falls under the sovereignty of different states.

It is the absence of this physical border, established by the Treaty of Concordia, between the French and Dutch part of the island which forms the subject of this paper. In the following, we will elaborate on the two zones of the island from the perspective of the European Union (EU) and from the perspective of the constitutional framework of the French Republic and the Kingdom of the Netherlands. Both parts enjoy a different status according to EU law, a difference that is at least partially rooted in the difference of the constitutional status of both territories. Accordingly, different EU regimes apply in the Dutch and French zone respectively. And although one of the main features of the European project is to minimise the reality of borders within the EU, this different status under European law has paradoxically created the possibility of a border between the two parts of St Martin which especially in the last year or so has

---

3 Article 1 of the Treaty of Concordia reads: “Que les Français demeureront dans le quartier où ils sont à present habituez, & habiteront tout le costé qui regarde l'Anguille”.

4 Article 2 of the Treaty of Concordia reads: “Que les Holandois auront le quartier du Fort, & terres qui sont à l'entour d'iceluy du costé du Sud”.


6 Article 3 of the Treaty of Concordia.

7 Article 6 of the Treaty of Concordia, establishing the free movement of persons and goods, reads: “Permis aux Français qui sont à present habituez avec les Holandois de se ranger & mettre avec les Français, si bon leur semble, & emporter leurs meubles, vivres, moyens & autres ustencilles, moyennant qu’ils satisfassent à leurs debtes, ou donnent suffisante caution: & pourront les Holandois en faire de mesme dans les mesmes conditions”.

8 This principle can be illustrated by not only looking at the free movement of persons and goods, but also at other provisions of the Treaty which establish a truly reciprocal relationship between the French and Dutch part of the island respectively, such as Articles 4 and 5 of the Treaty. Article 4 reads: “Que si quelqu’un, soit Français, soit Holandois, se trouve en délict, ou infraction des conventions, ou par refus aux commandemens de leurs Supérieurs, ou quelqu'autre genre de faute, se retrieroit de l'autre Nation, lesdits sieurs Accordans s'obligeant à le faire arrester dans leur quartier, et le représenter à la première demande de son Gouverneur”. Article 5 reads: “Que la chasse, la pesche, les salines, les rivières, estangs, eaux-douces, bois de teinture, Mines, ou Minéraux, Ports & rades, & autres commoditez de ladite Isle seront communes, & ce pour subvenir à la nécessité des habitans”.

2
become something of a reality for the inhabitants of the entire island, which are in majority European citizens. St Martin is therefore under threat of becoming less and less an ‘ever closer Union’.

The structure of the paper is as follows. In the second paragraph the Dutch respectively French constitutional framework in which Saint Martin and Sint Maarten operate shall be sketched. How should the parts be qualified in their national constitutional legal order? How ‘integrated’ are they in their respective Métropoles? What kind of competences do Saint Martin and Sint Maarten have according to French respectively Dutch constitutional law? Thereafter, in the third paragraph, attention shall be paid to the EU’s framework for the overseas territories of Saint Martin and Sint Maarten. The legal problems created by the parallel existence of the Concordia Treaty and the EU’s legal order shall be elaborated upon. What are the differences between the statuses that both parts enjoy according to EU law? Which reasons entail that more and more often a physical border is experienced by the inhabitants of the island? Finally, the fourth paragraph shall conclude on the aforementioned matters.

2. Sint Maarten and Saint Martin according to Dutch and French constitutional law respectively

After the Second World War, one of the key issues on the agenda of various Western states concerned the relationship these states had with their overseas territories, due to the pressure for decolonisation created through inter alia the newly established UN Charter. Due to the extensive overseas exploration in the Age of Exploration, several Western states exercised sovereignty over enormous territories sometimes thousands of miles away from the metropole. A new era had, thus, arrived after the Second World War in order to structure the (constitutional) relationship between these territories and the motherland. This goes for both the Kingdom of the Netherlands and the French Republic. Both states sought new structures in order to (re)organise their constitutional framework pertaining to the overseas. Before the EU’s legal framework on the overseas territories of Sint Maarten and Saint Martin shall be depicted in paragraph 3, in this paragraph the constitutional position of Sint Maarten and Saint Martin according to Dutch respectively French constitutional law shall be scrutinised. Firstly, the position of Sint Maarten as Land (Country) within the Kingdom of the Netherlands shall be sketched and thereafter, the position of Saint Martin as Collectivité d’outre-mer in the French Republic will follow.

2.1 Sint Maarten as a Country in the Kingdom of the Netherlands

After long-lasting discussions in the Kingdom of the Netherlands in the late 1940s, the Charter for the Kingdom of the Netherlands (Statuut voor het Koninkrijk der Nederlanden) was established on 15 December 1954. This Charter constituted a new legal order in the (since 1814 existing) Kingdom of the Netherlands. In 1954, the new legal order created three autonomous Countries, being the Netherlands (in Europe), Surinam (in South America) and the Netherlands Antilles (in the Caribbean Sea). The principal Dutch colony, the Netherlands Indies (in South East Asia), had already gained full independence in 1949. Currently, after the independence of Surinam in 1975 and the dismantling of the Netherlands Antilles in 2010, the Kingdom of the Netherlands comprises of four autonomous Countries, being the Netherlands, Aruba, Curaçao and Sint Maarten. The Kingdom’s Charter restructured the ties with the overseas territories of the Netherlands and emancipated their position in the Kingdom by providing them the status of Country (Land). Nonetheless, the Charter for the Kingdom was never

---

9 Stb. 596.
10 Article 1 Charter for the Kingdom of the Netherlands.
intended to be a ‘fully-fletched new constitution’, since on several relevant areas it augments the Constitution of one of the Countries: the Netherlands.\textsuperscript{11}

Each of these Countries of the Kingdom has its own constitutional framework, codified in a constitution.\textsuperscript{12} Each Country has, for instance, its own local parliament (Staten for the overseas Countries and Staten-Generaal for the Netherlands), local Government (regering) and judiciary. The Countries of the Kingdom conduct their internal affairs fully autonomously.\textsuperscript{13} However, the important question here is which powers can be considered as powers of the Countries and of the Kingdom respectively. The Charter answers this question by making a distinction between the powers of the Kingdom, which are enumerated in the Charter itself, and, by default, the powers of the Countries. In so doing, it explicitly guarantees the autonomy of the Kingdom’s Countries in their internal affairs.\textsuperscript{14} The Kingdom’s powers are narrowly defined in the Charter. They include, \textit{inter alia}, defence, foreign relations, Dutch citizenship, shipping regulations, immigration, supervision on general rules governing the admission and expulsion of Dutch citizens, general conditions for the admission and expulsion of foreign nationals and extradition.\textsuperscript{15} Furthermore, the Kingdom has relevant powers concerning control and oversight. By virtue of Article 43, each of the Kingdom’s Countries shall secure the realisation of fundamental human rights and freedoms, legal certainty and good governance. The second paragraph of the Article entails that the Kingdom will act as a guarantor of this obligation of the Countries. Powers which are not labelled by the Charter as Kingdom powers fall automatically within the autonomous sphere of the Kingdom’s Countries. For instance, civil (procedural) law, criminal (procedural) law, education and social security, are all subjects which are not defined by the Charter as Kingdom powers, automatically making them Countries’ powers. Consequently, the Countries are free to regulate these subjects autonomously.

Besides these Kingdom powers, the Charter makes it possible for the Kingdom to uphold Article 43. Article 44 is an example of this. According to Article 44, any amendment of the Constitutions of the overseas Countries, \textit{i.e.} Aruba, Curacao and Sint Maarten, concerning fundamental human rights, the powers of the Countries’ governments, the Countries’ local parliaments or the judiciary, needs the approval of the Government of the Kingdom before it can enter into force.\textsuperscript{16} Furthermore, Article 50 of

\textsuperscript{11} Bröring, H. E., Cherednychenko, O. O., Hoogers, H., & Karapetian, G., In-depth analysis evaluating the legal, political and institutional framework concerning offshore practices related to tax evasion, money laundering and tax transparency in the Overseas Countries and Territories (OCTs) of the Kingdom of the Netherlands, as defined in Annex II of the Treaty on the Functioning of the European Union (TFEU), and the relations of the Kingdom of the Netherlands with those OCTs, in: Tax evasion, money laundering and tax transparency in the EU Overseas Countries and Territories: Ex-Post Impact Assessment, 2017, pp. 93-144, [Annex II] Brussels : European Parliamentary Research Service, p. 122

\textsuperscript{12} Aruba, Curacao and Sint Maarten have their own constitution (Staatsregeling van Aruba/Staatsregeling van Curacao/Staatsregeling van Sint Maarten). The Netherlands’ constitution is called the Constitution for the Kingdom of the Netherlands (Grondwet voor het Koninkrijk der Nederlanden) which was established in 1814. This title of the Netherlands’ constitution can entail misunderstandings. However, before the entry into force of the Charter for the Kingdom, it was the Netherlands’ constitution which governed the relationship between the motherland (the Netherlands) and its overseas areas. Currently, it is mostly the constitution for the Country of the Netherlands – but many provisions are still valid for the entire Kingdom, within the limits set by the Charter.

\textsuperscript{13} Article 41 Charter for the Kingdom of the Netherlands.

\textsuperscript{14} Ibid.

\textsuperscript{15} Article 3 Charter for the Kingdom of the Netherlands.

\textsuperscript{16} The equivalent for the Country of the Netherlands is regulated in Article 45 of the Charter. According to this provision, amendments to the Dutch constitution pertaining to, for instance, fundamental rights, shall be discussed within the Council of Ministers of the Kingdom. This gives each Minister-Plenipotentiary of the overseas Countries the possibility to discuss these amendments to the Dutch constitution in the body of the Kingdom’s Government.
the Charter makes it possible for the Government of the Kingdom (consisting of all the ministers of the Netherlands and a representative of the Governments of each of the three other Countries) to nullify any legal provision in the legislation of Aruba, Curaçao or Sint Maarten if it violates Kingdom law, international obligations of the Kingdom or other fundamental interests of the Kingdom. Additionally, Article 51 of the Charter empowers the Kingdom’s Government to interpose itself when a public body of Aruba, Curaçao or Sint Maarten does not fulfill its obligations under the Charter, a treaty or a Kingdom regulation. Although the Kingdom’s Government has these powers, it uses them only sporadically.17

As mentioned earlier, Sint Maarten has its own Constitution (Staatsregeling van Sint Maarten).18 The Constitution entered into force on 10 October 2010, after the dismantling of the Netherlands Antilles. The Constitution is made and amended by Sint Maarten’s Government and parliament jointly. The Constitution’s nine chapters concern: 1) Territory and Unity, 2) Fundamental Rights, 3) The Government and the Minister-Plenipotentiary, 4) Parliament, 5) Council of Advice, General Audit Chamber, Ombudsman and Permanent Advisory Bodies, 6) Legislation and Administration, 7) Administration of Justice, Department of Public Prosecutions and Police, 8) Constitutional Court and 9) Final Provisions.19 These Constitution’s chapters illustrate that Sint Maarten’s autonomy under the Kingdom’s Charter is far-reaching. Beside the narrowly defined Kingdom powers, it is up to the Country of Sint Maarten to organise its legal, political, economic and social (local) society. According to the Constitution, Sint Maarten has a parliamentary system. The Staten comprise of 15 members, directly chosen through a system of proportional representation by Dutch resident nationals20 in Sint Maarten. The Government comprises of the King and the ministers. The King is represented in Sint Maarten by a Governor.21 If a minister does no longer have the confidence of the majority of parliament, he shall resign.22 National ordinances are enacted by the parliament and Government of the Country jointly.23 These national ordinances can concern any subject which is not labelled as a Kingdom power by virtue of the Charter for the Kingdom. Consequently, Sint Maarten has its own ordinances on, for instance, fundamental rights (see above, Chapter 2 of the Constitution), the judiciary, criminal (procedural) law and monetary law.24

Although Sint Maarten’s autonomy within the Kingdom of the Netherlands is massive, the Country should nonetheless comply with international regulations, such as the abovementioned provisions of the

17 The far-reaching powers of Article 50 were used twice by the Kingdom’s Government. Firstly, in 1998 when the Kingdom Government approved a decision by the Aruba Governor not to appoint a candidate-minister; secondly in April 2017 when the Kingdom Government approved the decision by the Curaçao Governor not to sign a national ordinance on labour market reform because it contravened with the right to equality. The powers of Article 51 have been used once: in April 2017, the Kingdom Government intervened in Curaçao to make sure that the scheduled snap elections for the Staten were not obstructed or postponed by the Curaçao interim Government.
18 AB 2010, GT no.1.
20 According to Article 3 of the Charter for the Kingdom, Dutch citizenship is a Kingdom’s power. As a result, Arubans, Curacaoans and Sint Maartenians possess Dutch citizenship. See also, Kingdom Act on Dutch Citizenship (Rijkswet op het Nederlanderschap, Stb. 1984, 628).
21 Article 2, paragraph 2, Charter for the Kingdom of the Netherlands; Article 32, paragraph 2 Constitution of Sint Maarten.
22 Article 33, paragraph 2, Constitution of Sint Maarten.
23 Article 82 Constitution of Sint Maarten.
24 Consequently, Sint Maarten and Saint Martin do not have the same official currency: in Sint Maarten the old Netherlands Antillean Guilder is still official tender (like in Curaçao), while in Saint Martin the euro is the official currency.
Treaty of Concordia. It in the next subparagraph, attention shall be paid to the constitutional position and the autonomy of Saint Martin according to French constitutional law.

2.2 Saint Martin as a Collectivité d’outre-mer in the French Republic

French colonial history is characterised by two periods of colonial expansion: le premier empire colonial and le deuxième empire colonial. The first colonial empire originated in the 16th century and lasted until the beginning of the 19th century. The second colonial empire began with the conquest of Algeria in 1830 and ended with the decolonisation process in the second half of the 20th century. During the first colonial empire, various colonies were established by France in the Americas, such as New France (including Canada and Louisiana), the French West Indies (including Saint-Domingue, Guadeloupe (then including Saint Barthélemy and Saint Martin) Martinique and other islands) and French Guyana. However, not all these territories remained French. Various wars in which France took part of, such as the Austrian Succession War (1740–1748) and the Seven Years’ War (1756–1763) entailed the collapse of the first French colonial empire. In 1763, by virtue of the Treaty of Paris, France only maintained full sovereignty over the following four territories, as remnants of the first empire: Guadeloupe (including Saint Barthélemy and Saint Martin), Martinique, French Guyana and the island of Bourbon, currently referred to as La Réunion. These four colonies are, accordingly, referred to as les quatre vieilles colonies. Since the territories which remained French after the first colonial empire were small, a new colonial expansion was originated by France in the 19th century, particularly in Africa and Asia. The territories conquered during the second colonial empire were enormous. Various West African states, but also territories in Asia, such as Laos and Cambodia, were conquered. The constitutional relationship between the territories conquered during the second colonial empire and the French metropole was more reserved and distant than the one between the four old colonies and the Métropole.

After the Second World War, as mentioned earlier, France was not spared from reviewing its relationship with the colonies from the first respectively second colonial empire. In 1946, the differences between the colonies from the first colonial empire on the one hand and the second colonial empire on the other hand entailed the so-called ‘départementalisation’ of the four old colonies into metropolitan

25 Besides the Treaty of Concordia, there are various international agreements between the Kingdom of the Netherlands and the French Republic specifically with regard to the island of St Martin. They include the Traité entre le Royaume des Pays-Bas et la République française sur le contrôle des personnes entrant dans Saint Martin dans les aéroports (1994) and the Convention entre la République française et le Royaume des Pays-Bas, relative à l’assistance mutuelle et à la coopération entre leurs administrations douanières, en vue d’appliquer correctement la législation douanière, de prévenir, de rechercher, de constater et de réprimer les infractions douanières dans la région des Caraïbes, et notamment sur l’île de Saint-Martin (2010).


29 Faberon & Ziller 2007, p.16. Besides the four colonies, France also held on to some earlier established trading posts, such as Saint-Pierre-et-Miquelon (the last remnant of French Canada) and Chandernagore in India.


31 For a list of the territories conquered by France during the second colonial empire, see: Faberon & Ziller 2007, p. 18 et seq.

32 Karapetian forthcoming 2018/2019. Several reasons could be given for this. A possible reason could be that the territories captured in the 19th century had (to a degree) experienced a state and nation building process, contrary to the four old colonies. Consequently, it was more difficult and complicated to integrate or assimilate, similar to the four old colonies, the colonies from the second colonial empire in the constitutional order of the metropole.
France. As a result, the four old colonies were fully assimilated in the constitutional order of the Republic as overseas departments (départements d’outre-mer). Saint Martin, was, as mentioned earlier, at the time part of Guadeloupe, which as a result of the départementalisation became an overseas department. However, on 7 December 2003, a referendum took place in Saint Martin concerning the constitutional status of Saint Martin as part of Guadeloupe. The referendum resulted in the choice to separate from Guadeloupe (both administratively and politically) and to increase its autonomy in its relation to the French metropole. Saint Martin became an overseas collectivity (Collectivité d’outre-mer) in February 2007. The constitutional position of an overseas collectivity is regulated by the French Constitution in Article 74. According to the first sentence of this provision, it is a statute which regulates the position of the concerning collectivity. This statute is an organic Act (loi organique). This loi organique should according to the abovementioned provision of the Constitution state, among others, under which conditions legal arrangements (lois et règlements) of the metropole are applicable in the concerning collectivity and what the competences of the collectivity are. Interestingly, the provision explicitly states that these competences of the collectivities cannot pertain to the subjects stated in Article 73, fourth paragraph of the Constitution. These subjects of Article 73, fourth paragraph are:

“la nationalité, les droits civiques, les garanties des libertés publiques, l’état et la capacité des personnes, l’organisation de la justice, le droit pénal, la procédure pénale, la politique étrangère, la défense, la sécurité et l’ordre publics, la monnaie, le crédit et les changes, ainsi que le droit électoral ».

The Loi Organique 2007-223 and the Loi Organique 2007-224 regulate the position of Saint Martin. Since then, Saint Martin is administered by a territorial council (conseil territorial) elected by the citizens of Saint Martin. Furthermore, concerning the applicability of legal arrangements of the Métropole, the Loi Organique 2007-223 states that all legal arrangements of the metropole are fully applicable in Saint Martin, « à l'exception de celles intervenant dans les matières qui relèvent de la loi organique en application de l'article 74 de la Constitution ou de la compétence de la collectivité en application de l'article LO 6314-3 ». The competences of the collectivity of Saint Martin concern, inter alia, all executive powers previously belonging to Guadeloupe, limited taxation competences,

---

33 This happened through the Loi n° 46-451 du 19 mars 1946 tendant au classement comme départements français de la Guadeloupe, de la Martinique, de la Réunion et de la Guyane française. Article 1 of this Act clearly states: ‘Les colonies de la Guadeloupe, de la Martinique, de la Réunion et la Guyane française sont érigées en départements français ».

34 According to French constitutional law, Saint Martin was from 1946 until 2007 a commune of the overseas department of Guadeloupe.


36 The provision makes also clear: ‘Cette énumération pourra être précisée par une loi organique ».


39 These laws also regulate the position of St. Barthélemy, which was also a Commune of Guadeloupe until 2007.

40 Article 18.II of Loi organique n° 2007-223. The institutions of the collectivity of Saint Martin are the conseil territorial, the president of the conseil territorial, a conseil exécutif and a conseil économique, social et culturel. For more on the institutions of Saint Martin, see Article 5, Livre III (Saint-Martin), Titre II (Les institutions de la collectivité) Loi organique n° 2007-223 du 21 février 2007 portant dispositions statutaires et institutionnelles relatives à l’outre-mer (1).

supervision on public roads and public buildings, admission of foreigners to the labour market and tourism.\textsuperscript{42}

The above-mentioned illustrates that although Sint Maarten and Saint Martin are part of the same island, the constitutional position according to Dutch respectively French law differs massively. As of 2010, Sint Maarten constitutes an autonomous Country within the Kingdom of the Netherlands with far-reaching legislative, executive and judicial powers. The Kingdom’s Charter makes it possible that these legislative, executive and judicial branches are organised and structured by the Kingdom’s Countries. Saint Martin, on the contrary, is since the change of its political status in 2007, an overseas collectivity. Although it has more competences as an overseas collectivity than as part of the Département of Guadeloupe, the competences between Saint Martin and Sint Maarten on legislative, executive and judicial matters are not equal. Nevertheless, the Treaty of Concordia still tries to establish a reciprocal relationship between both parts of St Martin, notwithstanding the position of Sint Maarten and Saint Martin according to national Dutch and French constitutional law respectively. Yet, this division entails various challenges, as will be illustrated in the following paragraph, which are strengthened by the different status both parts of the island enjoy according to EU law. In analyzing these challenges, we will focus on the rights of entry and permit for nationals and non-nationals in both hemispheres of St Martin, because a border is most real for persons wanting to cross it.

3. Sint Maarten and Saint Martin under EU law; separate and unequal

The different status both parts of the island enjoy according to the constitutional law of France and the Netherlands is mirrored in the separate status they enjoy in European law. The Union’s law has always taken into account the fact that a number of Member States have constitutional ties with territories outside of the continent of Europe. The first, and arguably most important of them is the so-called ultra-peripherous regions (UPR)-status provided for by Article 349 of the Treaty on the Functioning of the European Union (TFEU). This Article is expressis verbis in force for Saint Martin. UPR’s are part of the Union and the Unions’ legal order, but with certain exceptions that mostly have to do with the specific circumstances of these territories laid down in Article 349 TFEU in relation to the Union as a whole and their own metropole. Essentially speaking, the laws of the Union, including the common market, form part of the law of a UPR. This has recently been confirmed again by the Court of Justice of the European Union (ECJ) in its Mayotte-decision of 15 December 2015.\textsuperscript{43} In contrast with this, the so-called Overseas Countries and Territories (OCT) are only loosely tied to the Union and its legal order. They find their foundation in part IV of the TFEU. Articles 198-204 of the TFEU regulate the relationship between the OCT’s and the EU; Article 355 under 2 states that this regime is applicable on those territories that are numbered in annex II of the TFEU. Sint Maarten is one of the territories mentioned in annex II. The OCT regime, essentially uniform for all the 26 OCT’s, regulates that goods exported from an OCT into the territory of the Union (not another OCT, therefore, but including the UPR’s) benefit from the Union’s customs union. The OCT’s on the other hand, are entitled to levy import duties on goods from the Union, as long as they do not discriminate between their own metropole and other Member States in doing so (Article 200). Article 202 regulates that between the Union and the OCT’s free movement of workers shall be instituted, but only according to regulations laid down by the Council by unanimity. The Council Decision made on the basis of Art. 203 TFEU\textsuperscript{44} does not contain

\textsuperscript{42} Article 5, Livre III (Saint-Martin), Titre Ier, Chapitre IV (Compétences) Loi organique n° 2007-223 du 21 février 2007 portant dispositions statutaires et institutionnelles relatives à l’outre-mer (1).

\textsuperscript{43} Joint cases C 132-136/14.

\textsuperscript{44} Presently Council Decision 2013/755/EU of 25 November 2013, OJEU 2013, L344/1.
provisions on the free movement of workers and other persons (neither did any of the former Council Decisions on this topic). In law and practice, there exists no freedom of movement for workers and other persons between the Union and the OCT’s and between the OCT’s *inter se*. The OCT’s, in short, benefit from the freedoms of the customs union, with the exception of the freedom of movement for workers, but are only limited by it to a certain extent. Since the majority of the inhabitants of the OCT’s have the nationality of one or more of the Member States, they are European Union citizens, however. As citizens of the Union, they have free access to the Union anyway, including the UPR’s. As far as the Union’s laws are not encompassed by the regulations of Articles 198-204 TFEU and the Council Decision on the OCT’s of 25 November 2013, they are not binding on the OCT’s and their citizens. However, the case law of the ECJ has widened the scope of the Union’s legal order with regards to the OCT’s to a certain extent, as will be shown infra.

3.1 The Laws on Entry and Residence in Sint Maarten and Saint Martin: ‘Concordia proof’?

As we saw above, Saint Martin is a *Collectivité d’outre-mer* whose constitutional status is regulated by Art 74 of the French Constitution and the *Loi organique* of 21 February 2007. Article LO 6313-1 regulates that the laws on entry and residence of aliens and on asylum shall not be applicable in Saint Martin, unless this is regulated *expressis verbis*; in Article LO 6314-3 under 4, the local authorities are empowered to regulate the labour market for aliens. Saint Martin, therefore, has the right to regulate its own economy with regards to foreign workers; the authorities of the state have the right to regulate on other aspects of the entry and residence of aliens (non-French citizens) in the *collectivité* differently from France itself. At least potentially, therefore, Saint Martin (or the state, in Paris) may discern between French citizens and all others, including EU-citizens, when it comes to living and working in the *collectivité*. The national law in effect is the *Code d’entrée et du séjour des étrangers et du droit d’asyl*, which regulates the entire spectrum of the entry, residence and entitlement to asylum of aliens in France. Most of these provisions are also valid for Saint Martin; exceptions are made for some regulations having to do with the procedure following a summation to leave the territory of the Republic and the right to asylum.46 These exceptions are rather limited in scope. The Country of Sint Maarten, on the other hand, has a far-reaching autonomy that also encompasses the economy, the entry and residence of aliens and Dutch citizens who are not natives of Sint Maarten and asylum laws. Sint Maarten can therefore, like Saint Martin to a certain degree, regulate the entry- and residence rights of aliens, up to and including Dutch nationals who are not Sint Maartenians; but unlike Saint Martin, it can regulate almost everything else related to this subject autonomously as well.

The Treaty of Concordia has for the past 370 years regulated a peaceful coexistence between Sint Maarten and Saint Martin, where the border was hardly any barrier for the people living on both hemispheres of the island. It therefore created, on the small scale of the island of St Martin, a legal space quite like the one created by the EU’s legal order. Unfortunately, this shared aim does not necessarily mean that the legal order created by the Concordia Treaty and the legal order created by the European Treaties are mutually compatible, as we will show. There are a number of questions on the relationship between and parallel applicability of the Concordia Treaty and the EU Treaties. The recent Treaty between the Kingdom of the Netherlands and the French Republic of 6 April 2016 on the demarcation of the maritime borders around the island47 refers *expressis verbis* to the Treaty of Concordia, thereby stressing its legal validity according to both High Contracting Parties. We saw already that Article 6 of

45 Article L. 514-1.
46 Article L. 766-2 (exceptions to *Lois*) and R. 766-2, D 766-2-1 and R. 766-3 (exceptions to *Réglements* and *Décrets*)
47 *Tractatenblad van het Koninkrijk der Nederlanden*, vol. 2016 no. 82.
the Concordia Treaty allows resident nationals from both states, Dutch and French citizens therefore, to move freely from one half of the island to the other and to bring their means of income or other possessions to the other half if they want to live there. This is basically the creation of a free movement of persons and goods between Sint Maarten and Saint Martin; and apparently, it’s still valid law.

Under the specific regulations of the OCT and UPR-status and the constitutional status that Sint Maarten and Saint Martin hold, both the Land and the collectivité can be subject to separate rules concerning the entry and residence of aliens. The first question we want to look into is if this legal autonomy on both sides of the border, provided for by both constitutional and EU law, can stand the test of the Treaty of Concordia. The national ordinance on the admission to and expulsion from Sint Maarten as amended by the national ordinance of 23 March 201448 entitles persons the right to enter and leave Sint Maarten on two conditions; they are either allowed by operation of law (‘van rechtsweg’) or by official permit from the Sint Maarten Government. Excepted from these categories are Dutch nationals born in Sint Maarten, Curaçao, Bonaire, Sint Eustatius and Saba, (all the islands forming the Netherlands Antilles until 10 October 2010), and Dutch nationals born in Aruba before 1 January 1986 (the date on which Aruba left the Netherlands Antilles and became a Country within the Kingdom in its own right) who lived in Sint Maarten, Curaçao, Bonaire, Sint Eustatius or Saba on 1 January 1986. These two categories are the only persons under Sint Maarten law to have complete free access to Sint Maarten to live and work there. The LTU does not mention the status of French nationals under the Concordia Treaty and it is unclear to us if French citizens residing in Saint Martin are exempted from the workings of the LTU. If they are not, the LTU clearly violates the terms of the Concordia Treaty: under the Treaty, French nationals residing in Saint Martin are fully entitled to enter Sint Maarten and to live and work there. The French alien and asylum code is far more Concordia-proof. It allows all EU-citizens and citizens of the European Economic Area (EEA) and Switzerland free access to France (including Saint Martin, Article L 111-3) if they have a job or sufficient other means of sustainment and form no danger to the public order.49 Furthermore, Article L 111-2 of the code stipulates clearly that it shall be applicable only within the limits set by treaties binding on France. Dutch nationals from Sint Maarten therefore have access to Saint Martin under terms that are rather similar to those set out by the Treaty of Concordia; French nationals from Saint Martin do not have the same access to Sint Maarten, which seems to violate the provisions of the Concordia Treaty.50

3.2 The Laws on Entry and Residence in Sint Maarten and Saint Martin: ‘EU proof’?

A second question in need of an analysis is whether the provisions on entry, residence and exit on both sides of the island can withstand the test of EU-conformity. Since the Council Decision on the basis of Article 202 and 203 of the TFEU does not contain any provision on the free movement of individuals, the Sint Maarten LTU is probably in accordance with EU law: there is no free access of European citizens to the OCT of Sint Maarten. There are no limits on this regulatory autonomy to be discerned from the case law of the ECJ either. Although the ECJ has widened the scope of the application of EU

48 AB 2014, no 23.
49 Article L 121-1.
50 A question we will not delve into is whether or not the provisions of the Concordia Treaty might be considered as generally binding treaty norms in the sense of art. 94 of the Dutch Constitution, a constitutional Kingdom provision in force in Sint Maarten. Under this provision, legal norms in the Countries of the Kingdom that contravene these generally binding norms of international law (rules creating rights and duties for citizens) must be left unapplied by the Courts. On the face of it, it seems as if the Concordia Treaty does indeed contain such norms within the scope of Article 94: but as far as we know, there has never been a court decision on the matter.
law in the OCT’s over time, including the application of unwritten principles of EU law\textsuperscript{51}, such as the principle of equality\textsuperscript{52}, the ECJ has – so far – abstained from ruling that the OCT’s are not free to determine their own laws and policies regarding entry, residence and expulsion of aliens (or even nationals, as the example of Sint Maarten shows), including EU citizens. The French code is obviously EU-proof: it allows all EU citizens free access to France, including Saint Martin, if they have a job or other means of supplying themselves.\textsuperscript{53} Every Dutch citizen that fulfills the conditions set out in Article L 121-1 of the French alien and asylum code can freely move to Saint Martin to live and work there.

So far, so good. The Treaty of Concordia creates an almost indivisible border between Sint Maarten and Saint Martin - at least, for French and Dutch citizens on both sides of the island. The national legislation of Sint Maarten on this topic, the LTU, is not in accordance with this Treaty: it allows the Sint Maarten authorities the right to discern between Dutch citizens and others, and even allows for discerning between different groups of Dutch nationals based on place of birth. We do not know yet if these provisions are upheld against French nationals of Saint Martin, or if \textit{de facto} Article 6 of the Concordia Treaty prevails. The LTU might thus possibly violate the Concordia Treaty, it is fully EU-proof, however: as an OCT, Sint Maarten is not bound to give EU-citizens free access to the Country. As a UPR, Saint Martin is far more bound by EU-norms than Sint Maarten. It is a French national code, not a local form of law that regulates the entry and residence of aliens (non-Frenchmen) in Saint Martin. The alien and asylum code is both Concordia- and EU-proof; like all other citizens of the Union, Dutchmen living in Sint Maarten have free entry into Saint Martin to live and work there under the code’s conditions.

As we saw earlier, the border between Sint Maarten and Saint Martin used to be almost non-existent: in that sense, the Concordia Treaty has functioned almost flawlessly. Recently, however, the Kingdom authorities in The Hague have stepped up efforts to tighten border control between Sint Maarten and Saint Martin. Such border controls (we will get back to them later) are in accordance with the EU status of Sint Maarten, but they might violate the rights granted to French citizens residing in Saint Martin by the Concordia Treaty.\textsuperscript{54} This raises the question whether or not EU law prevails over the Concordia provisions. The third question worth analysing is therefore if the Treaty of Concordia can be effectuated next to the rights, obligations and legal status Sint Maarten has under EU law. Is the Treaty of Concordia applicable within the legal order of the European Union?

3.3 The Treaty of Concordia: ‘EU proof’?

From the beginning, the Founding Fathers of the European Communities have had a sharp eye for the peculiar nature that the new legal order they were going to establish would have – albeit no one could have foreseen the legal revolution introduced by \textit{Van Gend en Loos} and \textit{Costa-ENEL}. In what is now Article 351 TFEU the Treaty holds a solution for the problem of contravening treaty obligations for Member States. The Article regulates that Member States of the Union can fulfill their obligations under treaties concluded before the coming into force of the EC Treaty in 1958 or before the accession of that

\textsuperscript{51} ECJ Judgment of 11 February 1999, C-390/95, Antillean Rice Mills.

\textsuperscript{52} ECJ judgment of 12 September 2006, C-300/04, Eman/Sevinger.

\textsuperscript{53} Since the French \textit{Collectivités d'outre-mer} are not part of the Schengen area, there are a few exceptions to this rule for British citizens: British nationals from the UK itself and from the British overseas territories of Bermuda, Montserrat, the Virgin Islands, the Turks and Caicos Islands and Anguilla have free access to Saint Martin as EU citizens; UK citizens from other British dependencies do not.

\textsuperscript{54} The 1994 Treaty on border control on the airports of St Martin is not valid for citizens of Member States of the EEA and is therefore not relevant for our analysis.
state to the Union, if those treaties were concluded between one or more Member States and one or more other states. Its aim is to protect the interests of third states (the classical international law provision of res inter alios acta), not to safeguard the rights of Member States against the laws of the Union. In its Commission v. Italy and other decisions, the ECJ has made clear that such agreements can never be invoked with the aim of infringing upon the workings of the EU-Treaties and the autonomous legal order of which they are the foundation. This might even go so far as to oblige a Member State to denounce a prior agreement with a third state. The Court also believes, from Commission v. Italy onward, that the clause does not affect treaties among Member States themselves.

From the point of view of the ECJ, the Treaty of Concordia cannot be invoked by France against the Kingdom of the Netherlands to safeguard the rights of its citizens wanting to move to Sint Maarten if said Treaty would infringe upon the legal order that the EU Treaties have created. Does it do so? We would argue that it does. The Treaty of Concordia grants French nationals resident in Saint Martin the right to live and work in Sint Maarten, more or less if and when they see fit. The Sint Maarten alien code, the LTU, does not grant them these rights and reserves these for certain categories of Dutch nationals, as we saw. Sint Maarten has the right, as an OCT, to decide for itself who it allows access to its territory. And as long as Sint Maarten remains an OCT, the constitutional arrangements laid down in the Charter which grant Sint Maarten this power do not contravene EU law. But adhering to the Treaty of Concordia means granting basically the same rights given to specific categories of Dutch nationals to a specific category of other EU-citizens: French nationals residing in Saint Martin. A French national, residing in Saint Martin, has the right to move to Sint Maarten and work there, under Article 6 of the Concordia Treaty; a Slovak, Irish or Danish national, legally residing in Saint Martin, does not have this right. This boils down to a form of discrimination between European citizens for which there can be no relevant justification. In its Eman-Sevinger judgment, the ECJ has made clear that in relation to the OCT’s the argument of the limited territorial scope of the validity of European law is of no relevance when it comes to unjustified unequal treatment of European Union citizens. In this case, this unjustified discrimination was between Dutch nationals living outside of the Kingdom of the Netherlands (who enjoyed the right to vote for the European Parliament) and Dutch nationals living in Aruba or the (then) Netherlands Antilles (who only enjoyed this right if they had previously lived in the Netherlands for at least ten years). Even among European citizens who share the same nationality, such unequal treatment leads to discrimination and is therefore a violation of EU law. It does not seem very far-fetched that this is even more so when the discrimination takes place between European citizens of different nationalities but in very similar circumstances. We do not see how such an unequal treatment between Union citizens can possibly be justified in any relevant way.

57 “In that regard, it must be observed that the principle of equal treatment or nondiscrimination, which is one of the general principles of Community law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 ABNA and Others [2005] ECR I-10423, paragraph 63, and Case C-344/04 IATA and ELFAA [2006] ECR I-403, paragraph 95)”, Eman-Sevinger, par. 57.
The Kadi-decision\textsuperscript{58} gives an additional argument in favour of this line of thought. In this very (in)famous judgment, the ECJ concluded that since the EU’s legal order is an autonomous legal order, treaties such as the UN-Charter (to which the EU is not a party) cannot alter or affect the allocation of powers fixed by the Treaties, nor prejudice the constitutional principles of the EC Treaty.\textsuperscript{59} Among these are the fundamental rights that form the common constitutional tradition of the Member States. Thus, it could be argued, if the ECJ does not accept that the UN Charter can entitle to infringements on fundamental rights the Union’s legal order grants or guarantees, it is hard to see how the Concordia Treaty could entitle a Member State to discriminate between EU Citizens in one of its OCT’s and in doing so not to violate the right to equal treatment of European Union citizens.

It appears, therefore, that the Concordia Treaty cannot be invoked for the benefit of French nationals who want to move to Sint Maarten, because that would violate binding principles of EU law. From Eman-Sevinger\textsuperscript{60} it follows that the Kingdom of the Netherlands had to redress the unequal treatment of its nationals: by regulating the right to vote of all Dutch nationals living outside of the Netherlands under the same terms, either by limiting it for Dutch nationals living outside of the Kingdom, or by extending it for Dutch nationals living in Aruba and the Netherlands Antilles.\textsuperscript{60} From this point of view, it seems that for Sint Maarten the choice would either be to extend the right to live and work in Sint Maarten to all European Union citizens resident in Saint Martin, or to negate that right to French nationals there, which means simply upholding the present LTU. Since the passing of hurricane Irma and the massive amounts of money it requires to rebuild the Country, the Dutch government has put severe conditions on Sint Maarten on the use of the rather large sum (€ 550 million) it has reserved for the reconstruction effort. One of those is the strengthening of the border control in Sint Maarten.\textsuperscript{61} To this end, Sint Maarten has agreed to letting Dutch police- and customs officials and members of the Royal Marine Corps take over parts of these duties from the local forces. We do not know, and it has not been made clear in any of the official documents related to this subject, whether or not this also encompasses the land border between Sint Maarten and Saint Martin. The fact is, however, that following the passing of hurricane Irma on 6 September 2017, the land border has been closed a number of times. It might therefore be done again if the need arises – and it is no longer fully up to the Sint Maarten authorities to decide on that. If the border will be closed again temporarily, or if (perhaps more realistic) a decision will be taken to enforce a more permanent system of border control on the land border between Sint Maarten and Saint Martin and this would hinder the free movement of French nationals into Sint Maarten, that would violate Article 6 of the Concordia Treaty; but it would be in accordance with EU law. Paradoxically, the existence of a real, physical border between Sint Maarten and Saint Martin, enforcing equal treatment between French citizens entering Sint Maarten and other EU citizens doing the same, would be more in accordance with EU law than the absence of one. The island of St Martin is therefore in more than one aspect unique: it might be the only place on Earth where the very existence of EU law entails the creation of real, physical borders within the territory of the Union itself.

\textsuperscript{58} ECJ Judgment (Grand Chamber) of 3 September 2008, joint cases C-425/05 and C-415/05, Kadi & Al Barakaat v. Council of the European Union & Commission.

\textsuperscript{59} Ibid. par. 285.

\textsuperscript{60} Eman-Sevinger, par. 61. The Netherlands decided to solve the problem by giving Dutch nationals resident in the Netherlands Antilles and Aruba the right to vote for the European Parliament under the same conditions as those for Dutch nationals living outside of the Kingdom. It did so by an amendment to the Dutch election code, which raised the question whether, in the constitutional framework of the Kingdom, one of the Countries can regulate electoral rights for citizens of one or more of the other Countries. This question is not answered completely satisfactory up to the present day; we would argue that the answer is negative and that the Netherlands have therefore overstepped the constitutional boundaries placed upon it by the Charter.

\textsuperscript{61} The Minister of Internal and Kingdom Affairs of the Netherlands laid down these conditions in a letter to the Sint Maarten Government of 13 October 2017, no. 2017-0000514277.
4. Concluding remarks

In this article, we have put a small and not very well-known island in the spotlight: the Caribbean island of St Martin. Named after the famous early Christian Saint Martin of Tours, on whose name day in 1493 the island was discovered by Columbus, it is the smallest island in the world falling under the sovereignty of two different countries and the only place in the Caribbean under the sovereignty of two different EU Member States: France and the Kingdom of the Netherlands. The basis for the division of the island, and of the very uneventful and frugal coexistence of the two parts of the island has since 1648 been the Treaty of Concordia. On the basis of this Treaty, the island is not only partitioned, but the French and Dutch nationals residing on both sides of the island have the right to freely move, live and work on both sides of the island. Up to the present day, France and the Kingdom of the Netherlands still adhere to the validity of this Treaty.

Over the past 370 years, however, the legal status of both sides of the island underwent many changes. Over time, the Dutch side, Sint Maarten, has profited from the development of Dutch decolonisation politics, finally bringing it the status of one of the four constituent Countries of the Kingdom of the Netherlands (the other three being the Netherlands itself, Aruba and Curaçao) in 2010. As an autonomous Country within the Kingdom, Sint Maarten has its own Constitution, parliament and Government, creating its own laws on the vast majority of subjects that, under the Charter for the Kingdom of the Netherlands, fall within its autonomous powers. Saint Martin, on the other hand, underwent the French development of integrating its former colonies, especially those that were already part of the French Empire in the 17th century, more and more into the Métropole. And although Saint Martin is since 2007 no longer a part of the D-ROM of Guadeloupe, as a Collectivité d’outre-mer in its own right it is still essentially a part of the French Republic, were the laws of France are valid and were the locals vote for the French political institutions.

This very different constitutional status is up to a certain extent mirrored by the different status both parts of the island have under European law. Whereas Sint Maarten is an OCT, only loosely tied to the legal framework of the EU, Saint Martin is a UPR, where essentially all EU law is in force. On the other hand: both the citizens with a Dutch and those with a French passport on the island are by virtue of their nationality citizens of the EU. Because of its autonomy under Dutch and European law, Sint Maarten is entitled to regulate the entry, residence and exit to its own territory autonomously. It has done so via the Landsverordening Toelating en Uitzetting, LTU. Under the LTU, only Dutch nationals born in Sint Maarten or Curaçao, Bonaire, Sint Eustatius and Saba and under more stringent conditions Dutch nationals from Aruba have free access to Sint Maarten: everyone else needs some form of permit from the Sint Maarten Government. Saint Martin falls under the French alien and asylum code. Under this French law, all citizens from one of the countries of the EEA and Switzerland have free access to the territory of the collectivité. Both parts of the island are in compliance with the European norms in force respectively; Saint Martin also fully complies with the free movement granted by the Concordia Treaty. Sint Maarten’s LTU does not, however. Whether this causes any factual problems ‘on the ground’ is not fully known by us. This problem is mirrored by another: is the Concordia Treaty itself applicable in the context of the divergence in constitutional and EU status? In our analysis, we conclude that it is probably not, and can therefore, at least according to the case law of the ECJ, not be enforced in St Martin, because its application leads to an unjustifiable difference in treatment between French and other citizens of the EU. In a way, it is rather ironic that in creating a border between the two sides of the island (an idea proposed post-Irma by the Kingdom Government) a suitable instrument could be found – perhaps even the only instrument, given the peculiar situation on the island – to ensure a key feature of the EU’s legal
order, the equal treatment of those enjoying its citizenship. Perhaps we are looking at the last days in which the somewhat lackadaisical St Martin sketched by Lasserie in 1961 (‘La frontière n’est gardée par personne. Pour les habitants des deux zones, la partition de l’île n’a que des avantages’) is still true. The paradox that thus emerges is that the European Union, with all its instruments to bring down walls and borders between its Member States and to create free movement for its citizens, has also created a legal order that perhaps necessitates the enforcing of a border between two territories that are part of EU Member States and that never had a physical border between them.