

# THE APPLICATION OF EU LAW IN THE EU'S OVERSEAS REGIONS, COUNTRIES, AND TERRITORIES AFTER THE ENTRY INTO FORCE OF THE TREATY OF LISBON

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## INTRODUCTION AND STRUCTURE

Several of the Member States of the European Union (EU) include overseas regions and territories lying thousands of kilometres away from Brussels. These territories enjoy a wide array of diverse legal statuses governing their position *vis-à-vis* EU law and seem to have one thing in

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common: the functioning of national and European law in these areas is highly atypical compared with Europe. Just as it is unusual, the legal situation of such territories is highly acute, as millions of Britons, Dutchmen, Frenchmen, Danes, Spaniards and Portuguese permanently reside in the overseas parts of their Member States, providing a vivid reminder of the immediate colonial past.<sup>1</sup> These people, like the innumerable companies registered in such territories, often find themselves in a difficult position, as it is sometimes virtually impossible to answer the simplest of possible questions: which law should apply? While the implications of the specific legal position of the overseas regions and territories under the sovereignty or control of the EU Member States for the interaction between the legal orders of municipal, European, and international law are extremely far-reaching, they remain dangerously under-researched. In fact, some of the more obscure overseas regions seem to exist in a kind of legal limbo.

This contribution aims at outlining the foundations of the “EU law of the Overseas,” following the entry into force of the Treaty of Lisbon and presenting a selection of the key legal issues arising in the application of EU law to the Member State territories lying far away from the European continent, as well as placing such territories in the general context of the development of European integration, giving them the attention they deserve.

However controversial the term “territory”<sup>2</sup> might sound when applied to the EU, to deny the fact that such a thing exists would be unwise.<sup>3</sup> Clearly,

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1. For the land area and population of such overseas territories and regions, see Tables 1–3. Some such territories, enormous in size, cannot boast any population at all, however, which does not prevent them from having a Prefet/Administrateur supérieur and a philatelic commission. *See, e.g.,* A. Oraison, *Le statut des Terres australes et antarctiques françaises à la lumière de l'article additionnel 72-3 de la Constitution*, 22 *REVUE FRANÇAISE DE DROIT ADMINISTRATIF* 681 (2006).

2. On the meaning of “territory” in public international law, see, for example, MALCOLM N. SHAW, *INTERNATIONAL LAW* 409-62 (2003); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 105-67 (6th ed. 2003).

3. The literature on the territorial scope of EU law usually starts with the assumption of the inapplicability of the notion of “territory” to the Union, only to proceed to the scope *ratione loci* later, which is a very narrow approach to the issue. *See, e.g.,* Jacques Ziller, *The European Union and the Territorial Scope of European Territories*, 38 *VICTORIA U. WELLINGTON L. REV.* 51 (2007); V. Coussirat-Coustère, *Article 227*, in V. Constantinesco *et al.* (eds.), *TRAITÉ INSTUANT LA CEE: COMMENTAIRE ARTICLE PAR ARTICLE* 1419, 1420 (1995). *See also* L. Burgorgue-Larsen, *L'identité de l'Union européenne au cœur d'une controverse territoriale tricentenaire: Quand le statut de Gibraltar réapparaît sur la scène judiciaire européenne*, 43 *REVUE TRIMESTRIELLE DE DROIT EUROPÉEN* 25, 39-42 (2007); J. Groux, *“Territorialité” et droit communautaire*, 23 *REVUE TRIMESTRIELLE DE DROIT EUROPÉEN* 1, 5-33 (1987). In earlier publications, I shared this perspective, arguing that “instead of speaking of a territory of the EU . . . it is necessary to speak separately about the territorial scope of application of the most important component parts of EU law.” Dimitry Kochenov, *Substantive and Procedural Issues of Application of European Law in the Overseas Possessions of the Member States of the European Union*, 17 *MICH. ST. J. INT'L L.*

EU law applies across a certain number of square kilometres.<sup>4</sup> Moreover, although one can speak about a number of different “territories” within the Union, depending on what one has in mind,<sup>5</sup> the main principle here is

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195, 203 (2008). In light of the changes brought about by the Treaty of Lisbon, this approach does not seem sustainable any more. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1, the word “territory” should enter EU terminology without innumerable far-reaching derogations.

4. 4,324,782 km sq. (the European part).

5. The customs territory of the Union does not overlap with the Schengen territory.

The Schengen provisions, although forming part of the *acquis* for all Member States except the UK and Ireland and enjoying a special status in Denmark, apply to EEA States and Switzerland, although not in full in some new Union Member States such as Romania, Bulgaria, and Cyprus. Moreover, the overseas parts of the Member States are also excluded from the application of the Schengen system by the Schengen Convention. See Council Regulation 2913/92, Establishing the Community Customs Code, 1992 O.J. (L 302) 1 (as amended); Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders, of the Schengen Acquis, of 14 June 1985, art. 138, 2000 O.J. (L 239) 19. For a meticulous analysis of the customs territory, see, for example, LAURENCE W. GORMLEY, *EU LAW OF FREE MOVEMENT OF GOODS AND CUSTOMS UNION* (2009). France appended a special declaration to the Treaty of Amsterdam when the rules of the Convention were moved to what used to be the First Pillar of the Union. See Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1; Declaration by France Concerning the Situation of the Overseas Departments in the Light of the Protocol Integrating the Schengen Acquis into the Framework of the European Union, appended to Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 144. For a general analysis see, for example, RUBEN ZAIOTTI, *CULTURES OF BORDER CONTROL: SCHENGEN AND THE EVOLUTION OF EUROPEAN FRONTIERS* (2011). The territorial scope of application of both aforementioned “territories” does not overlap with the scope *ratione loci* of the secondary law on turn-over taxation, whose territorial scope of application is similar to that of the *Community Customs Code* and differs from the text of Article 355 of the Treaty on the Functioning of the European Union. See Consolidated Version of the Treaty on the Functioning of the European Union, Mar. 30, 2010, 2010 O.J. (C 83) 47 [hereinafter *TFEU*]. See Sixth Council Directive 77/388/EEC of 17 May 1977 on the Harmonization of the Laws of the Member States Relating to Turnover Taxes-Common System of Value Added Tax: Uniform Basis of Assessment., 1977 O.J. (L 145) 1 (as amended). See also Case C-283/84, *Trans Tirreno Express SpA v. Ufficio provinciale IVA*, 1986 E.C.R. 231 ¶ 20. On the issue of the territorial scope of the EMU and the Euro, see Fabian Amtenbrink, *EMU and the Overseas*, in *EU LAW OF THE OVERSEAS: OUTERMOST REGIONS, ASSOCIATED OVERSEAS COUNTRIES AND TERRITORIES, TERRITORIES SUI GENERIS 271* (Dimitry Kochenov ed., 2011) [hereinafter *EU LAW OF THE OVERSEAS*]. For a discussion of the statistical territory of the Community, see Council Regulation 1172/95, On the Statistics Relating to the Trading of Goods by the Community and Its Member States with Non-member Countries of 22 May 1995, art. 3, O.J. (L 118) 10 (EC). To illustrate the differences, see Council Regulation 476/97 of 13 March 1997, art. 1, 1997 O.J. (L 075) 1 (EC), amending with respect to statistical territory Council Regulation 1172/95. Council Regulation 476/97 included the Island of Helgoland, which is outside the Customs territory, into the statistical territory of the Community. More importantly, Eurostat strangely does not include the French Overseas

absolutely clear. As restated in Article 52(1) of the Treaty on the European Union (EU Treaty),<sup>6</sup> EU law applies in the territory of all the Member States.<sup>7</sup> Most recent case law of the Court of Justice the European Union (ECJ) supports the importance of territory.<sup>8</sup> This concept came to play a fundamental role in the framing of the Court's jurisdiction in EU citizenship cases.

Although the EU Treaty and the Treaty on the Functioning of the European Union (TFEU)<sup>9</sup> are independent instruments having "the same legal value,"<sup>10</sup> the fact that Article 52 TEU makes a reference to "[t]he Treaties" and entrusts Article 355 TFEU with the task of supplying *lex*

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Departments (DOM) in the territory of France as a Member State of the European Union. Fabien Brial, *La place des régions ultrapériphériques au sein de l'Union européenne*, 1998 CAHIERS DE DROIT EUROPÉEN 639, 641 n.9. With regard to a number of other fields of law, numerous variations abound. Particularly unclear is the understanding of EU territory for the purposes of EU criminal law and EU external action. See, for an analysis, Maria Fletcher, *EU Crime and Policing and the OCTs*, in *EU LAW OF THE OVERSEAS*, *supra*, at 291; Steven Blockmans, *Between the Devil and the Deep Blue Sea? Conflicts in External Action Pursued by OCTs and the EU*, in *EU LAW OF THE OVERSEAS*, *supra*, at 307; Kochenov, *supra* note 3, at 217–21.

6. Consolidated Version of the Treaty on European Union art. 52(1), Mar. 30, 2010, 2010 O.J. (C 83) 13 [hereinafter TEU].

7. Article 52(1) of the TEU reads as follows:

The Treaties shall apply to the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.

Problems might arise, however, when it is not absolutely clear what the meaning of a "Member State" is. That the issue is not purely hypothetical follows, for instance, from the legal questions Professor Monica Claes was asked by the Netherlands Ministry of the Interior and Kingdom Relations which included, "welke entiteit moet als lidstaat van de Europese Unie worden beschouwd: Nederland of het Koninkrijk der Nederlanden?", *i.e.*, the Dutch government did not know what a "Member State" is, even in the context of its own country. For Professor Claes's answers, see Monica Claes, *Europees-rechtelijke aspecten van kiesrecht van Nederlandse onderdanen die in de Antillen en Aruba woonachtig zijn* (2010) (Ticom Paper, Tilburg University).

8. Case C-34/09, *Zambrano v. Office national de l'emploi* 2011 ECJ EUR-Lex LEXIS 609J0034 (Mar. 8, 2011); Case C-434/09, *Shirley McCarthy v. Sec'y of State for the Home Dep't*, 2011 E.C.R. I-00000. For analysis, see Dimitry Kochenov, *A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe*, 18 COLUM. J. EUR. L. 55 (2011).

9. Consolidated Version of the Treaty on the Functioning of the European Union, Mar. 30, 2010, 2010 O.J. (C 83) 47 [hereinafter TFEU].

10. TEU, *supra* note 6, Art. 1(2).

*specialis* to accompany the *lex generalis* provision contained in the EU Treaty, unequivocally indicates that both Article 52 TEU and the relevant TFEU instruments are equally applicable to both Treaties, which had not been the case before Lisbon, when each of the Treaties in force had its own scope *ratione loci*,<sup>11</sup> not identical to other Treaties, albeit applicable to the same Member States.

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11. The founding Treaties formed a united system of law, since it was impossible to join one of the three Communities without joining the two others, just as joining the Union was impossible without joining the constituent Communities. This unity had started to take shape at least since the entry into force of the Merger Treaty. Treaty Establishing a Single Council and a Single Commission of the European Communities, Apr. 8, 1965, 1967 J.O. (152) 1 [hereinafter Merger Treaty]. See also JIM CLOOS, *LE TRAITÉ DE MAASTRICHT: GENÈSE, ANALYSE, COMMENTAIRES* 131 (2d. ed. 1994). Moreover, the single provision to regulate the enlargements of the Communities and the Union has been in place since Maastricht. Treaty on European Union art. 49, Dec. 24, 2002, 2002 O.J. (C 325) 5.

Nevertheless, the founding Treaties recognised a sophisticated regime for differentiation in their *ratione loci*. Therefore, while the European Coal and Steel Community Treaty (ECSC) only applied to the European territory of the Member States, the situation with European Atomic Energy Community Treaty (Euratom) and the European Economic Community (EEC) was drastically different, as both of them approached the territorial scope of application of the law differently from the ECSC. See Treaty Establishing the European Coal and Steel Community art. 79, Apr. 18, 1951, 261 U.N.T.S. 140; Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167 [hereinafter Eurotom Treaty]; Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3 [hereinafter EEC Treaty].

The Euratom Treaty is much more inclusive due to the common European interests in the uranium deposits of the former colonies that existed at the time of its negotiation. See Dominique Custos, *Implications of the European Integration for the Overseas*, in *EU LAW OF THE OVERSEAS*, *supra* note 5, at 91. Consequently, according to Article 198 of Euratom, the Treaty applies to the European territory of the Member States and “to the non-European territories within their jurisdiction.” Eurotom Treaty, art. 198. Exceptions are only made for the Færø Islands, Greenland and the UK Sovereign Bases on Cyprus. A special regime applies to the Isle of Man and the Channel Islands. All in all, it is clear that the inclusive approach to territory demonstrated by Euratom lost much of its force upon the gaining of independence of the African colonies rich in the relevant resources. Coupled with the “principle of speciality,” which necessarily limits the scope of issues that can be addressed via the Euratom framework, the relevance of this Community, which has survived the Lisbon reshuffle, to the overseas regions of the Member States remains very limited indeed.

As for the European Economic Community Treaty, it introduced several classes of territories in its law, with varied application of the Treaty provisions in each. This system of *ratione loci* variation, entirely different from the ECSC, which embraced the general principle of exclusion, and the Euratom Treaty, which embraced the general principle of inclusion, can be placed between the two. It laid the foundations of the current system of *ratione loci* of the law of the EU analysed below.

As for the pre-Lisbon version of the EU Treaty, there was no consensus in the literature or among the practitioners as to how the law is to apply. Consolidated Version of the Treaty Establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325) [hereinafter EC Treaty]. Most notably, the EC Treaty did not contain any provisions at all that would specify the extent of its territorial scope. Thus it provided an example of an approach to the definition of such scope that is different from the three other treaties then in

In other words, EU territory seems at first glance to represent a mathematical sum of the territories of the Member States with EU law equally applying to the entirety of the territory of the Member States, including their territorial waters<sup>12</sup> and “ships and aircraft under the rules of the flag.”<sup>13</sup> To adhere blindly to this simple statement, although generally correct, would be to oversimplify the issue of territorial application of EU law to an almost dangerous degree. Indeed, EU law applies very differently to Campione d’Italia, the Holy Mount Athos, the municipality of Budapest, the double kingdom of Wallis-et-Futuna within the French Republic, Martinique, or the Island of Bonaire. Interestingly, although all the territories mentioned are clearly parts of Member States, the application of EU law in each is far from identical.<sup>14</sup>

It is possible, in this regard, to distinguish between a classical model of application of EU law, consisting of the full application of the *acquis*<sup>15</sup> to the whole territory of the Member States as understood in the national Constitution<sup>16</sup> and where the principle of the “unitary concept of territory”<sup>17</sup>

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force. This sparked academic debate, notwithstanding the basic rule of the Vienna Convention in the Law of Treaties art. 29, Jan. 27, 1980, 1155 U.N.T.S. 331. This treaty stated in Article 29 that treaty law applies to the entire territory of each party, and thus binds the whole territories of the member states. *Id.* For an outline of this debate see Kochenov, *supra* note 3, at 216, 217-23. For contemporary implications and analyses, see the views expressed by Jacques Ziller, *Outermost Regions, Overseas Countries and Territories and Others after the Entry into Force of the Lisbon Treaty*, in *EU LAW OF THE OVERSEAS*, *supra* note 5, at 69; Morten Broberg, *Access to the European Court of Justice by Courts in Overseas Countries and Territories*, in *EU LAW OF THE OVERSEAS*, at 137; Fletcher, *supra* note 5, at 291; Steven Blockmans, *supra* note 5. On the territorial scope of the founding Treaties see, for example, Jacques Ziller, *Flexibility in the Geographical Scope of EU Law: Diversity and Differentiation in the Application of Substantive Law on Member States’ Territories*, in *CONSTITUTIONAL CHANGE IN THE EU: FROM UNIFORMITY TO FLEXIBILITY?* 113, 115 (Grainne de Búrca & Joanne Scott eds., 2000); Kochenov, *supra* note 3, at 204-17. It is unavoidable that the contributors to this book will be constantly returning to the issue of the historical evolution of the scopes *ratione loci* of the founding Treaties, which is fundamental to this study.

12. Case 61/77, *Commission v. Ireland*, 1978 E.C.R. 417; Case 63/83, *Regina v. Kent Kirk*, 1984 E.C.R. 2689.

13. See DAVID VAUGHAN, *VAUGHAN LAW OF THE EUROPEAN COMMUNITIES SERVICE* ¶ 643 (David Vaughan ed., Issue 34, 1990).

14. The variation in the application of EU law in the overseas regions and territories of the Member States should be viewed in the right context, providing yet another example of differentiation in the application of EU law, of which numerous examples are known. For an analysis of this general contest see, for example, *CONSTITUTIONAL CHANGE IN THE EU: FROM UNIFORMITY TO FLEXIBILITY?*, *supra* note 11.

15. For a general analysis of the term, see Christine Delcourt, *The Acquis Communautaire: Has the Concept Had Its Day?*, 38 *COMMON MARKET L. REV.* 829 (2001).

16. The ECJ respects the Member States’ own approaches to territory. For a concrete reference see, for example, Case 148/77, *H. Hansen Jun & O.C. Balle GmbH & Co. v. Hauptzollamt de Flensburg*, 1978 E.C.R. 1787, ¶ 10. In some cases Member States tried to challenge the inclusive vision of territory and national institutional structure embraced by the ECJ *vis-à-vis* other Member States, but to no avail. See *e.g.*, the British position in Joined cases C-100/89 and 101/89 *Kaefer v. French state* 1990 E.C.R. 4647 ¶¶ 6, 7. The British



applies (*i.e.* the main rule);<sup>18</sup> as opposed to the model where EU law does not fully apply to certain parts of Member State territory, *i.e.* where the unitary idea of territory is not applicable and differentiation is the key word. In the territories covered by the second model, EU law “s’applique fort imparfaitement,”<sup>19</sup> and to a varying degree—thus introducing concentric circles of EU involvement with different parts of Member States’ territories,<sup>20</sup> especially in the so-called “borderland Europe”<sup>21</sup> at times lying many time-zones away from the European part of the EU (*i.e.* the exception to the main rule). It is abundantly clear at this point that for some Member States “il n’y a pas coïncidence complète entre territoire national et territoire d’application du droit communautaire.”<sup>22</sup>

While the main principle that EU law applies in full is true for virtually all the European territory of the EU,<sup>23</sup> minor exceptions notwithstanding,<sup>24</sup>

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government submitted that a Polynesian court could not be regarded as a “court or tribunal of a Member State” in the sense of Art. 267 TFEU (then Art. 234 EC), an argument which failed to convince the Court. *See also* Broberg, *supra* note 11, at 137. Interestingly, AG Mischo, writing privately, was surprised that only one government made such an argument. J. Mischo, *The Competence of the Judiciary of the Netherlands Antilles and Aruba to Request Preliminary Rulings from the Court of Justice of the European Communities*, 1991 *TJDSCHTIJFT VOOR ANTILLIAANS RECHT—JUSTICIA*, 140, 142.

17. Case 34/79, *Regina v. Henn*, 1979 E.C.R. 379. Speaking about prohibitions on imports of goods justified on the grounds of public morality, the Court underlined that “the fact that certain differences exist between the laws enforced in the different constituent parts of a Member State does not thereby prevent that state from applying a unitary concept [of territory].” *Id.* ¶ 16.

18. TEU art. 52.

19. Syméon Karagiannis, *A propos du règlement des conflits d’intérêts entre les territoires dépendant d’Etats membres et les Communautés européennes*, 75 *REVUE DE DROIT INTERNATIONAL ET DE DROIT COMPARE* 330, 337 (1998).

20. Karis Muller, “*Concentric Circles*” of the Periphery of the European Union, 48 *AUSTRALIAN J. POL. & HIST.* 322 (2002); Morten Broberg, *The EU’s Legal Ties with Its Former Colonies: When Old Love Never Dies?* DIIS Working Paper, 2010.

21. *See* Teresa Pullano, *Restructuring Europe from its Margins*, in *EU LAW OF THE OVERSEAS*, *supra* note 5, at 363, 364.

22. Karagiannis, *supra* note 19, at 333.

23. The meaning of the reference to the Member States in Article 52 of the TEU is to be interpreted in the most inclusive manner. Therefore, unless some *lex specialis* provisions in the Treaty are applicable, the principle of the unitary approach to territory reigns. Case 34/79, *Regina v. Henn*, 1979 E.C.R. 3813, ¶ 6.

24. For such exceptions, see Council Regulation 2913/92, *Establishing the Community Customs Code*, art. 3(2), 1992 O.J. (L 302) 3 (EEC). The regulation lists all the territories that are outside the territory of the Member States, but are still considered part of the Community customs territory. *Id.* The consequences of such inclusion are far-reaching because the Customs Union is at the core of the Internal Market, and the preamble of Council Regulation states that the Community is “based upon a customs union.” *Id.* at pmb1. Such territories include Melilla, Ceuta, the Island of Heligoland, Buesingen, Livigno, Campione d’Italia. Council Regulation 2913/92, art. 3, 1992 O.J. (L 302) 1 (EEC). The reverse is also possible: a third country can be part of the customs territory of the EU while not being a Member State, as the examples from the past relations between the EEC and Monaco and between the EEC and San Marino have demonstrated. Council Regulation 2913/92, arts.

the largest share of the Member State territories lying outside of Europe—some of them not formally forming part of the particular Member State while clearly under its sovereignty<sup>25</sup>—provides examples of legal arrangements deviating from the main rule of Article 52(1) TEU. Unsurprisingly, such deviations are unequivocally authorised by the Treaties—Article 52(2) TEU contains a reference to Article 355 TFEU, where such rules are spelled out—and which form a complex system of rules.

The fact is that millions of EU citizens residing in what is considered Member State territory, find themselves in areas which either do not fall within the scope *ratione loci* of EU law entirely, or where EU law applies with serious derogations. This situation is prone to generate confusion and occlude clarity, unless addressed by experts in sufficient detail. In the English-speaking world the latter has not been done at any serious level until the publication of the volume on *EU Law of the Overseas*<sup>26</sup> edited by the author,<sup>27</sup> on an extract from which this contribution is based. Stunningly,

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3(2)(b) & 3(2)(c), 1992 O.J. (L 302) 1 (now obsolete). Some other examples of European Member State territories where EU law does not apply in full or applies with serious derogations include the Holy Mount Athos, the Åland Islands, the Nordic territories inhabited by Sami people, and the Channel Islands and the Isle of Man, which are mentioned above in the category of territories *sui generis*. See Documents Concerning the Accession of the Hellenic Republic to the European Communities, Joint Declaration Concerning Mount Athos, 1979 O.J. (L 291) 186 [hereinafter Declaration on Mount Athos]; TFEU, arts. 355(4) & 355(5)(c); Act Concerning the Conditions of Accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the Adjustments to the Treaties on which the European Union is Founded, 1994 O.J. (C 241) 9; Accession of Norway, Austria, Finland, and Sweden: Protocol No. 3 On the Sami People, 1994 O.J. (C 241) 352.

25. Which is the case with the numerous overseas territories connected with the U.K. IAN HENDRY & SUSAN DICKINSON, *BRITISH OVERSEAS TERRITORIES LAW* 2 (2011).

26. See generally *EU LAW OF THE OVERSEAS: OUTERMOST REGIONS, ASSOCIATED OVERSEAS COUNTRIES AND TERRITORIES, TERRITORIES SUI GENERIS* (Dimitry Kochenov ed., 2011).

27. For rare exceptions in English, see, for example, Ziller, *supra* note 3, and Kochenov, *supra* note 3. See, e.g., Dimitry Kochenov et al., *De caribische koninkrijksgebieden en de Europese Unie: Over de status van UPG en LGO naar Europees recht*, 26 *TJDSCHRIFT VOOR ANTILLIAANS RECHT-JUSTICIA* 10 (2010); Danielle Perrot, *Les régions ultrapériphériques françaises selon le traité de Lisbonne*, 4 *REVUE TRIMESTRIELLE DE DROIT EUROPÉEN* 717 (2009) [hereinafter Perrot, *Les régions ultrapériphériques françaises selon le traité de Lisbonne*]; Isabelle Vestris, *Le statut communautaire des régions ultrapériphériques, la construction d'un modèle attractif et perfectible d'intégration différenciée* (2009) (unpublished Ph.D. dissertation, University of the French Antilles and Guiana) (on file with author) (French West Indies); H.E. Bröring ET AL., *SCHURENDE RECHTSORDES: OVER DE EUROPESE UNIE, HET KONINKRIJK EN ZIJN CARIBISCHE GEBIEDEN* (2008); *UNION EUROPÉENNE ET OUTRE-MERS, UNIS DANS LEUR DIVERSITÉ* (L. Tesoka & J. Ziller eds., 2008); H. Béringier, *Outre-mer*, *JURISCLASSEUR FASCICULE 456* (2006); Jacques Ziller, *L'Union Européenne et l'outre-Mer*, 113 *POUVOIRS* 145 (2005); Jacques Ziller, *The European Union and Overseas Territories*, 113 *POUVOIRS* 145 (2005); Jacques Ziller, *Les outre-mers face à l'intégration européenne et à la mondialisation—L'association des pays et territoires d'outre-mer à la Communauté européenne*, 101 *REVUE FRANÇAISE*



in numerous cases it was even impossible to state with any degree of certainty whether and what kind of EU law applies in a certain territory, to which numerous academic debates<sup>28</sup> as well as the obvious errors made by the Commission in its policy documents<sup>29</sup> overwhelmingly testify.

Some elements of the *acquis* apply to the overseas parts of the territory of one Member State while being deemed inapplicable to the parts with identical EU law status connected with other Member States.<sup>30</sup> In other words, the general confusion is not the only problem once the scope of application *ratione loci* of EU law is analyzed. The current state of affairs has led to the loss of the general uniformity in the application of EU law in the overseas parts of the Member States predominantly lying outside Europe. Consequently, although rules abound and every opportunity to introduce clarity into the picture seems to be present, the situation—where EU law supposedly applies in the Member States' non-European territories—is far from clear. This article makes an attempt to remedy this gap.

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D'ADMINISTRATION PUBLIQUE 127 (2002); Arjen van Rijn, *Brussel, Den Haag en de landen en gebieden overzee: Problemen en perspectieven* [Brussels, the Hague and the Overseas Countries and Territories: Problems and Perspectives], in ONZE KEUS: PIROUETTES IN HET GEMEERSCHAPSRECHT 126 (Rolf de Groot et al. eds., 2001) (Neth.); LA SOUVERAINETÉ PARTAGÉE EN NOUVELLE CALÉDONIE ET EN DROIT COMPARÉ (Jean-Yves Faberon & Guy Agniel eds., 2000); Danielle Perrot, *Le nouvel article 299 paragraphe 2 du traité instituant la Communauté Européenne: Vers un approfondissement de la différenciation juridique en faveur des régions ultra-périphériques*, 12 POUVOIRS DANS LA CARAÏBE 111 (2000); Jean-Pierre Puissochet, *Aux confins de la Communauté européenne: les régions ultrapériphériques*, in MELANGES EN HOMMAGE À FERNAND SCHOCKWEILER 491 (Gil Carlos Rodríguez Iglesias et al. eds., 1999); Brial, *supra* note 5, at 639; Ismaël I. Omarjee, *Le traité d'Amsterdam et l'avenir de la politique de différenciation en faveur des départements français d'outre-mer*, 34 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 515 (1998); Karagiannis, *supra* note 19; JACQUES ZILLER, *LES DOM-TOM* (2d ed. 1996); Elisha Paulin & Marie Joséphe Rigobert, *Les régions ultrapériphériques et la CEE*, REVUE DU MARCHÉ COMMUN ET DE L'UNION EUROPÉENNE, 436 (1993); Groux, *supra* note 3. *See also* Fiona Murray, *The European Union and the Member State Territories: A New Legal Framework under the EU Treaties* (2012) (Ph.D. thesis, Erasmus University of Rotterdam).

28. For a short summary see, for example, Kochenov, *supra* note 3, at 217–20.

29. *See Commission Green Paper on the Future Relations Between the EU and the Overseas Countries and Territories*, at 6, COM (2008) 383 final (June 25, 2008) [hereinafter *Commission Green Paper*] (wrongly denying EU free movement rights to the residents of one group of the overseas regions holding EU citizenship). For critical discussion, see Dimitry Kochenov, *EU Citizenship in the Overseas*, in *EU LAW OF THE OVERSEAS*, *supra* note 5, at 199, 212.

30. Consider, for instance, the European Arrest Warrant which functions differently in the French OCTs, compared with the OCTs of any other Member State, where it is not applicable. Council Framework Decision 2002/584/JHA, of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, 2002 O.J. (L 190) 1. On the French position, see Council of the European Union, Note from French Delegation on the Implementation of the European Arrest Warrant in the French Overseas Departments and Territories, Doc. 11356/04, Brussels (9 July 2004). For more examples, see Fletcher, *supra* note 5; Blockmans, *supra* note 5.

At issue are continental territories,<sup>31</sup> as well as thousands of islands, islets and archipelagos in all the Oceans,<sup>32</sup> belonging to Denmark, Finland,<sup>33</sup> France, the Netherlands, Portugal, Spain, and the United Kingdom,<sup>34</sup> which jointly (when counted with territorial waters) span a territory far greater than that of the European part of the Union.<sup>35</sup> Although the process of decolonisation has diminished the extent of the Member States' territorial reach, necessarily toning down the ambitions of the Internal Market, which was initially conceived as "Eurafrica,"<sup>36</sup> the scale of the EU's direct involvement with the non-European territories of the Member States, as well as with European territories where the main principle of full application of EU law as stated in Article 52 TEU applies with deviations, remains very considerable indeed.

The reasons behind such deviations from the main rule vary and are rooted in numerous considerations, ranging from the upholding of a particular territory's status under international law<sup>37</sup> to the protection of minority cultures,<sup>38</sup> the reflection of the attained level of autonomy in

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31. The only continental territory outside of Europe belonging to a Member State is French Guiana. However, Gibraltar provides another example of a continental territory where the application of EU law is profoundly atypical, even though, *sensu stricto*, it is located in Europe.

32. See the map in Figure 1.

33. Although the Åland Islands are in the European waters, of course.

34. See HENDRY & DICKSON, *supra* note 25.

35. See Tables 1, 2, and 3 listing all such territories.

36. Jean-Marie Palayret, *Les mouvements proeuropéens et la question de l'Eurafrrique du Congrès de La Haye à la Convention de Yaoundé (1948–1963)*, in *L'EUROPE UNIE ET L'AFRIQUE: DE L'IDÉE D'EURAFRIQUE À LA CONVENTION DE LOMÉ I* 185 (Marie-Thérèse Bitsch & Gérard Bossuat eds., 2006). See also Custos, *supra* note 11, at 94–101. The absolute majority of the founding Member States had overseas territories under their control at the moment of the entry of the first Treaties marking European integration into force. Ziller, *L'Union Européenne et l'outre-Mer*, *supra* note 27.

37. Which is the case of the Åland Islands, for instance. The special regime governing the Islands in EU law, which is reflected in TFEU art. 335(4), was put into place to respect arrangements existing in international law. See *Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs*, League of Nations Doc. B.7.21/68/106 (1921); the guarantee to be given to the population of the Åland Islands (adopted June 27, 1921) in *The Åland Islands Question*, 2 LEAGUE OF NATIONS O.J. 691 (1921). The special regime for the Islands dates back to the Declaration of Paris of 1856, aimed at guaranteeing the demilitarisation of the Islands (then a territory within the Russian Empire). See Martin Ekman, *The Right to Be Small and Different*, 10 JERSEY L. REV. 2006, available at [http://www.jerseylaw.je/Publications/jerseylawreview/oct06/JLR0610\\_Ekman.aspx](http://www.jerseylaw.je/Publications/jerseylawreview/oct06/JLR0610_Ekman.aspx); AUTONOMY AND DEMILITARISATION IN INTERNATIONAL LAW: THE ÅLAND ISLANDS IN A CHANGING EUROPE (Lauri Hannikainen & Frank Horn eds., 1997). See also Dimitry Kochenov, *Regional Citizenships and EU Law: The Case of the Åland Islands and New Caledonia*, 35 EUR. L. REV. 307 (2010).

38. Which is the case of the Sami lands and, at least in part, the Channel Islands. See Documents Concerning the Accession of the Republic of Austria, the Kingdom of Sweden, the Republic of Finland and the Kingdom of Norway to the European Union: Protocol No. 3 on the Sami People, Aug. 29 1994, 1994 O.J. (C 241) 352 [hereinafter Protocol No. 3 on the Sami People] and Protocol No. 2 on the Faroe Islands & Protocol No. 3 on the Channel

national law,<sup>39</sup> as well as decolonisation.<sup>40</sup> Although a number of different relevant factors can be cumulatively applied, the most common reasons for special treatment are related to the need to adapt the application of EU law in particular territories to the discrepancies in the level of wealth, socioeconomic development, climate, and a number of other similar factors.<sup>41</sup> These factors distinguish the territory in question from the main territory of the EU where the *acquis* applies in full and reflects the special status of such territories in national law<sup>42</sup> or the willingness of a particular self-governing territory not to be covered by EU law.

Legally speaking, the EU's involvement with such territories is mostly channelled through three main statuses in EU law granted to each particular territory in question, including Outermost Region (OR) status,<sup>43</sup> Overseas Country or Territory Associated with the Union (OCT) status,<sup>44</sup> and a

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Islands and the Isle of Man, of the Documents Concerning the Accession to the European Communities of the Kingdom of Denmark, Ireland, and Kingdom of Norway and the United Kingdom of Great Britain and Northern Island, Mar. 27, 1972, 1972 O.J. (L 73) 164 [hereinafter 1972 Treaty of Accession]. See also Danielle Perrot & Franck Miatti, *Les Lapons et les îles Åland dans le quatrième élargissement: Contribution à l'étude de la différenciation juridique au sein de la Communauté européenne*, 413 REVUE DU MARCHÉ COMMUN 670, 671-76. For the general analysis of the role of minority protection in EU law, see, for example, Dimitry Kochenov, *The Summary of Contradictions: Outline of the EU's Numerous Approaches to Minority Protection*, 31 B.C. INT'L & COMP. L. REV. 1 (2009).

39. See Treaty Amending with Regard to Greenland the Treaties Establishing the European Communities, Jan. 2, 1985, 1985 O.J. (L 29) 1.

40. Which was the case of numerous former colonies that have managed to gain independence. In the current situation, New Caledonia, along with Bermuda, is one of the rare Member State territories included on the UN list of territories whose people have not yet attained a full measure of self-government. It was struck from this list in 1947, but got reintroduced on the list in 1986. See G.A. Res. 41/41A, U.N. GAOR, 41st Sess., Supp. No. 53, ¶ 1, U.N. Doc. A/RES/41/41A (Dec. 2, 1986).

41. For a sample of factors useful to explain *ratione loci* differentiation, see TFEU art. 349.

42. See Alain Moyrand, *Théorie de la souveraineté partagée*, in LA SOUVERAINETÉ PARTAGÉE EN NOUVELLE CALÉDONIE ET EN DROIT COMPARÉ, *supra* note 27, at 29.

43. E.g. Saint-Martin, La Réunion, Madeira. See TFEU arts. 349, 355(1). See, e.g., Ismaël Omarjee, *Specific Measures of the Outermost Regions After the Entry into Force of the Lisbon Treaty*, in EU LAW OF THE OVERSEAS, *supra* note 5, at 121; Perrot, *Les régions ultrapériphériques françaises selon le traité de Lisbonne*, *supra* note 27, at 717; Kochenov, *supra* note 3, at 227-44; Christian Vitalien, *Les régions ultra-périphériques entre assimilation et différenciation* [The Outermost Regions between Assimilation and Differentiation], 101 REVUE FRANÇAISE D'ADMINISTRATION PUBLIQUE [FRENCH REV. OF PUB. ADMIN.] 115 (2002); Perrot, *Le nouvel article 299 paragraphe 2*, *supra* note 27, at 111; Puissochet, *supra* note 27, at 491; Fabien Brial, *La place des régions ultrapériphériques*, 5-6 CAHIERS DE DROIT EUROPEEN 639 (1998); Omarjee, *supra* note 27, at 515; JACQUES ZILLER, LES DOM-TOM 60-78 (1996); Elisa Paulin & Marie-Josèphe Rigobert, *Les Régions Ultrapériphériques et la CEE*, 368 REVUE DU MARCHÉ COMMUN ET DE L'UNION EUROPÉENNE [RMCUE] 436 (1993).

44. E.g., Bermuda, Greenland, Wallis-et-Futuna. See TFEU art. 355(2) & Annex II. See also TFEU Part IV. For an analysis, see Dimitry Kochenov, *The Impact of European Citizenship on the Association of the Overseas Countries and Territories with the European*

plethora of *ad hoc* arrangements applicable to the Member State territories which do not fall squarely within the two statuses mentioned, but can be classed as a group of territories *sui generis*.<sup>45</sup> Theoretically, yet another status could be added to the list: that of the European territory for whose external relations a Member State is responsible.<sup>46</sup> However, since this category currently covers only Gibraltar,<sup>47</sup> the latter is herewith included among the *sui generis* territories, insofar as it represents a deviation from the other two main statuses applicable to the territories of the Member States where the application of the *acquis* is atypical, *i.e.* the OR and OCT statuses.

Roughly speaking, the starting assumption applicable to the ORs is that the EU *acquis* applies in full unless the contrary is stated,<sup>48</sup> which is reversed in the case of the OCTs.<sup>49</sup> The latter are, according to the ECJ, neither parts of the Union,<sup>50</sup> nor third countries.<sup>51</sup> According to established case law, “failing express provisions, the general provisions of the Treaty do not apply to [such] countries and territories.”<sup>52</sup>

In practice, however, this division is much less obvious than what one might expect: both main legal statuses seem to converge in a number of important respects,<sup>53</sup> while territories *sui generis* offer an example of flexible arrangements which can largely be turned either way. Key reasons for such convergence include the inherently limited nature of the *ratione loci* derogations contained in the Treaties, which are, as follows from the term itself, focused on the territoriality of the application of the law, paying little—if any—attention to other important factors, such as the personal scope of the law.<sup>54</sup> Other examples could be the willingness of the overseas regions and territories to apply EU law, even when it is not required, simply

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*Community*, 36 *LEGAL ISSUES ECON. INTEGRATION* 239 (2009); Kochenov, *supra* note 3, at 245-55; Jacques Ziller, *Les outre-mers face à l'intégration européenne et à la mondialisation—L'association des pays et territoires d'outre-mer à la Communauté européenne*, 101 *REVUE FRANÇAISE D'ADMINISTRATION PUBLIQUE* 127 (2002); ZILLER, *LES DOM-TOM*, *supra* note 43, at 110-117; *See* van Rijn, *supra* note 27, at 126-36.

45. *E.g.*, Færø Islands, Gibraltar, Isle of Man, Jersey. *See* TFEU arts. 355(4) (5). *See also* Kochenov, *supra* note 3, at 212, 256.

46. TFEU art. 355(3).

47. On the status of Gibraltar, see the Act Concerning the Conditions of Accession and the Adjustments to the Treaties of the 1972 Treaty of Accession, *supra* note 38, art. 28.

48. TFEU art. 355(1).

49. TFEU art. 355(2).

50. Case C-390/95 P, *Antillean Rice Mills NV v. Commission*, 1999 E.C.R. I-769, ¶ 36.

51. Since they are under the sovereignty of one of the Member States and since EU law applies there, at least in part.

52. Case C-260/90, *Leplat v. French Polynesia*, 1992 E.C.R. I-643, ¶ 10; Case C-110/97, *Netherlands v. Council*, 2001 E.C.R. I-8763, ¶ 49; Case C-300/04, *Eman & Sevinger v. College van Burgemeester en Wethouders van Den Haag*, 2006 E.C.R. I-8055, ¶ 46.

53. *See, e.g.*, Kochenov, *supra* note 44.

54. *See id.*; Kochenov, *supra* note 29.

because of its more advanced nature compared with regulation available locally.<sup>55</sup> The same applies to the vital importance of the Union to the remote territories of the Member States in terms of gaining a privileged status in their respective regions of the world, and in being a way to deal with the inherent deficiencies of their small size,<sup>56</sup> among other factors.<sup>57</sup> The need to be connected, however loosely, with the EU, ensures the very survival of some of the territories in question as independent economic and political actors,<sup>58</sup> enabling them to guarantee the high standard of living for their inhabitants. The realisation of the need to remain strongly associated with the former colonial centre, once realised, could certainly pose problems, as exemplified by Prime Minister Eman in his contribution, which mentions the Aruban fight *against* full independence from the Kingdom of the Netherlands.<sup>59</sup> An example of the vision contrary to the Aruban one would be New Caledonia, an OCT connected with France, which stands firmly on the way towards Kanak independence.<sup>60</sup>

Natural convergence in the essential *contenue* of the three legal statuses available in EU law only adds to the difficulties related to outlining the scope of the applicable EU law. In fact, the differences between different territories formerly belonging to the same category in EU law (be it OR or

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55. See, e.g., Eman & Sevinger, 2006 E.C.R. I-8055, ¶ 159 (Advocate General Tizzano's Opinion). The consequences of such voluntary adoption in the context of EU law are not always clear and can be potentially very far-reaching, as in light of Case C-28/95, *Leur-Bloem v. Inspecteur der Belastingen/Ondernemingen Amsterdam 2*, 1997 E.C.R. I-4161, ¶ 34. See also MORTEN BROBERG & NEILS FENGER, PRELIMINARY REFERENCES TO THE EUROPEAN COURT OF JUSTICE 143-52 (2010); Broberg, *supra* note 11, at 150.

56. See generally Mike Eman, *Defending the Democratic Rights of EU Citizens Overseas: A Personal Story*, in EU LAW OF THE OVERSEAS, *supra* note 5, at 433.

57. Some other handicaps are listed in TFEU art. 349, para. 1, outlining the context of the application of EU law in the ORs. By analogy, they should clearly be considered as relevant factors in analysing the OCTs too, as well as the reasons behind the special status enjoyed by the OCTs.

58. If not preventing their simple disappearance from the political map, as exemplified by the Falkland war and the recent tension between the Kingdom of the Netherlands and Venezuela over the Caribbean countries of the Kingdom.

59. The Charter of the Kingdom of the Netherlands regarded the status of Aruba as a separate country (*land*) within the Kingdom of the Netherlands upon Aruba's splitting away from the now defunct Federation of the Netherlands Antilles merely as a step to full independence Statuut voor het Koninkrijk der Nederlanden, Stb. 1954, p. 503; See also *Wijziging van 11 januari 1985*, Stb. 1985, p. . It took Aruba plenty of effort to remain a part of the Kingdom and thus avoid getting full independence. Dimitry Kochenov, *The EU and the Overseas: Outermost Regions, Overseas Countries and Territories Associated with the Union, and Territories Sui Generis*, in EU LAW OF THE OVERSEAS, *supra* note 5, at 3, 14 n.56.

60. Dominique Custos, *New Caledonia, a Case of Shared Sovereignty within the French Republic: Appearance or Reality?* 13 EUR. PUB. L. 97 (2007). See also Alan Berman, *1998 and Beyond in New Caledonia: At Freedom's Gate?*, 7 PAC. RIM L. & POL'Y J. 1 (1998); Alan Berman, *Future Kanak Independence in New Caledonia: Reality or Illusion?*, 34 STAN. J. INT'L L. 287 (1998). See also DESTINS DES COLLECTIVITÉS POLITIQUES D'Océanie: PEUPLES, POPULATIONS, NATIONS, ÉTATS, TERRITOIRES, PAYS, PATRIES, COMMUNAUTÉS, FRONTIÈRES (Jean-Yves Faberon, Viviane Fayaud & Jean-Marc Regnault eds., 2011).



OCT) can sometimes be so considerable that the very appropriateness of the existing categories can in some cases be legitimately put in doubt. This is particularly true in the case of the OCTs. As Dominique Custos has abundantly demonstrated, the single legal status of the OCT has never actually materialised in EU law,<sup>61</sup> as it seems to unite territories where the application of EU law is often profoundly dissimilar.<sup>62</sup> In this respect, the difference between the OCTs and the ORs is somewhat clearer, even though it was virtually non-existent before the landmark *Hansen* decision of the ECJ,<sup>63</sup> which sharpened the understanding of the OR status and laid the essential foundations for the distinctions existing between the OCTs and the ORs in the first place, textual differences to be found in the relevant provisions of the Treaties notwithstanding. Moreover, albeit via different legal means, *i.e.* by not applying EU law by default in the case of the OCTs, as opposed to applying it with profound derogations in the case of the ORs, a strikingly similar landscape of legal regulation can arise in practice in the context of the regulation of certain fields, *de facto* virtually removing the practical difference between the two statuses entirely. The story of the *octroi de mer* levies (*i.e.* dock dues)<sup>64</sup> in the ORs<sup>65</sup> and the OCTs<sup>66</sup> provides a telling illustration of this convergence.

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61. See Custos, *supra* note 11.

62. Bermuda is probably the most extreme example of this, as, although its status as an OCT cannot be put in doubt as it is included in Annex II of the TFEU, which lists all the territories with such a status, the provisions on the association with the Union actually do not apply to it in practice. The Association Decision of the Council governing the practical technicalities of the status of the OCT states that “[t]he arrangements for association laid down in this Decision should not be applied to Bermuda in accordance with the wishes of the Government of Bermuda.” Council Decision 2001/822/EC, of 27 November 2001 on the Association of the Overseas Countries and Territories with the European Community (‘Overseas Association Decision’), *pmbl.*, 2001 O.J. (L 314) 1. In this respect, the practical difference between OCT status and that of a territory *sui generis*, just to give one example, is not clear. It has been persuasively argued that the exclusion of Bermuda from the scope of application of the Association Decision cannot take precedence over the text of Annex IV, which includes Bermuda among other associated countries and territories. For this argument as well as the discussion of other scholarly opinions, see Karagiannis, *supra* note 19, at 338-39, n.27.

63. Case 148/77, *H. Hansen Jun & O.C. Balle GmbH & Co. v. Hauptzollamt de Flensburg*, 1978 E.C.R. 1787, ¶ 10.

64. For a detailed legal analysis of the legality of *octroi de mer* under Community law, see Marco Slotboom, *L’application du traité CE au commerce intraétatique: Le cas de l’octroi de mer*, 32 CAHIERS DE DROIT EUROPÉEN 9, 9 (1996). See also Puissochet, *supra* note 27, at 504-06. For a good summary of the development of the *octroi de mer* case-law of the ECJ, see Case C-126/94, *Société Cadi Surgelés v. Ministre des Finances*, 1996 E.C.R. I-5647.

65. See Council Decision 2004/162/EC, Concerning the Dock Dues in the French Overseas Departments and Extending the Period of Validity of Decision 89/688/EEC, 2004 O.J. (L 52) 64.

66. See, *e.g.*, Case C-260/90, *Leplat v. French Polynesia*, 1992 E.C.R. I-643. For an analysis, see Ziller, *L’Union Européenne et l’outre-Mer*, *supra* note 27, at 149.

When approaching the legal situation of the overseas countries, territories, regions, and departments, a dynamic analysis of the law is absolutely indispensable as the legal statuses at issue have been in a constant process of mutation, shaped and remoulded by the Member States' concerns, regular treaty amendments and ECJ case law. Mostly regarded as a burden throughout the Union's history,<sup>67</sup> the essential approach to the overseas regions and territories of the Member States in the Union seems to be changing at the moment,<sup>68</sup> enabling Dominique Custos to speak about a positive "shift in the perception of the Overseas from the EU's perspective."<sup>69</sup> However, this change in approach notwithstanding, the fact that a huge number of overwhelmingly important and apparently *not envisaged* changes in the application of EU law in such territories were introduced into the Treaties with the entry into force of the Treaty of Lisbon<sup>70</sup> makes it clear that the amount of attention that such territories attract is insufficient by far to solve the outstanding problems they are facing.<sup>71</sup> Most importantly, the recent changes seem to imply that the amount of applicable EU law could actually be reduced in some overseas countries and territories, which is not necessarily the case and is discussed *infra* in detail.

The scale of the legal issues arising from the interplay between the "normal" way to apply the *acquis* and the three statuses reserved for the territories of the Member States lying outside of the classical scope *ratione*

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67. The wording of the relevant Treaty provisions routed in the founding Treaties and dating back to the fifties still reflects this approach, making an emphasis, to provide an OR-related example, on the handicaps of the regions in question, rather than stressing the positive side of their contribution to the EU integration project. See TFEU art. 349(1). For an analysis, see Custos, *supra* note 11, at 105.

68. As exemplified in the recent Commission's documents marking the new approach. See *Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Strategy for the Outermost Regions: Achievements and Future Prospects*, COM (2007) 507 final (Sept. 12, 2007); *Communication from the Commission, The Outermost Regions: An Asset for Europe*, COM (2008) 642 final (Oct. 17, 2008); *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Elements for a New Partnership between the EU and the Overseas Countries and Territories (OCTs)*, COM (2009) 623 final (Nov. 6, 2009).

69. See Custos, *supra* note 11, at 110.

70. For detailed analysis, see Jacques Ziller, *Outermost Regions, Overseas Countries and Territories and Others after the Entry into Force of the Lisbon Treaty*, in *EU LAW OF THE OVERSEAS*, *supra* note 5, at 81-88.

71. Faced with this obvious problem, the ORs and the OCTs started to group together to promote their interests. For an analysis of the OCTs, see, for example, Freya Baetens, *The Overseas Countries and Territories Association: The Added Value of a Concerted Approach*, in *EU LAW OF THE OVERSEAS*, *supra* note 5, at 383. See, e.g., Marc Janus, *Un lobby originale des régions ultrapériphériques de la Communauté européenne*, 388 *REVUE DU MARCHÉ COMMUN ET DE L'UNION EUROPEENNE* 326 (1995), for more information about the ORs.

*loci* of EU law, as restated in Article 52 TEU, coupled with the high complexity of the legal design of derogations and specific features marking their nature, beg for a specific term to unite all these matters in one sub-discipline to tackle them in their legal evolution with the seriousness and precision they deserve. To address this challenge, the notion of *EU Law of the Overseas* has been introduced,<sup>72</sup> which, although new to English-speaking lawyers, is an accepted name for this branch of EU law in France, where it goes under the name of *droit européen d'outre mer*.<sup>73</sup> The term "Overseas" itself, although seemingly strange, has been chosen for its general character. A word was needed that would encompass a reference to any of the overseas regions, territories, departments, dependencies, etc., of the Member States, no matter what status in EU or national law they possess.

To provide a concise and complete overview of the EU Law of the Overseas, the article splits into sections dealing with the essential points governing the territorial scope of the Treaties and looking at the historical evolution of the present applicability of the EU and TFEU Treaties, as well as the Euratom in the Overseas (II), proceeding to the dynamic legal-historical analysis of the key elements of the three legal statuses awarded to the Overseas in EU law, focusing on the ORs (III), on the OCTs (IV), as well as providing examples of several territories *sui generis* (V). The article then moves to the reassessment of the legal statuses presented from the point of view of derogations from the *acquis* (VI) and to the procedural issues of EU's engagement with its Overseas, discussing the legal issues related to the changing of the legal statuses of overseas regions and territories in EU law (VII). The conclusion outlines the main challenges for the future and summarises the most important findings related to the essence of the core areas of the nascent EU Law of the Overseas (8).

## I. TERRITORIAL SCOPE OF THE TREATIES: LEGAL-HISTORICAL ANALYSIS

At the moment of the negotiation and the signing of the founding Treaties, the territorial configuration of what later became the Member States was quite different from the present-day picture. The six founding Member States (Belgium, Germany, France, Italy, Luxembourg, the Netherlands) exercised sovereignty over a huge territory in the form of colonial possessions, protectorates, overseas departments, etc., situated all over the world, but mostly on the African continent. The majority of these territories were not fully incorporated into the Member States, different law applying to them, compared with the metropolitan centres and including,

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72. See generally EU LAW OF THE OVERSEAS, *supra* note 26.

73. See Dominique Custos, *La révélation d'un droit communautaire d'outre-mer*, in UNION EUROPÉENNE ET OUTRE-MERS: UNIS DANS LEUR DIVERSITÉ 429 (Laurent Tesoka & Jacques Ziller eds., 2008).

*inter alia*, such territories as the (Belgian) Congo, Rwanda-Burundi, the (Italian) protectorate of Somalia, the Netherlands New Guinea, The Netherlands Antilles, Suriname, Algeria, French Equatorial Africa—including Côte-d'Ivoire, Dahomey, Guinea, Mauritania, Niger, Senegal, Sudan and Upper-Volta—French East Africa—comprising Moyen-Congo, Gabon, Oubangui-Chari and Chad—the protectorates of Togo, Cameroon and Wallis-et-Futuna, Comoros Islands, Madagascar, Côte Française des Somalis, and the Etablissements français de l'Océanie (now French Polynesia).

Given the huge economic potential of these territories, it is not surprising that the idea of a *Eurafrican* Common Market was considered very seriously at the time. The European powers saw the success of their future integration as directly related to the success of the gradual incorporation of the African dependent territories into the Single Market they planned to build. *Eurafrica* was supposed to incorporate the bigger parts of European and African continents, as archival research demonstrates.<sup>74</sup> In fact, while the Treaty Establishing the European Coal and Steel Community (ECSC Treaty) was only to cover the European territories of the Member States, the two Treaties of Rome adopted a totally different perspective. France, in charge of the largest share of the overseas possessions among the six, simply refused to enter the Common Market with the other Member States-to-be without a special accommodation of (in particular) its African territories. In the words of Professor Custos, “the spotlight was wholly put on the promises of *Eurafrica*”<sup>75</sup>—only to end abruptly with decolonisation.<sup>76</sup> While the Euratom Treaty was construed to apply to the entirety of the Member States' territories, and thus still includes the Overseas,<sup>77</sup> the EEC Treaty adopted a somewhat more nuanced approach.

The level of economic development of all the territories in question, as well as their level of incorporation into the legal-political systems of the *Herren der Verträge*, varied to a great degree. It is thus not surprising that not all the parts of the Member States' territories could be awarded identical status under the European Economic Community (EEC) Treaty when the EEC was founded. The most important step made by the founding Member States in this regard was to agree to the French idea of the potential extension of what was then the Common Market to cover their overseas possessions, thus departing from the ECSC Treaty model, which assumed the non-application of the ECSC law in the Overseas.<sup>78</sup> The first step to be made in this direction was to design a regime of association to tie the

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74. Custos, *supra* note 11, at 99.

75. *Id.* at 101.

76. *Id.* at 102.

77. Euratom Treaty, *supra* note 11, art. 198.

78. Treaty Establishing the European Coal and Steel Community, art. 97, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty].

African, and other territories of the Member States with the European integration project. With this, the status of an OCT was born. Although this legal status did not imply full inclusion into the Common Market, it was clearly designed with a view to the eventual *incorporation* of the territories benefiting from such status into the scope *ratione loci* of EU law, where the *acquis* would apply in full.<sup>79</sup>

Given that some non-European territories were legally entirely incorporated into the signatory states, they required a different legal status compared with that of the colonies and other possessions, to enjoy the association regime of the OCTs. At that time, France, having particular ties with its four Overseas Departments (*DOM*)<sup>80</sup> and Algeria, demanded the inclusion into the Treaty, in addition to the association provisions for other possessions (which enjoyed an infinitely higher level of importance economically) of a special clause granting limited differentiated treatment to the incorporated territories overseas—which, albeit under a specific regime and with some derogations, were to fall within the scope of Community law under the former Article 227(2) EEC [which has now mutated into Article 349 TFEU]—giving birth to what is now an OR legal regime.<sup>81</sup> Accordingly, the special status for the French *DOM* and Algeria in Community law was designed to differentiate between those overseas territories of the Member States which are incorporated into the state and those overseas territories which enjoy more autonomy under the national law of the Member State and do not generally fall within the territorial scope of full application of the EEC Treaty, as a special association regime applies.

At the moment of the signing of the EEC Treaty, OCT status was granted to a huge number of Belgian, Dutch,<sup>82</sup> French, and Italian territories not

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79. See the analysis provided by Dominique Custos, *Implications of the European Integration for the Overseas*, in *EU LAW OF THE OVERSEAS*, *supra* note 5.

80. The French *DOM* included Guadeloupe, Martinique, French Guiana and Réunion at the time. Due to the recent slight reshuffling of the French ORs, the list of the territories enjoying such status that are connected with France has become longer by two, incorporating Saint Barthélemy and Saint Martin with the entry into force of the Lisbon Treaty. Moreover, the Azores and Madeira joined the *DOM* in benefiting from the OR status arrangements upon the accession of Portugal to what used to be the Communities. See Documents Concerning the Accession of the Kingdom of Spain and the Portuguese Republic to the European Communities, Act Concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese Republic and the Adjustments to the Treaties, June 12, 1985, 1985 O.J. (L 302) 9 [hereinafter *Spain and Portugal Accession Treaty*]. The Canary Islands came to be within the scope of the OR status in 1991. Council Regulation 1911/91, Application of the Provisions of Community Law to the Canary Islands, 1991 O.J. (L 171) 1 (ECC).

81. The *DOM* and Algeria were legally inseparable from France and were included into the customs territory of the Republic. Puissochet, *supra* note 27, at 491.

82. In derogation from the general rule that the provisions of the EEC Treaty were to apply to the entirety of the territory of the Member States, the Kingdom of the Netherlands only signed this Treaty for the Kingdom in Europe and the New Guinea. A special protocol to this end has been appended to the EC Treaty. Vincent Coussirat-Coustère, *Article 227*, in



fully incorporated into the constitutional structure of these Member States,<sup>83</sup> marking a huge success of the French policy, only to be extended further upon the accession of the United Kingdom (UK) and Denmark to the Communities.<sup>84</sup>

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TRAITE INSTITUANT LA CEE 1419, 1422 (1992). Therefore, while the Treaty was later extended to cover the Dutch Islands in the Caribbean, it never has applied to Suriname. De Overeenkomst tot wijziging van het Verdrag tot oprichting van de Europese Economische Gemeenschap ten einde de bijzondere associatieregeling van het vierde deel van het Verdrag op de Nederlandse Antillen te doen zijn, Nov. 13 1962, 1964 J.O. (2413) 64.

83. The status of countries or territories associated with the Community was first granted to the Belgian territories of the Congo and Rwanda-Burundi, the Italian protectorate of Somalia, Netherlands New Guinea, and French equatorial Africa (Côte-d'Ivoire, Dahomey, Guinea, Mauritania, Niger, Senegal, Sudan and Upper-Volta), French East Africa (Moyen-Congo, Gabon, Oubangui-Chari and Chad), the protectorates of Togo and Cameroon, the Comoros Islands (Mayotte, separated from them is still associated with the EU under Art. 355(2) TFEU and included into Annex II TFEU), Madagascar and Côte Française des Somalis. To be added to this list are: the present French OCT, including the French Polynesia, which used to be called Etablissements français de l'Océanie; Wallis-and-Futuna, which is still a French protectorate; New Caledonia and Dependencies, French Southern and Antarctic Territories and St. Pierre-et-Miquelon. *See generally* Ziller, *L'Union Européenne et l'outre-Mer*, *supra* note 27, at 145-147. *See* De Overeenkomst tot wijziging van het Verdrag tot oprichting van de Europese Economische Gemeenschap ten einde de bijzondere associatieregeling van het vierde deel van het Verdrag op de Nederlandse Antillen te doen zijn, Nov. 13 1962, 1964 J.O. (2413) 64. *See*, on this issue, Dimitry Kochenov, *Le droit européen et le fédéralisme néerlandais: Une dynamique en évolution progressive*, in DESTINS DES COLLECTIVITÉS POLITIQUES D'OCÉANIE, *supra* note 60, at 345; M.M. Bense & E.B. Pronk, *Constitutionele aspecten bij de staatkundige hervorming van het Koninkrijk*, 2010 TIJDSCHRIFT VOOR CONSTITUTIONEEL RECHT [TVCR] 61; L.J.J. Rogier, *Het Koninkrijk der Nederlanden na de opheffing van de Nederlandse Antillen op oktober 2010*, 2010 ARS AEQUI 563; H.G. Hoogers, *De herstructurering van het Koninkrijk als lakmoesproef*, 2010 TIJDSCHRIFT VOOR CONSTITUTIONEEL RECHT 256; SCHURENDE RECHTSORDES: OVER JURIDISCHE IMPLICATIES VAN DE UPG-STATUS VOOR DE EILANDGEBIEDEN VAN DE NEDERLANDSE ANTILLEN EN ARUBA (Herman Bröring et al. eds., 2008).

84. *See* 1972 Treaty of Accession, *supra* note 38. Following the UK accession, the list of the associated countries and territories became much longer, including (in addition to the countries and territories still included in Annex II TFEU, such as Anguilla, Cayman Islands, Falkland Islands, South Georgia and the South Sandwich islands, Montserrat, Pitcairn, Saint Helena and Dependencies, British Antarctic Territory, British Indian Ocean Territory, Turks and Caicos Islands, British Virgin Islands, and Bermuda) the Bahamas, Brunei, the Caribbean Colonies and Associated States (including Antigua, Dominica, Grenada, St. Kitts and Nevis, St. Lucia, St. Vincent and Anguilla, and British Honduras), the Gilbert and Ellis Islands and the Line Islands, the Anglo-French Condominium of the New Hebrides, Solomon Islands, and Seychelles. Ziller, *L'Union Européenne et l'outre-Mer*, *supra* note 27, at 145-147; HENDRY & DICKSON, *supra* note 25.

Greenland acquired OCT status as a result of leaving the EEC. *See* Treaty Amending, With Regard to Greenland, the Treaties Establishing the European Communities, 1985 O.J. (L 29) 1 (the OCT status of Greenland is also reflected in Annex II TFEU). For an analysis, see Fiedl Weiss, *Greenland's Withdrawal from the European Communities*, 10 EUR. L. REV. 173 (1985). The possibility of Greenland's Association status was discussed in the academic literature even before the actual accession of Denmark to the EEC. *See, e.g.*, Christen Boye Jacobsen, *The Faerø Islands and Greenland and the European Communities*, in LEGAL PROBLEMS OF AN ENLARGED EUROPEAN COMMUNITY 170 (M.E. Bathurst et al. eds.,

In other words, although two different regimes applied, the ultimate goal of incorporation into the Common Market marked the development of both of them. The main difference between the two concerned more than anything the precise timing of such incorporation, as while Article 227 EEC contained clear deadlines for possible adjustments of some parts of the *acquis* to the objective realities of the *DOM* different from Europe,<sup>85</sup> the Association regime of the OCT status did not provide for any clear timetables. Nonetheless, the drive towards decolonisation clearly destroyed the initial plans that informed the French ultimatum on the inclusion of its African possessions, making the participation of the Republic in the EEC dependent on the agreement of other partners to the eventual incorporation of the Overseas into the European project.

Following the abandonment of the Eurafrikan dream and the dramatic shrinking in the number of the territories falling within the OCT category, OR status—which could never boast particular importance at the preparation stages of the EEC compared with the defining role played by the OCTs—naturally rose to prominence due to its relative economic power (which used to be negligent compared to that of the OCT before decolonisation) not to mention its relative population size (compared with the remaining OCTs). This, notwithstanding the gaining of independence by Algeria<sup>86</sup> and its subsequent withdrawal from the list of the territories where OR status applies.<sup>87</sup> The integration project was subsequently retuned inwards,<sup>88</sup> with the newly independent colonies successfully forgotten and safely ignored.<sup>89</sup>

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1972). For a meticulous analysis of the contemporary law on leaving the Union, see Adam Łazowski, *Withdrawal from the European Union and Alternatives to Membership*, 37 EUR. L. REV. 2012 (forthcoming).

85. See EEC Treaty art. 227(2) (as in effect 1958) (now obsolete).

86. On the role played by Algeria in the EEC, see Paul Tavernier, *Aspects juridiques des relations économiques entre la C.E.E. et l'Algérie*, 8 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN [R.T.D.E.] 1 (1972).

87. It has to be noted that “OR” status as such did not exist at that time, as the relevant provision of the EEC Treaty merely established a special legal regime for the French *DOM* and Algeria, without giving it a particular name. Curiously, Algeria was only struck from the list of territories where Article 227(2) of the EEC was to apply with the Maastricht revision of the Treaties, *i.e.* roughly thirty years after the gaining of independence by this country.

88. Notwithstanding the special association regime which was created for the former colonies. See, most recently, Agreement amending the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, 2005 O.J. (L 209) 27. See Justin Daniel, *Le cadre institutionnel et le dialogue sur les politiques: L'Accord de Cotonou à l'épreuve d'une réhabilitation du politique*, in LES RELATIONS ACP/UE APRÈS LE MODÈLE DE LOMÉ—QUEL PARTENARIAT? 261 (Danielle Perrot ed., 2007).

89. Virtually all the available literature on the issue is silent on the roots of the OCT status, taking the existing OCTs and ORs as its starting point, which naturally alters the assessment of the first steps of integration with respect to the governance of the Overseas.

The Treaties currently in force are profoundly rooted in the reality of decolonisation dating back fifty years and basically employ the same division of the Overseas into classes as the one established at the moment when the other five partners accepted the French demands and embarked towards the Eurafrika dream, notwithstanding the fact that the very idea of Eurafrika is largely forgotten. The change in the balance of the Overseas that was necessarily brought about by the independence of all the most economically promising overseas possessions of the Member States resulted in a situation where the role of the Overseas, so important in accordance with the initial projects, deteriorated virtually entirely, marking a fading away in the interest or concerns about the Overseas, of which the prior lack of the academic attention to these territories is a sound illustration. Consequently, the three fundamental statuses granted to the Member States' territories where the main rule of Article 52(1) TEU only applies with derogations have a very long history and are rooted in the negotiations preceding the drafting of the EEC Treaty more than half a century ago.

Before proceeding to an analysis of the main legal regimes governing the status of each group of the Overseas in EU law individually, the controversy sparked by the Treaty of Maastricht has to be mentioned, as it has introduced an element of unpredictability into the scope *ratione loci* of several important branches of EU law, the consequences of which are still felt today. At the centre of the controversy was the fact that the pre-Lisbon version of the EU Treaty first introduced at Maastricht<sup>90</sup> did not contain any provisions specifying its territorial scope of application. Consequently, while it was clear how EC and Euratom law were to apply in the Overseas, EU law *sensu stricto* could not boast this clarity. It has been claimed in the literature that the relevant provisions of EU law at the time—concentrated in what used to be the Second<sup>91</sup> and the Third Pillars<sup>92</sup> of the Union (a division which is now obsolete) dealing with police and judicial cooperation in criminal matters and the EU's external action (Common Foreign and Security Policy (CFSP))—were not territorial in nature *per se*,<sup>93</sup> which would make the very issue of *ratione loci* not applicable for them. However, this view of the law appears somewhat too simplistic, which became an especially acute issue after a number of legal instruments of binding nature,

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Professor Custos's recent research is particularly important in this regard, since her archival research directly challenges the presumptions that OR status was more important in the eyes of the six founding Member States than that of the OCTs. Custos, *supra* note 11.

90. Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1 [hereinafter Maastricht TEU].

91. Maastricht TEU arts. 11–28 (as in effect 1992).

92. *Id.* arts. 29–42 (as in effect 1992).

93. P.J.G. KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES: FROM MAASTRICHT TO AMSTERDAM 93 (Laurence W. Gormley ed., 3d ed. 1998). See also Kochenov, *supra* note 3, at 217–223; Jo SHAW, THE TRANSFORMATION OF CITIZENSHIP IN THE EUROPEAN UNION: ELECTORAL RIGHTS AND THE RESTRUCTURING OF POLITICAL SPACE 177 (2007).

such as the European Arrest Warrant<sup>94</sup> for instance, entered the context of this “non-territorial” law upon the introduction by the Treaty of Amsterdam of the possibility to adopt Framework Decisions in the context of what used to be the Third Pillar of the EU.<sup>95</sup>

The main rule of international law to govern *ratione loci* questions of this order is well known and has been summarised by P.J.G. Kapteyn and P. VerLoren van Themaat in the context of their assessment of the scope of application of EC law in following way: “Under general rules of international law it is clear that the Treaty is binding in relation to all the territory, including non-European parts falling under the sovereignty of the Parties, at least in so far as the Treaty does not provide for exceptions or otherwise make special provision.”<sup>96</sup>

Applied to EC law, the same principle should have clearly also governed the application of the pre-Lisbon EU law. This has not happened, however. Notwithstanding the clarity of the international law on the issue, the practice of application of pre-Lisbon EU law in the Overseas pointed to the lack of clarity and the fragmentation of the law. The Member States adopted diametrically opposed approaches in this regard, either applying EU law in full to the entirety of their territory—thus including the Overseas, no matter which of the statuses available in EU law they enjoy (like France)<sup>97</sup>—or presuming that the provisions of the pre-Lisbon EU Treaty had to follow the territorial scope of the EC Treaty,<sup>98</sup> thus recognising only a limited application in certain Member State overseas territories.<sup>99</sup> Once again, the EU Treaty itself was silent on the matter. Moreover, due to the limited role entrusted to the ECJ in these areas (especially in the CFSP), no clarification could be expected from the Court. Consequently, a situation arose where the uniformity of application of EU Law in the Overseas was profoundly undermined and depended solely on the interpretation of the law by the Member State with which each particular territory was connected.

The Treaty of Lisbon has seemingly resolved this controversy, since it removed the old Pillar structure of the Union and united the scopes *ratione loci* of the two Treaties by providing a cross-reference from Article 52(2)

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94. For an analysis of the functioning of this instrument in the EU’s Overseas, see Fletcher, *supra* note 5.

95. Maastricht TEU art. 34(2)(b) (as in effect 1992).

96. KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 93, at 89 (footnotes omitted). See also KOEN LENAERTS & PIET VAN NUFFEL, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 351 (Robert Bray ed., 2d ed. 2005).

97. In the literature, this position is reflected very clearly by Karagiannis: “a priori, les dispositions non communautaires du Traité sur l’Union européenne ont comme champ d’application l’intégralité du territoire des parties contractantes.” Karagiannis, *supra* note 19, at 340.

98. See generally KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 93.

99. For the criticism of this position see, e.g., Kochenov, *supra* note 3, at 217–20.

TEU to Article 355 TFEU.<sup>100</sup> It is thus currently clear that the territorial scopes of application of the law of both Treaties in question are clearly defined and overlap entirely. As far as Euratom is concerned, there was no change there, and its law applies to the entirety of the territories of the Member States, including the Overseas. The silence of the pre-Lisbon EU Treaty was thus replaced by an embrace of the three special statuses known in European law since the entry into force of the EEC Treaty. The three now cover the EU Treaty, too.

However, this arrangement does not actually touch upon the essence of the problem surrounding the territorial application of the EU Treaty. This is because although it is clear that the Treaties have identical territorial scopes, the question of the application or non-application of EU law in the different classes of the Overseas territories remains. The Member States continue to use diverging practices in this regard. Indeed, should the argument that the law of the former Second and the Third Pillars is not really territorial in nature since, in the words of Jo Shaw, “[it] merely binds the governments of the Member States,”<sup>101</sup> be accepted, all the old questions become only more pressing, rather than being resolved. The biggest controversy arises, as could be expected, with respect to the OCT status. Some authors still seem to subscribe to the established position of the ECJ that “the OCTs are subject to the special association arrangements set out in Part Four of the Treaty (Articles 182 to 188 EC [now Articles 198–204 TFEU]) with the result that, failing express reference, the general provisions of the Treaty do not apply to them.”<sup>102</sup>

To agree with Jacques Ziller, in the near future the Court is likely to depart from this approach, reflecting the change in the Primary Law.<sup>103</sup> In fact, the position of the Court, which seemed somewhat light-hearted even before the entry into force of the Treaty of Lisbon,<sup>104</sup> now seems, with all respect, entirely inadequate. This is not only due to the fact that a huge number of the provisions of the Treaties contained outwith Part IV TFEU *obviously* apply, at least *de facto*, to the OCTs, but also due to the expansion of the role played by EU citizenship in the Overseas, which introduced important corrections into the accepted approaches to the interpretation of

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100. For a general analysis of this change in the context of the CFSP, see, e.g., Peter Van Elsuwege, *EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance between Delimitation and Consistency*, 47 COMMON MARKET L. REV. 987 (2010).

101. SHAW, *supra* note 93, at 177.

102. See Case C-300/04, *Eman & Sevinger v. College van burgemeester en wethouders van Den Haag*, 2006 E.C.R. I-8055, ¶ 46. The Commission faithfully supports this view. See, e.g., *Commission Green Paper*, *supra* note 29, at 3.

103. See Ziller, *Outermost Regions, Overseas Countries and Territories and Others after the Entry into Force of the Lisbon Treaty*, in *EU LAW OF THE OVERSEAS*, *supra* note 5, at 73.

104. For criticism, see, e.g., Kochenov, *supra* note 3, at 217 et seq.; Ziller, *The European Union and the Territorial Scope of European Territories*, *supra* note 3.



the limits territorial derogations.<sup>105</sup> The same applies to the fundamental principles.<sup>106</sup> Given that some law applies via the scope *ratione loci* of EU law and also that some other provisions must apply by default to make Part IV TFEU operational, as such it becomes abundantly clear that, contrary to what the ECJ keeps repeating, Part IV TFEU is *not all the law* applicable to the OCT. Far from it.

There is a pressing need to attune the case law with reality at this point. Sooner or later the Court is bound to agree with the position that Part IV TFEU is merely a derogation from Part III TFEU, the former rather than the latter applying to the OCTs. In the words of Jacques Ziller,

With the entry into force of the Lisbon Treaty, the territorial scope of application is unified for all EU policies, be they under the TEU or the TFEU, be they in Part III TFEU on Union policies and internal actions, or in Part V TFEU on the Union's external action. This is a confirmation, in my view, of the thesis which ventures that Part IV TFEU on OCTs cannot be considered as a comprehensive *lex specialis* covering the same ground as the Treaties. Part IV TFEU establishes a special legal basis for association for Union policies and internal actions, as an exception to Part III TFEU. It cannot impede the application to OCTs of the TEU and of Parts I TFEU on Principles, II TFEU on Non-discrimination and Citizenship or the Union, and VI TFEU on Institutional and Financial Provisions.<sup>107</sup>

Reasoning in the same vein, Steven Blockmans asserts, quite simply, that “[t]he argument that EU law (in pre-Lisbon sense) [. . .] do[es] not apply to Greenland, New Caledonia and the other OCTs should be *discarded*.”<sup>108</sup> Importantly, this view can be substantiated not only by the very wording of Article 355(2) TFEU, which states that “[t]he special arrangements for association set out in Part Four shall apply to the overseas countries and territories listed in Annex II”<sup>109</sup>—thus being remarkably silent with regard to any principle of “non-application” of the law, which is found constantly restated in the ECJ’s case law on the matter—but also by the historical roots of the status of the OCT, as groundbreaking research by Dominique Custos

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105. See Kochenov, *supra* note 29; Kochenov, *supra* note 44.

106. See, e.g., Case C-300/04, *Eman & Sevinger v. College van burgemeester en wethouders van Den Haag*, 2006 E.C.R. I-8055 (fundamental unwritten principle of equality was at stake).

107. Ziller, *Outermost Regions, Overseas Countries and Territories and Others after the Entry into Force of the Lisbon Treaty*, in *EU LAW OF THE OVERSEAS*, *supra* note 5, at 73. For a similar position, see also Blockmans, *supra* note 5, at 307; Custos, *supra* note 11. See also H.G. Hoogers, *De BES-eilanden, de Grondwet en het Europese recht: Over constitutionele en Europeesrechtelijke consequenties van de handhaving van de LGO-status van de BES-eilanden*, 24 *REGELMAAT* 5, 9 (2009). *But see* Broberg, *supra* note 11, at 142-48 (embracing the limited approach of the ECJ).

108. Blockmans, *supra* note 5, at 319-20.

109. TFEU art. 355(2).

has clearly demonstrated.<sup>110</sup> Knowing that the historical roots of the status lie in the idea of *incorporation* of the OCT into the European integration project and that the very signing of the EEC Treaty was made conditional on such incorporation certainly presents the arguments in favour of the exclusive reading of Part IV TFEU as the only EU law applicable to the OCTs in a somewhat dubious light.

All in all, although the Treaty of Lisbon has simplified the rules on the scope *ratione loci* of the Treaties to some extent, it did not entirely resolve the controversy arising from the failure of the drafters of the Treaty of Maastricht to include into the pre-Lisbon EU Treaty any provision that would either directly govern this issue, or provide a cross-reference to the other Treaties. However, as the structural and historical analysis of the Treaty texts currently abundantly demonstrates, there is a clash between the popular reading of the scope of the law reflected in the case law of the Court, and what the wording of the Treaties seems to imply. The academic disagreement which arose from this somewhat unfortunate discrepancy will fade away in the near future as the understanding of the implications of the new reality, especially in its historical context, gradually takes hold. Already today, sound consensus is being formed to regard the ECJ's position in the most critical terms: "an overstated exclusionary status"<sup>111</sup> is not legally substantiated.

## II. OUTERMOST REGIONS IN THE EU LAW OF THE OVERSEAS

The main rule governing OR status in EU law is the goal of the full incorporation of these territories within the scope *ratione materiae* of EU law, while taking into account the natural specificity of these regions.<sup>112</sup> This clearly follows from Article 355(1) TFEU, establishing that "[t]he provisions of the Treaties shall apply to Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands in accordance with Article 349 [TFEU],"<sup>113</sup> the latter requiring the Council to "adopt specific measures aimed, in particular, at

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110. Custos, *supra* note 11.

111. *See id.* at 108.

112. Some elements of this and the following sections draw on Kochenov, *supra* note 3. When this is the case, the text has been substantially updated to reflect the changes introduced by the Treaty of Lisbon, as well as the changing context of the EU's perception of the Overseas. Custos, *supra* note 11.

113. *See* TFEU art. 355(1). Note that the text of the Treaties does not employ the term "Outermost Regions," which is, nevertheless, widely used in the scholarly literature and Commission's communications when referring to the status of the territories mentioned in TFEU art. 355(1). *See, e.g., Commission Report on the Measures to Implement Article 299(2): The Outermost Regions of the European Union*, COM (2000) 147 final/2 (May 19, 2000) [hereinafter *Commission Report on the Measures to Implement Article 299(2)*].

laying down the conditions of application of the Treaties to those regions.”<sup>114</sup>

Historically, the development of the OR status has been marked by a constant shift in the balance between the ideal of full incorporation of these regions into the scope of the *acquis* and the need to pay adequate attention to the objective differentiating factors able to influence the application of the law in those regions, putting them in a position different from that of the European territories of the Member States. This constant balancing, in the words of Christian Vitalien “entre assimilation et différenciation,”<sup>115</sup> thus lies at the core of this legal status.

Consequently, a legal analysis of the essence of this status is impossible without paying due attention to its evolution, which has generally resulted in two important developments. Firstly, the evolution of the status is a gradual move away from the rigid understanding of the *acquis* towards more flexible solutions better suited to the regions in question. Secondly, it is also a move away from the negative perception of the ORs as problematic regions, resulting in a positive vision of their contribution to the European integration project, as well as their importance and potential.<sup>116</sup> Both lines of development have been evolving hand-in-hand. In order to see them with all clarity, all the previous versions of Article 349 TFEU,<sup>117</sup> including Article 299(2) EC<sup>118</sup> and Article 227(2) EEC,<sup>119</sup> need to be considered in the light of the relevant ECJ case law, which shaped the interpretation and application of these provisions.

Although the starting assumption has always been that the *acquis* applies in the ORs in full, all the provisions historically governing the territories enjoying such status allowed for substantial derogations from this principle. Importantly, the Treaty of Lisbon has cast away the rigid core of the status: *i.e.* the clear statement that the Treaties apply to the ORs, which was contained in all the pre-Lisbon instruments governing the legal position of such regions. Therefore, while the now obsolete Article 299(2) EC, similarly to Article 227(2) EEC, used to state unequivocally that “[t]he provisions of [the EC] Treaty shall apply to the [ORs],”<sup>120</sup> the text of the current Article 355(1) TFEU seems very different, as the restatement of the fact that the *acquis* applied *tout court* to the ORs gave way to a more

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114. TFEU art. 349(1).

115. Vitalien, *supra* note 43, at 115.

116. See Custos, *supra* note 11, at 108-19.

117. For an analysis of this provision, see Omarjee, *supra* note 43, at 121. See also Perrot, *Les régions ultrapériphériques françaises selon le traité de Lisbonne*, *supra* note 27, at 717.

118. Omarjee, *supra* note 27, at 515, 516.

119. For a detailed analysis of this article, see Coussirat-Coustère, *supra* note 82, at 1419-30; Vitalien, *supra* note 43, at 115-17.

120. EC Treaty art. 299(2).

nuanced formulation, “in accordance with Article 349 [TFEU].”<sup>121</sup> Presumably, this change can be read as a sign of the widening of the room for manoeuvre available to the Council and the Court in shaping the essence of the OR status in order to meet the needs of the regions in question in the best possible way, which is a development to be welcomed.<sup>122</sup>

The toned-down text of the new provision notwithstanding, the presumption of application of the *acquis* in the ORs, unless the contrary is clearly stated in the secondary law adopted in accordance with the procedure outlined in Article 349 TFEU itself holds. In this respect, all the case law of the ECJ informing the interpretation of the old versions of the Article can clearly be of assistance in clarifying the nature of the legal status, as well as the extent of the possible derogations allowed under Article 349 TFEU.<sup>123</sup> Established ECJ case law refuses to view the ORs as essentially different from the European territories of the Member States as far as the application of EU law is concerned. In one example, in *Coopérative agricole d’approvisionnement des Aviron*s, the Court found that “[t]he situation of Réunion is not objectively different from that of the rest of the Community,”<sup>124</sup> disagreeing with the argument presented by the claimant that Réunion (which is an OR now included on the list of such regions in contained in Article 355(1) TFEU) was in a situation essentially different from that of the Member State territories in Europe.

ORs thus automatically fall within the scope of application of EU law: full application of the *acquis* there is the default position. Nevertheless, the practice of application of the earlier version of the relevant Treaty provision demonstrates quite clearly that this obvious reading of the Article has not always been accepted by the Member States and the Institutions of the Community. Having analysed the text of the Treaty provisions currently in force, the legal evolution of the OR status will be presented.

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121. TFEU art. 355(1).

122. *But see* Perrot, *Les régions ultrapériphériques françaises selon le traité de Lisbonne*, *supra* note 27, at 721-24.

123. *See generally* Omarjee, *supra* note 43.

124. Case 58/86, *Coopérative agricole d’approvisionnement des Aviron*s v. *Receveur des douanes de Saint-Denis*, 1987 E.C.R. 1525, ¶ 17. The case concerned the import levies on maize established by Council Regulation 2727/75, of 29 October 1975 on the Common Organization of the Market in Cereals, 1975 O.J. (L 281) 1 (EEC). This conclusion of the Court reached with regard to the free-movement of goods applies to other areas as well: the same flat rates of travel costs reimbursement apply to Community officials from the European part of France and the Island of Réunion. This, notwithstanding substantial differences in the costs of transportation, giving rise to proceedings before of the Civil Service Tribunal. *See generally* Case F-43/05, *Chassagne v. Comm’n of the European Comtys*, 2007 E.C.R. I-0027.

### A. Main principles of Article 349 TFEU

Article 349 TFEU, which is responsible for the OR status in the present version of the Treaties reads as follows:<sup>125</sup>

Taking account of the structural social and economic situation of Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands, which is compounded by their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development, the Council, on a proposal from the Commission and after consulting the European Parliament, shall adopt specific measures aimed, in particular, at laying down the conditions of application of the Treaties to those regions, including common policies. Where the specific measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act on a proposal from the Commission and after consulting the European Parliament.

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125. This provision is very similar to the text of its predecessor EC Treaty art. 299(2), which had the following wording:

2. The provisions of this Treaty shall apply to the French overseas departments, the Azores, Madeira and the Canary Islands.

However, taking account of the structural social and economic situation of the French overseas departments, the Azores, Madeira and the Canary Islands, which is compounded by their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development, the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, shall adopt specific measures aimed, in particular, at laying down the conditions of application of the present Treaty to those regions, including common policies.

The Council shall, when adopting the relevant measures referred to in the second subparagraph, take into account areas such as customs and trade policies, fiscal policy, free zones, agriculture and fisheries policies, conditions for supply of raw materials and essential consumer goods, State aids and conditions of access to structural funds and to horizontal Community programmes.

The Council shall adopt the measures referred to in the second subparagraph taking into account the special characteristics and constraints of the outermost regions without undermining the integrity and the coherence of the Community legal order, including the internal market and common policies.



The measures referred to in the first paragraph concern in particular areas such as customs and trade policies, fiscal policy, free zones, agriculture and fisheries policies, conditions for supply of raw materials and essential consumer goods, State aids and conditions of access to structural funds and to horizontal Union programmes.

The Council shall adopt the measures referred to in the first paragraph taking into account the special characteristics and constraints of the outermost regions without undermining the integrity and the coherence of the Union legal order, including the internal market and common policies.

The provision makes it clear to which territories the special status described by the Article applies. Just as with Annex II TFEU, containing the list of all the OCTs, this is a closed list.<sup>126</sup> This means that the Member States cannot add territories to it as they please and the procedural requirements contained in the Treaties have to be satisfied in order to alter the list and extend the application of the Article to any new territory, or strike a territory from the list.<sup>127</sup>

The previous versions of the provision could not boast such clarity. Since OR status was first designed to clarify the status of the French *DOM* and Algeria in European law, all the pre-Lisbon versions of the relevant provisions contained a reference to the French *DOM*, without naming each of such territories separately. Consequently, the illusion could be created that the status of an OR could be attained by a territory following a change in the Constitutional status of this territory within the French Republic, which caused some problems, particularly with regard to the legal status of Saint-Pierre-et-Miquelon in European law.<sup>128</sup> The enlargement of the OR status to cover non-French regions has only happened following the Iberian enlargement of the Communities.<sup>129</sup> As a result, OR status came to be

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126. The special regime described in TFEU art. 349 cannot apply to any territories that are not entered on the list. TFEU art. 349. *See Answer Given by Mr. Prodi on Behalf of the Commission to Written Question E-2225/00 by Sebastiano Musumeci to the Commission on the Application of Article 299 of the EC Treaty*, 2001 O.J. (C 81) 176. The question concerned whether the special regime of EC Treaty art. 299(2) applied to the Islands of Sicily and Sardinia. EC Treaty art. 299(2) (as in effect 2002) (now TFEU art. 349). At the same time, the Council has used EC Treaty art. 299(2) as one of the legal bases to change the application of structural funds to “outlying Greek Islands which are under a handicap due to their distant location.” *See* Council Regulation 1447/2001, Amending Council Regulation (EC) No 1260/1999 Laying Down General Provisions on the Structural Funds, art. 1(1), 2001 O.J. (L 198) 1 (EC). In other words, although EC Treaty art. 299(2) contains a closed list of regions where OR status applies, a specific regime which would be in some way *de facto* similar to this arrangement can also be granted to other territories. EC Treaty art. 299(2).

127. On the procedural aspects of territories’ status change in the EU Law of the Overseas, see Part VII *infra*; Ziller, *Outermost Regions, Overseas Countries and Territories and Others after the Entry into Force of the Lisbon Treaty*, in *EU LAW OF THE OVERSEAS*, *supra* note 5, at 78; Omarjee, *supra* note 43, at 126.

128. For analysis, see *infra* Part VII.

129. *See* Spain and Portugal Accession Treaty, *supra* note 80.

applicable to Portuguese and Spanish regions as well. Initially, the statuses enjoyed by the Spanish and Portuguese ORs-to-be were entirely different from those of the *DOM* and were thus not covered by what was then Article 227(2) EEC. Two quite different approaches were adopted: with regards to Madeira and the Azores, full integration into the EEC legal system was initially foreseen. Notwithstanding minor derogations enumerated in the Act of Accession, these territories were aiming at accepting the *acquis* in full after the expiry of the transitional periods. With regard to the Canary Islands, a status largely outside the scope of Community law was designed, the Islands not even being integrated into the customs territory of the Community. The situation changed in 1991, when the Canary Islands decided to embrace the *acquis* and denounce the special status outside of the law of the EEC granted to them,<sup>130</sup> and when the Azores and Madeira, aware of their special handicaps comparable with other territories where Community law applied, opted for a special status under the EEC Treaty before the transitional periods under the relevant Act of Accession elapsed. As a result of this convergence, having started at two opposing sides of the legal spectrum, the Portuguese and the Spanish islands in question ended up being grouped together with the *DOM* and, as a result, ended up in the OR group. Consequently, the territories of only three Member States benefit from the status regulated by Article 349 TFEU. This Article only concerns France, Portugal, and Spain.

All the territories entitled to OR status are very similar in their particularities: all of them are influenced by the factors negatively affecting their development mentioned in Article 349(1) TFEU and include “remoteness, insularity, small size, difficult topography and climate, economic dependence on few products, the permanence and combination of which severely restrain development.”<sup>131</sup> Important in this regard is that the Article does not presuppose that all the negative factors which it mentions should come together to affect negatively the same territory in order for it to benefit from OR status. However, it is absolutely clear from the text that the effect of these factors should be severe enough to justify the application of a special regime to the territory concerned. Moreover, “seuls les critères retenus dans l’énumération du traité peuvent fonder une démarche de différenciation.”<sup>132</sup> In other words, this Article cannot be applied to relatively well-off regions not suffering from at least some of the particular drawbacks it lists. At the same time, being an island is not necessary, as the example of French Guiana demonstrates.

The list of the negative points contained in Article 349(1) TFEU is the key to understanding the rationale for this provision. Only the particularities

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130. Council Regulation 1911/91, of 26 June 1991 on the Application of the Provisions of Community Law to the Canary Islands, 1991 O.J. (L 171) 1 (EEC).

131. TFEU art. 349(1).

132. Vitalien, *supra* note 43, at 122.

of their climate, geographical position, etc. permit the justification of the possible deviations from the *acquis*. That is why the procedure that allows the Council to “adopt specific measures aimed, in particular, at laying down the conditions of application of the Treaties to [the ORs]”<sup>133</sup> is found in the same subparagraph of the provision that lists the hardships which these regions face. The structure of the Article in question makes it clear that the Council is only allowed to legislate in order to remedy the specific difficulties described in the provision itself, not in order to defy the main principle of integrity of the Internal Market.<sup>134</sup> This conclusion clearly follows from Article 349(3) TFEU, which expressly prohibits the abuse of the Article, resulting in “undermining the integrity and coherence of the Union legal order.”<sup>135</sup> Specific mention of “the internal market and common policies”<sup>136</sup> is extremely important in this regard, containing a clear indication of the inherent limitations governing the derogations from the *acquis* under this provision.<sup>137</sup> In practice this means that Article 349 TFEU does not really have many teeth.<sup>138</sup>

The guiding principle being the application of the *acquis* to the regions included in the list of Article 355(1) TFEU in full, Article 349(3) TFEU narrows the possible extent of deviation from this principle enormously. What kind of measures can the Council come up with that would not undermine the Internal Market or the common policies? The Council and the Commission, the proposing institution, are clearly invited to legislate very delicately, balancing two principles: full application of the *acquis* and possible limited deviations.

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133. TFEU art. 349, para. 1.

134. For an analysis, see e.g., Danielle Perrot, *Intégrité et cohérence de l'ordre juridique communautaire*, in *LE DROIT DE L'UNION EUROPÉENNE EN PRINCIPES: LIBER AMICORUM EN L'HONNEUR DE JEAN RAUX* 615 (Jean Raux ed., 2006).

135. TFEU art. 349, para. 3.

136. *Id.*

137. In this sense, Article 349 TFEU, just like all its predecessors, directly borrows from the French Constitutional law, where the legal position of the *DOM*, although assimilated into the law of the *métropole* (France being “une République indivisible,”), can be marked by derogations when the latter are needed in order to remedy the specific negative factors affecting the development of the *DOM*. 1958 CONST. 1. So, according to Elisa Paulin and Marie-Josèphe Rigobert, “leurs situation outre-mer ne les différencie pas des autres collectivités territoriales si ce n'est par l'adaptation de certaine règles à leur situation spécifique.” Paulin & Rigobert, *supra* note 43, at 438. It is thus possible to agree with Christian Vitalien that with regard to the legal position of the Ors, “[l]e droit [Français] constitutionnel interne et le droit communautaire poursuivent . . . leur coexistence fondée sur des logiques interpénétrables.” Vitalien, *supra* note 43, at 117. *See also* 1958 CONST. 72 (Fr.) (“Le régime législative et l'organisation administrative des Départements d'outre-mer peuvent faire l'objet de mesures d'adaptation nécessaires par leurs situation spécifique.”). *See also* 1946 CONST. 73 (Fr.) (“Le régime législatif des départements d'outre-mer est le même que celui des départements métropolitains, sauf exceptions déterminées par la loi.”).

138. For the analysis of the corresponding sub-paragraph of EC art. 299, see Brial, *supra* note 5, at 655; Omarjee, *supra* note 27, at 525–30.

### B. Article 349 TFEU from a legal-historical perspective

The ECJ is the guarantor of the right balance to be struck between the principle of the maximal possible application of the *acquis* in the ORs and providing sufficient room for derogations in order to deal with the problems naturally affecting OR development, as outlined in Article 349(1) TFEU. Charged with ensuring that “in the interpretation and application of the Treaties the law is observed,”<sup>139</sup> the Court has demonstrated quite clearly that severe derogations from the *acquis* will not be tolerated, even if bound to the handicaps suffered by the ORs. This is the point that is crucial for the understanding of the potential of Article 349 TFEU to generate derogations from the letter of the *acquis*.

The career of this provision—or, rather, of its predecessors *i.e.* Articles 299(2) EC and 227(2) EEC—started with an embarrassment. Having provided for the application of the *acquis communautaire* to the territories listed therein, Article 227(2) EEC also set a clear *deadline* for the adoption of specific measures that would lay down the essence of OR status by providing specific “conditions of application” of the *acquis* to such regions.<sup>140</sup> Simultaneously, the Article also contained a list of core EC law provisions to apply to those regions immediately after the entry of the EEC Treaty into force.<sup>141</sup> This deadline, set on 1 January 1960, was simply ignored by the Institutions.

139. See TEU art. 19(1).

140. Note that the text of the article did not allow for non-application of some parts of the *acquis* to the territories with such status and merely allowed for derogations in how the *acquis* was to apply. Vitalien, *supra* note 43, at 117.

141. EEC Treaty art. 227(2) (as in effect 1958) (now obsolete). Article 227(2) EEC reads as follows:

2. En ce qui concerne l'Algérie et les départements français d'outre-mer, les dispositions particulières et générales du présent traité relatives :

- à la libre circulation des marchandises,
- à l'agriculture, à l'exception de l'article 40, paragraphe 4,
- à la libération des services,
- aux règles de concurrence,
- aux mesures de sauvegarde prévues aux articles 108, 109 et 226,
- aux institutions,

sont applicables dès l'entrée en vigueur du présent traité.

Les conditions d'application des autres dispositions du présent traité seront déterminées au plus tard deux ans après son entrée en vigueur, par des décisions du Conseil statuant à l'unanimité sur proposition de la Commission.

Les institutions de la Communauté veilleront, dans le cadre des procédures prévues par le présent traité et notamment de l'article

Such “volontarisme des institutions”<sup>142</sup> can be explained, according to Jacques Ziller, by the historical circumstances of the time: there was war in Algeria.<sup>143</sup> Given the prominent status played by Algeria<sup>144</sup> and the importance in the eyes of the French to incorporate this region into the EEC Treaty system in full, it has even been argued that the *DOM* themselves were entirely forgotten at that time due to their relative lack of importance compared with Algeria.<sup>145</sup> However, missing the deadline would not have been as embarrassing if only the Member States and the Institutions had been faithful to the main principle established by the Article, and this was not the case. Instead of accepting the obvious desire of the drafters gradually to incorporate the *DOM* into the scope of the *acquis* in full, minor derogations notwithstanding, Article 227(2) EEC was interpreted contrary to its very purpose as meaning that only the parts of the *acquis* expressly mentioned in the implementing legislation adopted on the basis of this article were binding on the *DOM*, thus going against this provision’s letter and spirit.<sup>146</sup> It has even been suggested in the literature that “the Institutions did not feel bound by Article 227(2) EEC.”<sup>147</sup> Consequently, only the core of the Common Market applied to the *DOM* for many years after the deadline, rather than the *acquis communautaire in full*, as a careful reading of the text of the Article would demand.

The situation persisted until 1978, when the ECJ was able to review the legality of this regime by answering a preliminary question in the *Hansen* case.<sup>148</sup> The case concerned the import of rum from Guadeloupe into Germany, where the alcohol of such origin was classified as a product

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226, à permettre le développement économique et social de ces régions.

142. Vitalien, *supra* note 43, at 117. Puissochet was also critical of the approach taken by the institutions vis-à-vis the ORs. Puissochet, *supra* note 27, at 491-92.

143. Ziller, *The European Union and the Territorial Scope of European Territories*, *supra* note 3, at 51. Algeria gained independence from France only in 1962.

144. For a discussion on the role played by Algeria in the EEC, see Tavernier, *supra* note 86.

145. Moreover, the French approach to Algeria played the leading role in the drafting of EEC art. 227(2) in the first place. Puissochet, *supra* note 27, at 499 n.8.

146. Note, however, that this is not how the French government reasoned when presenting the EEC Treaty for ratification to the Assemblée Nationale. The French government stated back then that “L’unanimité étant requise pour déterminer les conditions d’application des dispositions du Traité non encore applicables à l’Algérie et aux DOM, tout État membre de la Communauté peut refuser l’extension à l’Algérie et aux DOM des dispositions autres que celles énumérées à l’article 227(2)” *Id.* at 499 n.24. This surprising position does not seem to be consistent with EEC Treaty art. 227(2) (as in effect 1958) (now obsolete).

147. Ziller, *The European Union and the Territorial Scope of European Territories*, *supra* note 3, at 51.

148. See also Case 58/86, *Coopérative agricole d’approvisionnement des Aviron v. Receveur des douanes de Saint-Denis*, 1987 E.C.R. 1525. See Case 148/77, *H. Hansen Jun & O.C. Balle GmbH & Co. v. Hauptzollamt de Flensburg*, 1978 E.C.R. 1787. For the discussion of the *Hansen* case, see Puissochet, *supra* note 27, at 494.

coming from outside of the Community and taxed accordingly, rather than being exempt from German taxes as alcohol produced in the European part of France would have been. The Court stated, unequivocally, that upon the expiration of the transitional period, Community law applied to the *DOM* in full:

In order to make due allowance for the special geographic, economic and social situation of those departments, Article 227(2) made provision for the Treaty to be applied by stages, and in addition it made available the widest powers for the adoption of special provisions commensurate to the specific requirements of those parts of the French territories.

11. For that purpose, Article 227 precisely stated certain chapters and articles which were to apply as soon as the Treaty entered into force, while at the same time reserving a period of two years within which the Council could determine special conditions under which other groups of provisions were to apply.

Therefore after the expiry of that period, the provisions of the Treaty and of secondary law must apply automatically to the French overseas departments inasmuch as they are an integral part of the French Republic, it being understood, however, that it always remains possible subsequently to adopt specific measures in order to meet the needs of those territories.<sup>149</sup>

The ECJ thus made it absolutely clear that the *DOM*, by default, fall within the geographical scope of application of EU (then Community) law. While this clarification amounted to an important step forward compared with the pre-*Hansen* practice of application of Community law to the ORs, it did not resolve all the pending issues. Most importantly, while allowing for possible derogations from the *acquis* “to meet the needs of those territories,”<sup>150</sup> *Hansen* did not make the limits on the possible extent of such derogations entirely clear.<sup>151</sup> How far could the Council go in deviating from the *acquis* in legislating on the basis of Article 227(2) EEC? Needless to say, this question is also absolutely crucial in the context of the application of the current Article 349 TFEU.<sup>152</sup>

As the practice of application of the *Hansen* rule demonstrates,<sup>153</sup> the Institutions did not feel any constraints on the content of the measures to be adopted under Article 227(2) EEC in derogation from the *acquis*

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149. Case 148/77, *H. Hansen Jun & O.C. Balle GmbH & Co. v. Hauptzollamt de Flensburg*, 1978 E.C.R. 1787, ¶ 10-11.

150. *Id.* ¶ 11.

151. Puissochet, *supra* note 27, at 499.

152. The lack of clarity going back to *Hansen* still affects OR status. See Omarjee, *supra* note 43.

153. The core of *Hansen* has also been restated at the Maastricht IGC with the drafting of a Declaration in Annex C.



*communautaire* as long as the measures adopted aimed at remedying “the special geographic, economic and social situation of [the ORs].”<sup>154</sup> Adhering to this logic, the Council adopted the POSEI Decisions,<sup>155</sup> dealing with all the three groups of the ORs, finishing off the framework of the OR *acquis* and introducing derogations from some core principles of the *acquis communautaire*. Illustrative of the importance of these Decisions, they have been characterised by the Commission as “the backbone of the policy for supporting the outermost regions.”<sup>156</sup>

All in all, three POSEI Framework Programmes in the form of Decisions have been adopted: POSEIDOM,<sup>157</sup> POSEIMA<sup>158</sup> and POSEICAN.<sup>159</sup> Moreover, the status of the *DOM* gained in specificity due to the Dock Dues (*octroi de mer*) Decision<sup>160</sup> to allow for a special taxation regime in the *DOM*. A number of secondary law measures have been adopted based on the POSEI Programmes, increasing the complexity of the OR *acquis*.<sup>161</sup>

The adoption of the essentially similar POSEIDOM, POSEIMA and POSEICAN—albeit adopted using different legal bases, since the Spanish and Portuguese territories concerned were not included in the text of Article 227(2) EEC at the moment of their adoption<sup>162</sup>—gives rise to claims of

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154. Case 148/77, *H. Hansen Jun & O.C. Balle GmbH & Co. v. Hauptzollamt de Flensburg*, 1978 E.C.R. 1787, ¶ 10.

155. POSEI stands for “Programme d’Options Spécifiques à l’Éloignement et à l’Insularité.” *Le Programme POSEI France*, POSEI FRANCE.FR, <http://www.posei-france.fr/index.php> (last visited Mar. 24, 2012).

156. *Commission Report on the Measures to Implement Article 299(2)*, *supra* note 113, at 6.

157. Council Decision 89/687/EEC, of 22 December 1989 Establishing a Programme of Options Specific to the Remote and Insular Nature of the French Overseas Departments (POSEIDOM), 1989 O.J. (L 399) 39 (EC) (on the *DOM*).

158. Council Decision 91/315/EEC, of 26 June 1991 Setting up a Programme of Options Specific to the Remote and Insular Nature of Madeira and the Azores (POSEIMA), 1991 O.J. (L 171) 10 (EC).

159. Council Decision 91/314/EEC, of 26 June 1991 Setting up a Programme of Options Specific to the Remote and Insular Nature of the Canary Islands (POSEICAN), 1991 O.J. (L 171) 5 (EC).

160. Council Decision 89/688/EEC, of 22 December 1989 Concerning the Dock Dues in the French Overseas Departments, 1989 O.J. (L 399) 46 (EC). For the second extension of this Decision (now in force), see Council Decision 2004/162/EC, of 10 February 2004 Concerning the Dock Dues in the French Overseas Departments and Extending the Period of Validity of Decision 89/688/EEC, 2004 O.J. (L 52) 64. For a detailed legal analysis of the legality of *octroi de mer* in the context of EU law, see Slotboom, *supra* note 64, at 9. See also Puissechot, *supra* note 27, at 504-06.

161. More than 700 acts have been adopted under the POSEI Decisions. *Commission Report on the Measures to Implement Article 299(2)*, *supra* note 113, at 13, Annex I (listing the most important adopted measures).

162. Council Decision 89/687/EEC, of 22 December 1989 Establishing a Programme of Options Specific to the Remote and Insular Nature of the French Overseas Departments (POSEIDOM), 1989 O.J. (L 399) 39 (EC), was adopted on the basis of EEC arts. 227(2) & 235; Council Decision 91/315/EEC, of 26 June 1991 Setting up a Programme of Options Specific to the Remote and Insular Nature of Madeira and the Azores (POSEIMA), 1991 O.J.

applicability to the ORs of the principle of parallelism. The principle presupposes that the situations of all the ORs are essentially similar, making elaborate differentiation measures within this group impractical, if not illegal. Indeed, the similarity of their permanent handicaps summarised in the text of Article 349(1) TFEU, is behind the special status granted to these regions in the first place. As formulated by the former *conseiller au cabinet du secrétaire d'État à l'outre-mer*, the principle “a conduit à traiter de manière identique les situations comparables des régions ultrapériphériques.”<sup>163</sup>

The text of Article 227(2) EEC was structurally very differently from that of Article 299(2) EC on which the current tandem Articles governing OR status, Article 355(1) and 349 TFEU, are based. One of the key differences between Articles 227(2) EEC and 299(2) EC was that the text of Article 227(2) EEC contained a clear list of provisions that were supposed to apply to the ORs (then only *DOM*) immediately upon the entry into force of the EEC Treaty. The Article thus contained a clear list of rules to which the two year deadline set in that article did *not* apply.<sup>164</sup> The current legal provisions on OR status in the TFEU do not contain any such lists, which alters considerably the legal framing of OR status.

It was when interpreting the secondary legislation adopted under the OR Article in force in the light of this list that the ECJ received a chance to review the possible extent of derogations from the *acquis* to be permitted when legislating under Article 227(2) EEC. As long as the relevant ECJ case law is not overruled, the Treaty provisions currently in force are thus indirectly affected by the list of such untouchable elements of the *acquis*, even though it is no longer included in the text of Article 349 TFEU.

In two leading cases on explaining the extent of possible derogations to be granted to the ORs in the context of the list of the areas of the *acquis* which *had to* apply in the ORs—*Legros*<sup>165</sup> and *Lancry*<sup>166</sup>—the Court nuanced *Hansen*, by introducing into its case law an idea of the hierarchy of norms within the *acquis* as applied to the ORs. Having first appeared in the

(L 171) 10 (EC), was adopted on the basis of EEC arts. 43, 113 & 235 and the Spain and Portugal Accession Treaty, *supra* note 80. Council Decision 91/314/EEC, of 26 June 1991 Setting up a Programme of Options Specific to the Remote and Insular Nature of the Canary Islands (POSEICAN), 1991 O.J. (L 171) 5 (EC), was adopted on the basis of Council Regulation 1911/91, of 26 June 1991 on the Application of the Provisions of Community Law to the Canary Islands, 1991 O.J. (L 171) 1 (EC).

163. Vitalien, *supra* note 43, at 125.

164. EEC Treaty art. 227(2) (as in effect 1958) (now obsolete).

165. Case C 163/90, *Administration des Douanes et Droits Indirects v. Legros*, 1992 E.C.R. I-4625, ¶ 18. See Danielle Perrot, *A propos de l'arrêt Legros, réflexions sur le statut communautaire des départements français d'outre-mer*, 368 REVUE DU MARCHÉ COMMUN ET DE L'UNION EUROPÉENNE 427 (1993).

166. Joined Cases C-363 & 407/93, 408/93, 409/93, 410/93 & 411/93, *René Lancry v. Direction Générale des Douanes*, 1994 E.C.R. I-3978, ¶ 37.

Opinion of AG Jacobs in *Legros*,<sup>167</sup> a very simple argument was accepted by the ECJ in *Lancry*. The ECJ used the list of areas of Community law that had to be applicable in the ORs immediately upon the entry into force of the EEC Treaty as a clear indication of the overwhelming importance of the areas of law mentioned on the list compared with the rest of the *acquis*.

The Court found in *Lancry* that when derogating from the *acquis* and using Article 227(2) EEC as a legal basis the Council could not touch the core of the *acquis*, which is listed in the provision itself:

37. By expressly authorizing the Council to determine the conditions of application only of those Treaty provisions not listed in its first subparagraph, Article 227(2) excludes the possibility of derogating from the application in the French overseas departments of the provisions which are mentioned therein, including those relating to the free-movement of goods. To interpret Article 235 of the Treaty as allowing the Council to suspend, even temporarily, the application of Articles 9, 12 and 13 of the Treaty in the French overseas departments would be to disregard the fundamental distinction established by Article 227(2) and to deprive its first subparagraph of its effectiveness.<sup>168</sup>

By using this line of argument, the ECJ thus went against the core of the Dock Dues Decision of the Council.<sup>169</sup> The fact that this duty was equally applicable to French goods and the goods coming from other Member States did not change the nature of the charge, which is a “charge having an effect equivalent to a customs duty on imports,”<sup>170</sup> thus going against the core principle of the free-movement of goods.<sup>171</sup> A reference to the article of the

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167. Case C-163/90, *Administration des Douanes et Droits Indirects v. Legros*, 1992 E.C.R. I-4625, ¶ 14 (Opinion of AG Jacobs). The Court refused to follow the conclusion of the AG in that case, not ruling on the validity of the *Octroi de mer* decision and dealing solely with the *octroi de mer* levied preceding its entry into force.

168. Joined Cases C-363 & 407/93, 408/93, 409/93, 410/93 & 411/93, *René Lancry v. Direction Générale des Douanes*, 1994 E.C.R. I-3978, ¶ 37.

169. For an analysis, see also Alina Tryfonidou, *The Overseas Application of the Customs Duties Provisions of the TFEU*, in *EU LAW OF THE OVERSEAS*, *supra* note 5, at 221.

170. Case C-163/90, *Administration des Douanes et Droits Indirects v. Legros*, 1992 E.C.R. I-4625, ¶ 13. The Court referred to Joined Cases 2/69 & 3/69, *Sociaal Fonds voor de Diamantarbeiders v. S.A. Ch. Brachfeld & Sons*, 1969 E.C.R. 211, to illustrate the meaning of the notion of charges having equivalent effect to customs duties.

171. See TFEU art. 30. The factual situation in *Legros* and *Lancry* was remarkably similar to that of other cases decided by the ECJ which involved regional taxes on imported goods decided by the ECJ. Without a special regime under EC Treaty art. 299(2) (now TFEU art. 349), however, such taxes were virtually impossible to justify. See Joined Cases C-485 & 486/93, *Maria Simitzi v. Dimos Kos*, 1995 E.C.R. I-2655. In *Simitzi* the Court found that “an ad valorem charge levied by a Member State on goods imported from another Member State by reason of their entry into a region of the first Member State’s territory constitutes a charge having an effect equivalent to a customs duty on imports, notwithstanding the fact that it is also levied on goods entering that region from another part of the same State’s territory, and notwithstanding the fact that an ad valorem charge is also levied on goods exported from the

Treaty prohibiting such charges was in the list in Article 227(2)(2) EEC when the cases were decided, which was a clear indication, according both to the Court and the Advocate General, that the Council was not empowered to derogate from it.

The logic of the Court is difficult to object to: the Council could not be given a *carte blanche* in its discretion to derogate from the *acquis*, which, according to the first subparagraph of Article 227(2) EEC, had to apply to the ORs mentioned therein in full. Moreover, as Marco Slotboom reminds, the Member States and the Institutions of the Union are bound to respect the principle of the free movement of goods.<sup>172</sup> Using the procedures of any article of the Treaties in order to undermine it thus goes against the spirit of EU law and can be characterised as a violation of the duty of loyalty.<sup>173</sup> It is clear, however that such a rigid hierarchical approach to the part of the *acquis* intended to be applicable with or without derogations in the ORs severely limits the freedom of the Council to legislate with a view to diminishing the effects of the handicaps the ORs are said to suffer from. Inability to deviate from a number of key areas of the *acquis* thus threatens the achievement of the very objective of the OR instrument in the Treaty—a situation which the renewed OR instrument in the Treaties—*i.e.* Article 299(2) EC, on which the current Article 349 TFEU is based—was designed to remedy. This has been achieved by removing the list of the untouchable *acquis* provisions from the text of the Article.

An obvious question arising in this regard is how far the reasoning used by the Court in *Legros* and *Lancry* affects the instruments currently in force, especially Article 349 TFEU, which largely inherited the wording of now obsolete Article 299(2) EC.<sup>174</sup> In order to answer this question, it is first necessary to turn to the history of the drafting of this provision. It has been suggested in the literature that Article 299(2) EC was amended *specifically* to neutralise the ECJ's *Lancry* and *Legros* case law with a view to returning to the vagueness, if not freedom, of *Hansen*, and thus freeing the hands of the Council to modify the application of any part of the *acquis* whatsoever when legislating on the basis of Article 299(2) EC and, consequently, on the basis of current Article 349 TFEU.

Although the interests of the ORs and especially the *DOM* levying *octroi de mer* are quite clear, they have to be balanced against the goals of the

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region in question." *Id.* ¶ 17. See also Case C-45/94, Cámara de Comercio, Industria y Navegación de Ceuta v. Ayuntamiento de Ceuta, 1995 E.C.R. I-4385.

172. Slotboom, *supra* note 64, at 23. See also Case 37/83, Rewe-Zentrale AG v. Direktor der Landwirtschaftskammer Rheinland, 1984 E.C.R. 1229, ¶ 18.

173. TEU art. 4(3) also applies to Community Institutions. See in relation to their cooperation with national judicial authorities, Case C-2/88, Imm., J.J. Zwartveld & Others, 1990 E.C.R. I-4405.

174. For an analysis of textual changes see Ziller, *Outermost Regions, Overseas Countries and Territories and Others after the Entry into Force of the Lisbon Treaty*, in EU LAW OF THE OVERSEAS, *supra* note 5, at 69; see also Table 1.

Treaties as set out in Article 3 TEU and, especially, the idea of the Internal Market. In the light of these observations it is highly unlikely that a simple removal of the list of immediately effective provisions from a Treaty Article responsible for the OR regime could restrain the Court's willingness to defend the coherence of the Union legal order and the Internal Market, to which a reference is still provided in Article 349(3) TFEU. If the OR lobby was trying to achieve this,<sup>175</sup> it was clearly somewhat naïve;<sup>176</sup> which is not, however, to underestimate the importance of the changes introduced into the text of Article 299(2) EC by the Amsterdam revision.<sup>177</sup>

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175. See Ziller, *The European Union and the Territorial Scope of European Territories*, *supra* note 3. In their Declarations adopted during the Amsterdam IGC the Presidents of the ORs outlined their position regarding the particularities of the legal status they aspired to have under the new Treaty. The declarations make it clear that the ECJ's *Lancry* and *Legros* case law was not met with enthusiasm in the ORs. The ultimate feature of the post-Amsterdam status had to be the possibility to derogate from *any* parts of the *acquis* for *unlimited* periods. This is something that the post-Amsterdam Art. 299(2) EC, just as Art. 349 TFEU currently in force, clearly does not allow for. See, e.g., the so-called Funchal (Madeira) Declaration of 14 March 1996:

Les dispositions du Traité instituant la Communauté européenne et du droit dérivé s'appliquent aux Régions ultrapériphériques. Toutefois, le Conseil, pour tenir compte des réalités et des spécificités de ces régions, adopte des mesures particulières en leur faveur et détermine les conditions spéciales de mise en œuvre des politiques communes [ . . . ] dans la mesure et aussi longtemps qu'il existe un besoin objectif de prendre de telles dispositions.

Brial, *supra* note 5, at 653 n.54.

176. Two days before the Amsterdam summit was expected to approve the text of the Amending Treaty, the Presidents of the ORs gathered at Saint-Denis de La Réunion to issue a declaration demanding a change in the status of the ORs under the new Treaty. See Brial, *supra* note 5, at 651 n.50 (citing Declaration des présidents des régions ultrapériphériques, Saint-Denis (La Réunion), 17 Apr. 1997).

177. The OR lobby was not particularly successful before the Amsterdam IGC. Its main achievement in Maastricht was Declaration No. 26 (Declaration on the Outermost Regions of the Community), appended to the Maastricht TEU, 1992 O.J. (C 191) 104). Numerous elements of that Declaration have been incorporated into the text of EC Treaty art. 299(2) by the Amsterdam IGC. The Declaration read as follows:

La Conférence reconnaît que les régions ultrapériphériques de la Communauté (départements français d'outre-mer, Açores et Madère et îles Canaries) subissent un retard structurel important aggravé par plusieurs phénomènes (grand éloignement, insularité, faible superficie, relief et climat difficile, dépendance économique vis-à-vis de quelques produits) dont la constance et le cumul portent lourdement préjudice à leur développement économique et social. Elle estime que, si les dispositions du traité instituant la Communauté européenne et du droit dérivé s'appliquent de plein droit aux régions ultrapériphériques, il reste possible d'adopter des mesures spécifiques en leur faveur dans la mesure et aussi longtemps

Probably receptive to this change, the Court sent a signal of understanding of the ORs' special position in *Chevassus-Marche*<sup>178</sup> and *Sodiprem-SARL*,<sup>179</sup> which were decided under Article 227(2) EC when the new text of Article 299(2) EC has already been drafted and was available for consultation by the Court. Making it clear that its earlier case-law stands in principle, the ECJ, however, applied it in a somewhat more nuanced way, stating that any deviations from the *acquis* rooted in Article 227(2) EC "necessary, proportionate and precisely determined"<sup>180</sup> are compatible with EU law. This reasoning allowed the Court to rule in *Chevassus-Marche* that exemptions from the *octroi de mer* of the locally produced goods on Réunion were compatible with the Treaty.<sup>181</sup> The revolutionary nature of this case should not be underestimated: the Court allowed for the first time derogation from the principles of Article 90 EC [now Art. 110 TFEU] on the basis of the provision granting the ORs their special status.

Thus, although Article 299(2) EC "procède à une extension matérielle du champ ouvert aux mesures spécifiques,"<sup>182</sup> it should be interpreted with caution.<sup>183</sup> The specific list of provisions of the Treaty immediately applicable to the ORs having been removed from the Treaty Article establishing OR status, radical change in the interpretation of the essence of the status was highly unlikely, which has been confirmed in practice. This was particularly true, given the strict wording of the last paragraph of the relevant Treaty provision, prohibiting the Council from undermining the "coherence of the Union legal order, including the internal market and common policies."<sup>184</sup> To summarise, although the present version of the

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qu'il existe un besoin objectif de prendre de telles mesures en vue d'un développement économique et social de ces régions. Ces mesures doivent viser à la fois l'objectif de l'achèvement du marché intérieur et celui d'une reconnaissance de la réalité régionale en vue de permettre à ces régions de rattraper le niveau économique et social moyen de la Communauté.

For an account of the ORs' lobbying activities in Brussels see Janus, *supra* note 71.

178. Case C-212/96, Paul Chevassus-Marche v. Conseil Régional de la Réunion, 1998 E.C.R. I-743. Before this case was decided, scholars tended to regard the regime approved by the Court as being contrary to Community Law, as it clearly deviated from the main principles of the Internal Market. Slotboom, *supra* note 64, at 23.

179. Joined Cases C-37 & 38/96, Sodiprem SARL & Others v. Direction Générale des Douanes, 1998 E.C.R. I-2039. For an informative summary of the development of the *octroi de mer* case-law of the ECJ, see Case C-126/94, Société Cadi Surgelés v. Ministre des Fin., 1996 E.C.R. I-5647.

180. Case C-212/96, Paul Chevassus-Marche v. Conseil Régional de la Réunion, 1998 E.C.R. I-743, ¶ 49.

181. *Id.* ¶ 53.

182. Vitalien, *supra* note 43, at 121. For a similar position see Omarjee, *supra* note 27, at 518.

183. Omarjee, *supra* note 27, at 525.

184. TFEU art. 349, para. 3.



Article seemingly grants the ORs more room to accommodate their specificity better within the EU legal order compared to the OR instrument in the EEC Treaty, the far-reaching structural derogations from the *acquis* which are only nominally connected with the “handicaps” listed in Article 349(1) TFEU are highly unlikely to be pronounced legal by the Court. In other words, agreeing with Fabien Brial, “de nombreuses incertitudes subsistent”<sup>185</sup>—a conclusion also reached by Ismaël Omarjee.<sup>186</sup> At the same time, it would not be right to deny the fact that certain clarity is established by *Chevassus-Marche* and *Sodiprem-SARL* case law, demonstrating that derogations are likely not to infringe the coherence of the EU legal order as long as they are clearly necessary and strictly construed.

The story presented demonstrates that there is a constant movement from a more to a less restrictive vision of flexibility in the way the *acquis* is to be applied in the ORs. The removal of the untouchable list from the text of the relevant Treaty instrument is a great illustration of this process. More importantly, however, the Treaty of Lisbon altered the OR Article of the Treaty so that the strict restatement of the main principle that the *acquis* applies in the ORs in full has disappeared from the text. To state, as Article 355(1) TFEU does, that the Treaty is to apply to the ORs “in accordance with Article 349 [TFEU]”<sup>187</sup> can only be viewed as the continuation of the trend leading towards the relaxation of the strict approach to the *acquis* necessarily applicable in the ORs established by the ECJ in *Hansen*. In the long run, should this trend continue, it is likely to result in an increase in the convergence of the main legal statuses granted to the Overseas in EU law, moving the ORs closer to the status enjoyed by the OCTs. This process has started on a number of fronts and is only likely to continue with renewed intensity.

### C. Article 349 TFEU as a source of derogations

To use Article 349(1) TFEU as a legal basis, the Council is required to follow the special legislative procedure described in the Article,<sup>188</sup> which requires the Council to act by qualified majority voting (QMV)<sup>189</sup> on a proposal of the Commission after having consulted the European Parliament. In fact, it is a restatement of the procedure contained in the

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185. Brial, *supra* note 27, at 652.

186. Omarjee, *supra* note 43.

187. TFEU art. 355(1).

188. See also TFEU art. 289(2) (restating the rules of the special legislative procedure). See Perrot, *Les régions ultrapériphériques françaises selon le traité de Lisbonne*, *supra* note 27, at 731-36 (describing the speculation as to why TFEU art. 249 actually repeats TFEU art. 203 rules besides simply naming the legislative procedure in question).

189. TEU art. 16(3) applies since TFEU art. 349, para. 1 does not provide otherwise.

previous version of the Article—Article 299(2) EC.<sup>190</sup> If we take one step back, it is clear that the last serious improvement brought into the OR derogations procedure was when Article 227(2) EC was scrapped. The latter required unanimity and thus was left open for any Member State to block the adoption of specific measures to meet the needs of the ORs. Ismaël Omarjee is right to point out that this possibility is not purely hypothetical, referring to the numerous steps taken by Germany to block special measures regarding the banana market.<sup>191</sup> At the same time, if the contemporary QMV rules are compared to the unanimity of pre-Amsterdam times, especially since the number of Member States in charge of ORs has not grown at all, it becomes clear that QMV might not be very easy to reach either, something Danielle Perrot also underlined in her analysis of Article 349(1) TFEU.<sup>192</sup>

The outcomes of the employment of the special legislative procedure of Article 349 TFEU only concern the application of EU law in the territories of a minority of the Member States. The Treaty provision does not introduce any qualifications to the QMV rule to reflect this reality, though it is possible to imagine that no measure would be adopted under the Article against the will of the Member State exercising sovereignty over an OR whose status is at stake.<sup>193</sup> Moreover, ideally, the OR in question itself should be consulted as well, although no binding legal provision to this effect is to be found anywhere in the *acquis*.

The question whether the procedure described in Article 349 TFEU will always be used by the Institutions remains open, however, since the choice of the procedure concerns the nature of Article 349(1) TFEU as a legal basis. Given that cumulative legal bases are not uncommon in EU law and that the procedures associated with different legal bases frequently vary, especially in derogating from the special legislative procedure, a *de facto* different procedure for the introduction of Article 349 TFEU derogations will often be used.

To provide some examples, and given that Article 349 TFEU is still very new, the history of the employment of Article 299(2) EC as a legal basis for derogations in favour of the ORs needs to be considered. Parallels with Article 299(2) EC will obviously hold, since the procedures contained in

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190. For the analysis of the contemporary wording see for example Ziller, *supra* note 5; Perrot, *Les régions ultrapériphériques françaises selon le traité de Lisbonne*, *supra* note 27. For an analysis of the procedure in EC art. 299(2), see, e.g., Omarjee, *supra* note 27, at 520-23.

191. Omarjee, *supra* note 27, at 520.

192. Perrot, *Les régions ultrapériphériques françaises selon le traité de Lisbonne*, *supra* note 27, at 732.

193. See also Omarjee, *supra* note 27, at 521. There is a perception in the literature that the theoretical possibility of such an outcome has increased with the last rounds of enlargement. No evidence is provided, however, except for the simple growth in the number of Member States. See, e.g., Ziller, *L'Union Européenne et l'outre-Mer*, *supra* note 27, at 154.

both provisions are identical and also since the rules on cumulative legal bases have not changed with the Treaty of Lisbon amendments.

Although Article 299(2) EC has been used as a legal basis for the derogations in favour of the ORs on numerous occasions,<sup>194</sup> equally numerous are the examples of the employment of the old versions of Article 349(1) TFEU in cumulative legal bases. The analysis of the practice of application of Article 227(2) EC as a legal basis demonstrates, for instance, that before this provision became Article 299(2) EC, the Institutions were very eager indeed to use it in conjunction with some other legal basis from the EC Treaty. So the Dock Dues Decision 89/688/EEC had a double legal basis: both Article 227(2) EC and the former Article 235 EC<sup>195</sup> were used.<sup>196</sup> Given such practice, scholars even started questioning the capacity of the predecessors of Article 349(1) TFEU to serve as free-standing legal bases for derogations from the *acquis* to be applied to the ORs.<sup>197</sup> While the ability of the OR provision in the Treaties to provide a unique legal basis for derogations has already been demonstrated, it is clear that a cumulative legal basis is often preferred and this is unlikely to change in the future. Based on an analysis of the employment of Article 299(2) EC, it can be concluded that the Commission seems to be of the opinion that a special provision authorising derogations from the *acquis* to meet the needs of the ORs can only be used as a unique legal basis when no other article able to supply such legal basis is available in the Treaty.<sup>198</sup>

A good example of the practical implications of this finding is Regulation (EC) 1447/2001 amending Regulation (EC) No. 1260/1999 laying down general provisions on the Structural Funds,<sup>199</sup> which was adopted on the basis of two articles: Article 299(2) EC and Article 161 EC.<sup>200</sup> The consequences of such a double legal basis are far-reaching. Given that the Article 299(2) EC procedure required QMV and Article 161 EC contained a requirement for unanimity, the stricter procedure was used, which in practice resulted in the application of stricter voting requirements

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194. See, e.g., Council Decision 2004/162, of 10 February 2004 Concerning the Dock Dues in the French Overseas Departments and Extending the Period of Validity of Decision 89/688/EEC, 2004 O.J. (L 52) 64 (EC); Council Decision 2002/546, of 20 June 2002 on the AIEM Tax Applicable in the Canary Islands, 2002 O.J. (L 179) 22 (EC).

195. TFEU art. 352 (formerly Art. 308 EC in post-Amsterdam numbering).

196. Council Decision 89/688/EEC, of 22 December 1989 Concerning the Dock Dues in the French Overseas Departments, pmb., 1989 O.J. (L 399) 46 (EC).

197. Vitalien, *supra* note 43, at 123-24.

198. For academic support of such a position, see Perrot, *Le nouvel article 299 paragraphe 2, supra* note 27, at 145, 147.

199. Council Regulation 1447/2001, of 28 June 2001 Amending Regulation (EC) No. 1260/1999 Laying Down General Provisions on the Structural Funds, 2001 O.J. (L 198) 1 (EC). See Vitalien, *supra* note 43, at 123-24.

200. Now TFEU art. 171; Council Regulation 1447/2001, of 28 June 2001 Amending Regulation (EC) No. 1260/1999 Laying Down General Provisions on the Structural Funds, pmb., 2001 O.J. (L 198) 1 (EC).

than would have been necessary had Article 299(2) EC been used as a free-standing legal basis. Although Article 161 EC became Article 171 TFEU, which also entailed a change in the procedure required, since the most commonly used procedure in the Treaties is the ordinary one, it is expected that the European Parliament will be playing a much more important role in framing the derogations from the *acquis* to apply in the ORs than what Article 349(1) TFEU seems to suggest. Article 171 TFEU also now contains a requirement to use an ordinary legislative procedure.<sup>201</sup>

All in all, the practice of cumulation of legal bases can thus make the adoption of acts under Article 349(1) TFEU more difficult.<sup>202</sup> In this context, it may be reasonable to consider changing the current practice of applying provisions responsible for the shaping of the OR *acquis*. Indeed, neither the text of Article 349 TFEU nor the way the Article and its predecessors have been interpreted by the ECJ provide reasons for believing that the institutions are right in not using it as a free-standing legal basis, even if there is an apparent overlap with other treaty provisions. The position embraced by Jean-Pierre Puissechet is very instructive in this regard. He interpreted the silence of the Court in *Chevassus-Marche* about any other legal bases for the Dock Dues Decision besides Article 299(2)EC as a clear indication of the irrelevance of the additional legal basis.<sup>203</sup>

Although put in place to deal with permanent handicaps, the derogations from the *acquis* under Article 349 TFEU cannot be permanent in nature. This provision thus cannot be viewed as being exempt from the main principles of EU law governing the employment of derogations: they have to be construed as strictly as possible, be proportionate to the stated goals and be temporary. Agreeing with Ismaël Omarjee on this point, it is clear that “la possibilité permanente d’adopter des mesures spécifiques ne signifie pas forcément la permanence de ces mesures.”<sup>204</sup> However, the extension of previously granted derogations is obviously possible.

In practice, the Commission has historically played a leading role in the implementation of the Treaty articles responsible for the introduction and the extension of the derogations from the *acquis* in favour of the ORs. Upon the request of the European Council,<sup>205</sup> the Commission submits general

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201. It has to be borne in mind, however, that TEU art. 48(7), para. 2 allows for a simplified Treaty amendment to replace special legislative procedures with ordinary ones. Should TFEU art. 349, para. 1 demonstrate that, in practice, the accumulation of legal basis mostly results in the application of the ordinary legislative procedure, it would make sense to make use of TEU art. 48(7), para. 2 in order to bridge the gap between the reality of OR regulation and the text of TFEU art. 349, para. 1.

202. See also Perrot, *Les régions ultrapériphériques françaises selon le traité de Lisbonne*, *supra* note 27, at 734-35.

203. The second legal basis was EC Treaty art. 308 (as in effect 2007) (now TFEU art. 352). See Puissechet, *supra* note 27, at 506.

204. The declaration is quoted in full in Omarjee, *supra* note 27, at 520.

205. So the 1999 Cologne European Council invited the Commission “to submit to the Council by the end of 1999 a report identifying a package of measures to implement the

reports on the measures designed to ensure the application of the OR provision of the Treaty, analysing the opportunities the *acquis* offers to deal with the natural handicaps of the ORs.<sup>206</sup> The reports are “built on global, coherent approach to the special characteristics of the [situation of the ORs] and to way[s] of addressing them.”<sup>207</sup> Such analysis is conducted in close cooperation and partnership with the authorities of the Member States concerned and of the ORs themselves,<sup>208</sup> so that the Commission has access to the most up-to-date information in drafting its reports.

Along with the general strategic reports, the Commission also releases progress reports that assess the effect of the special measures already adopted on the basis of Article 349 TFEU and its predecessors.<sup>209</sup> Such reports cover all the steps taken by the Commission towards using the possibilities offered by the treaties to remedy the permanent handicaps which the ORs suffer from. Thus, the Commission is there to provide general policy guidelines, which are then incorporated into the proposals it submits to the Council legislating on the basis of Article 349 TFEU. The 2004 Communication on the Stronger Partnership with the Outermost Regions<sup>210</sup> outlined the key aspects of future development of the outermost regions *acquis*. These are competitiveness, access and offsetting of other constraints, and integration into the regional area<sup>211</sup>—the main fields to mark the use of Article 349 TFEU in the near future.

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provisions of Article 299(2) of the EC Treaty with regard to the outermost regions’’: Presidency Conclusions, Cologne European Council, E.U. BULL., no. 6, ¶ 38 (1999). *See also* Presidency Conclusions, Seville European Council, E.U. BULL., no. 6, ¶ 58 (2002) [hereinafter Seville European Council].

206. *See e.g.*, *Commission Report on the Measures to Implement Article 299(2)*, *supra* note 113; *Communication from the Commission: A Stronger Partnership for the Outermost Regions*, COM (2004) 343 final (May 26, 2004) [hereinafter *Commission Communication on Partnership for Outermost Regions*]. These should not be confused with the Reports regularly submitted by the Commission on the progress made in implementation of POSEI programmes. *See, e.g.*, *Report from the Commission to the Council and the European Parliament in Accordance with Article 23 of Regulation (EEC) No 3763/91*, *Report from the Commission to the Council and the European Parliament in Accordance with Article 35 of Regulation (EEC) No 1600/92*, *Report from the Commission to the Council and the European Parliament in Accordance with Article 30 of Regulation (EEC) No 1601/92*, COM (2000) 790 final (Nov. 29, 2000).

207. Seville European Council, *supra* note 205, ¶ 58.

208. *See, e.g.*, *Answer of Mr. Prodi on Behalf of the Commission to the Written Question P-224/00 by Carlos Costa Neves to the Commission (Jan. 3, 1 2000) Regarding Commission Report on the Application of Article 299(2) of the Treaty*, 2000 O.J. (303) 163 E. The input from the ORs is acknowledged in the Commission’s Reports. *See, e.g.*, *Commission Report on the Measures to Implement Article 299(2)*, *supra* note 113, at 5-6.

209. *See, e.g.*, *Report from the Commission on Implementation of Article 299(2) of the EC Treaty: Measures to Assist the Outermost Regions*, COM (2002) 723 final (Dec. 19, 2002) [hereinafter *Report on the Implementation of Article 299(2)*].

210. *Commission Communication on Partnership for Outermost Regions*, *supra* note 206.

211. *Id.* at 4.

#### D. Examples of Derogations Enjoyed by the ORs

The POSEI programmes and further legislation focus on derogations in a number of fields, mostly concentrating on: agriculture; fisheries; taxation; customs; state aids; aid to small businesses, craft firms and tourism; energy; transport; research and development; the information society; environment; and regional cooperation.<sup>212</sup> The broad coverage of areas by specific measures does not mean, however, that the derogations in question necessarily substantially alter the norms of the *acquis* applicable to the ORs in all the areas mentioned. The intensity of derogations varies to a great degree. While in some fields, such as taxation, derogations are quite far-reaching,<sup>213</sup> in others, such as research and development, there is virtually nothing available in terms of specific measures targeting the handicaps the ORs suffer from. In its Report on a Stronger Partnership for the Outermost Regions<sup>214</sup> the Commission expressed concerns with the practical functioning of some of the derogations. The *acquis* applicable to the ORs in the areas of the environment, transport, and the Internal Market has been particularly characterised as failing to “take adequate account of the special features of the [outermost] regions.”<sup>215</sup> Clearly, there is room for improvement in the way Article 349 TFEU is employed.

To illustrate the depth of derogations from the *acquis* in favour of the ORs, several examples can be provided. The derogations in the field of agriculture<sup>216</sup> thus concern the special measures regarding the traditional

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212. For further analysis of TFEU art. 249(2) as a source of derogations see Omarjee, *supra* note 43, at 126. TFEU art. 349, para. 2 contains its own list of the main areas where the derogations from the *acquis* are most likely. It mentions that “in particular areas such as customs and trade policies, fiscal policy, free zones, agriculture and fisheries policies, conditions for supply of raw materials and essential consumer goods, State aids and conditions of access to structural funds and to horizontal Union programmes.” *Id.*

213. See Kochenov, *supra* note 3, at 282-85.

214. *Commission Communication on Partnership for Outermost Regions*, *supra* note 206.

215. *Id.* ¶ 2.2.

216. See, e.g., Council Regulations (EC) 1452/2001 (POSEIDOM); 1453/2001 (POSEIMA); See, e.g., Council Regulations 1452/2001, of 28 June 2001 Introducing Specific Measures for Certain Agricultural Products for the French Overseas Departments (POSEIDOM), 2001 O.J. (L 198) 11 (EC); Council Regulation 1453/2001, of 28 June 2001 Introducing Specific Measures for Certain Agricultural Products for the Azores and Madeira (POSEIMA), 2001 O.J. (L 198) 26 (EC); Council Regulation 1454/2001, of 28 June 2001 Introducing Specific Measures for Certain Agricultural Products for the Canary Islands (POSEICAN), 2001 O.J. (L 198) 45 (EC); Council Regulation 1455/2001, of 28 June 2001 Amending Regulation (EC) No 1254/1999 on the Common Organisation of the Market in Beef and Veal, 2001 O.J. (L 198) 58 (EC); Council Regulation 1447/2001, of 28 June 2001 Amending Regulation (EC) No 1260/1999 and Laying Down General Provisions on the Structural Funds, 2001 O.J. (L 198) 1 (EC); Council Regulation (EC) 1455/2001 of 28 June 2001 [2001] OJ L 198/54; Council Regulation (EC) 1447/2001 of 28 June 2001 [2001] OJ L 198.



products of the ORs, especially rice, sugar, pineapples, and bananas.<sup>217</sup> These measures aim to guarantee production and prices. They also concern compensatory aid for production and the import of such products, especially bananas, from the third-countries.<sup>218</sup> The second most important aspect related to the special measures in the field of agriculture concern the establishment of a system of specific supply arrangements. The Commission summarised the system as follows:

Each marketing year, a forecast supply balance is adopted for agricultural products necessary for human consumption and local processing. . . . Imports originating outside the Community are exempt from customs duties, while supplies or products originating in the Community benefit from aid equivalent to the benefit arising from this exemption.

The aim of this measure is to offset the additional costs arising as a result of remoteness and isolation and to bring down prices for end users by promoting competition between sources of supply. . . .

Products benefiting from the arrangements may not be re-exported to third countries or redispached to the rest of the Community. However, where they are processed in the region concerned, this ban does not apply to traditional exports or shipments to the rest of the Community within given limits.<sup>219</sup>

In the field of fisheries, when scrutinising state aid to the fisheries sector, the Commission uses guidelines specifically referring to the special position enjoyed by the ORs given the handicaps they suffer from.<sup>220</sup> A special system of compensation for the additional costs incurred as a result of the remoteness for the marketing of the fisheries products from the ORs permits special treatment of these regions. The system is extended regularly based

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217. *Commission Report on the Measures to Implement Article 299(2)*, *supra* note 113, at 13.

218. *See, e.g.*, Council Regulation 2587/2001, of 19 December 2001 Amending Regulation (EEC) No 404/93 on the Common Organisation of the Market in Bananas, 2001 O.J. (L 345) 13 (EC) (introducing tariff system).

219. *Id.* at 14.

220. Guidelines for the Examination of State Aid to Fisheries and Aquaculture, 2001 O.J. (C 19) 7. Section 2.9.5 of the Guidelines allows for a special regime of aid granted in the ORs:

Aid designed to meet the needs of outermost regions will be assessed on a case-by-case basis, having regard to the provisions of Article 299(2) of the EC Treaty [now TFEU art. 349] and the compatibility of the measures concerned with the objectives of the common fisheries policy and the potential effect of the measures on competition in these regions and in the other parts of the [Union].

on Commission assessments.<sup>221</sup> The present instrument for “offsetting the additional costs for the marketing of certain fishery products”<sup>222</sup> will apply until 2013.<sup>223</sup> As is the case with all the measures adopted on the basis of Article 349 TFEU and its predecessors, extension will be possible if needed for dealing with the permanent handicaps described in the Article.

Similarly to the aid to the fisheries industry, the concept of remoteness has been incorporated into the Guidelines on National Regional Aid, providing for more favourable rules on the assessment of the compatibility of such aid with the Internal Market,<sup>224</sup> which is now reflected in the Treaties.<sup>225</sup>

Special customs duties regimes applicable in the ORs allow for exemptions from customs duties of certain products able to assist the ORs in dealing with the permanent handicaps. The duties on the import to Canary Islands of goods for capital investment and raw materials for maintenance and processing and fisheries products are thus suspended until 31 December 2011.<sup>226</sup> The case of the Canary Islands is in no way exceptional among the ORs. In its Report the Commission specified that it is:

[w]illing to consider any other request for customs measures to assist the outermost regions and designed to offset the effects of trade policy towards non-member countries, particularly those bordering on the outermost regions, as long as such measures comply with the limits set out in Article 299(2) of the Treaty [now Art. 349 TFEU].<sup>227</sup>

In the area of transport, the ports of the ORs are automatically regarded as “of common interest and form part of the trans-European network” and are thus eligible for finance from the Cohesion fund.<sup>228</sup> In addition to the funding for ports, the possibility to impose public service obligations on the

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221. For the latest Regulation adopted in this context, see Council Regulation 791/2007, of 21 May 2007 Introducing a Scheme to Compensate for the Additional Costs Incurred in the Marketing of Certain Fishery Products from the Outermost Regions the Azores, Madeira, the Canary Islands, French Guiana and Réunion, 2007 O.J. (L 176) 1 (EC).

222. *Id.* at pmb1.

223. *Id.* art. 14.

224. Amendments to the Guidelines on National Regional Aid, 2000 O.J. (C 258) 5.

225. TFEU art. 107(3)(a).

226. Council Regulation 704/2002, Temporary Suspending Autonomous Common Customs Tariff Duties on Imports of Certain Industrial Products and Opening and Providing for the Administration of Autonomous Community Tariff Quotas on Imports of Certain Fishery Products into the Canary Islands, art. 1, 2002 O.J. (L 111) 1, 3 (EC).

227. *Report on the Implementation of Article 299(2)*, *supra* note 209, at 8.

228. Decision 1346/2001, Amending Decision No 1692/96/EC as Regards Seaports, Inland Ports and Intermodal Terminals as well as Project No. 8 in Annex III, 2001 O.J. (L 185) 1.

scheduled services to the airports serving outermost regions has also benefited the accessibility of these regions.<sup>229</sup>

All in all, special measures rooted in Article 349 TFEU are absolutely necessary to make OR status work to the benefit of the territories concerned. Although the Article does not provide any time limits for derogations, each of them should be limited in time. Such limitation does not mean, however, that the derogations should necessarily cease to apply upon the expiry of the time-limit concerned. All the instruments introducing special measures derogating from the *acquis* based on Article 349 TFEU and its predecessors require regular reassessment of the situation in each sector, which normally leads to the *prolongation* of the derogations, giving them at least *de facto* quasi-permanence.

The regulation of the legal position of the ORs in EU law is a very dynamic field, which is bound to follow the developments in the regions concerned. The recent negative to positive change in the approach endorsed by the EU with respect to the Overseas in general and the ORs in particular, leaves room for optimism that Article 349 TFEU will be used in the best possible way to attune the *acquis* to the specificity of these regions.

### III. OVERSEAS COUNTRIES AND TERRITORIES IN THE EU LAW OF THE OVERSEAS

The OCTs in the sense of Article 355(2) TFEU (formerly Art. 299(3) EC) are only those countries and territories associated with the EU mentioned in Annex II TFEU.<sup>230</sup> Clarifying the status of these territories in EU law, Article 355(2) TFEU states that “special arrangements for association set out in Part Four [TFEU] shall apply to the overseas countries and territories listed in Annex II.”<sup>231</sup> Part IV TFEU<sup>232</sup> contains a number of

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229. *Commission Report on the Measures to Implement Article 299(2)*, *supra* note 113, at 22-23.

230. TFEU Annex II includes the following: Danish, French and the Netherlands territories and the territories under the sovereignty of the UK: Greenland; New Caledonia; French Polynesia; Wallis-and-Futuna; Mayotte; Saint-Pierre-and-Miquelon; French Austral and Antarctic Territory; Aruba; the Netherlands Antilles (now divided into five separate entities separately included in the Annex. *i.e.* Bonaire, Curaçao, Saba, Sint Eustasius and Sint Maarten); Anguilla; British Virgin Islands; Cayman Islands; Montserrat; the Turks and Caicos Islands; the Falkland Islands; Saint Helena and its Dependencies; British Indian Ocean Territory (Chagos archipelago); Pitcairn; the South Sandwich Islands and Southern Georgia; British Antarctic Territory; and the Bermuda Islands. On the situation of the OCTs *vis-à-vis* EU law in their evolution see generally Custos, *supra* note 11; ZILLER, *LES DOM-TOM*, *supra* note 27. For the initial French perspective, see J.L. Gautron, *La situation des DOM et des TOM au regard de la CEE*, 3 ANNUAIRE DU TIERS MONDE 141. A number of the overseas territories and regions of the UK not included in the list and not specifically referred to in TFEU art. 355 are, by virtue of TFEU art. 355(2), para. 2, totally excluded from the scope of the Treaties—thus unable to claim OCT or any other status in EU law.

231. TFEU art. 355(2).

232. TFEU arts. 198–204.

provisions specifying the limits of the application of the core of the Internal Market *acquis* in the OCTs, as well as providing a legal basis under Article 203 TFEU for designing and managing further rules of association.

It is important in this regard not to confuse the association of the OCTs with the EU and the association agreements concluded with the third countries, since the OCTs' association merely refers to a system of secondary EU law which governs the specific rules of application of EU law in the territories listed in Annex II TFEU. Consequently, the OCTs' association does not entail any negotiations or the signing of any agreements with the OCTs themselves. All the day-to-day rules of association are stated in a Decision adopted on the basis of Article 203 TFEU, which simply requires the Council to act unanimously on the proposal of the Commission—no negotiations, diplomatic games, and ratifications are required.<sup>233</sup>

#### A. The Main Rules of Association

Part IV TFEU established the main rules of association. In the opening article of this part,<sup>234</sup> the goals of association are outlined in the following terms:

The purpose of association shall be to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Union as a whole.<sup>235</sup>

In accordance with the principles set out in the preamble to this Treaty, association shall serve primarily to further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire.<sup>236</sup>

The association regime is currently governed by Council Decision 2001/822/EC<sup>237</sup>—adopted on the basis of Article 187 EC (now Article 203 TFEU)—and Secondary law adopted on the basis of this decision.<sup>238</sup>

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233. The OCTs are united in the Overseas Countries and Territories Association (OCTA), which might provide an opportunity for their voice to be heard, should such games be required. For an analysis, see Baetens, *supra* note 71, at 383.

234. TFEU art. 198.

235. TFEU art. 198, para. 2.

236. TFEU art. 198, para. 3.

237. Council Decision 2001/822, On the Association of the Overseas Countries and Territories with the European Community, 2001 O.J. (L 314) 1 (EC). For a commentary see Ziller, *Les outre-mers face à l'intégration européenne et à la mondialisation—L'association des pays et territoires d'outre-mer à la Communauté européenne*, *supra* note 44, at 133, 134.

238. See, e.g., Commission Regulation 1424/2007, Amending Regulation (EC) No 2304/2002 Implementing Council Decision 2001/822/EC on the Association of the Overseas Countries and Territories with the European Community and Allocating the Indicative Amounts under the 10th European Development Fund, 2007 O.J. (L 317) 38 (EC).

Part IV TFEU provides for a number of important principles guiding the association. The asymmetry in the EU–OCTs relationship emerges as the key element of Part IV TFEU regime. The relations between the Union and the OCTs associated with it are far from equal—preference always being given to the OCTs—which can be illustrated by a number of examples, ranging from free movement of goods to free movement of persons.

Therefore, while the “Member States . . . apply to their trade with the countries and territories the same treatment as they accord each other pursuant to the Treaties,”<sup>239</sup> the OCTs merely “apply to [their] trade with the Member States and with the other countries and territories the same treatment as that which [is] applie[d] to the European State with which it has its special relations.”<sup>240</sup> Consequently, while the “[c]ustoms duties on imports into the Member States of goods originating in the countries and territories [are] prohibited,”<sup>241</sup> the OCTs themselves are empowered to “levy customs duties which meet the needs of their development and industrialisation or *produce revenue for their budgets*.”<sup>242</sup> The latter freedom is limited by the principle of non-discrimination,<sup>243</sup> since such duties “may not exceed the level of those imposed on imports of products from the Member State with which each country or territory has special relations.”<sup>244</sup> The ECJ explained that “although the OCTs are countries and territories which have special links with the [EU], they do not, however, form part of the [Union], and free-movement of goods between the OCTs and the Community does not exist unrestrictedly at this stage.”<sup>245</sup> As a result of this approach, the OCTs enjoy much more freedom in economic affairs than the ORs. In one example, unlike the ORs, the OCTs were allowed more flexibility in the field of taxation and had no trouble levying *octroi de mer*-like taxes.<sup>246</sup>

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239. TFEU art. 199(1). This provision does not mean, however, that unrestricted free-movement of goods exists between the Union and the OCTs. *See generally* Tryfonidou, *supra* note 169. *See also* Cees T. Dekker, *The Ambit of the Free Movement of Goods under the Association of Overseas Countries and Territories*, 23 EUR. L. REV. 272 (1998); R.H. Lauwaars & M.C.E.J. Bronckers, *Passen communautaire origineregels in het handelsverkeer met de Landen en Gebieden Overzee?*, in MET HET OOG OP EUROPA: DE EUROPESE GEMEENSCHAP, DE NEDERLANDSE ANTILLEN EN ARUBA 34 (1991).

240. TFEU art. 199(2).

241. TFEU art. 200(1). In practice, however, this prohibition is not absolute, since “originating” can know restrictive interpretations. *See* Case C-310/95, *Road Air BV v. Inspecteur der Invoerrechten en Accijnzen*, 1997 E.C.R. I-2229.

242. TFEU art. 200(3) (emphasis added). *But see* TFEU art. 200(2) (“Customs duties on imports into each country or territory from Member States or from the other countries or territories shall be prohibited in accordance with the provisions of Article 30.”).

243. Both direct and indirect discrimination “either in law or in fact” between imports from various Member States is prohibited. TFEU art. 200(5).

244. TFEU art. 200(3), para. 2.

245. Case C-390/95 P, *Antillean Rice Mills NV v. Comm’n*, 1999 E.C.R. I-769, ¶ 36.

246. Case C-260/90, *Leplat v. French Polynesia*, 1992 E.C.R. I-643. Ziller, *L’Union Européenne et l’outre-Mer*, *supra* note 27, at 149.

As far as the free movement of persons goes, it only applies to the movement of EU citizens *from* the OCTs to the EU, not vice versa.<sup>247</sup> This provides another example of asymmetry in the EU–OCT interaction according to the current OCT *acquis*. Freedom of establishment does apply.<sup>248</sup> While derogations are theoretically possible under Article 203 TFEU, as long as they are adopted by the Council unanimously and are grounded in the principles of the treaties,<sup>249</sup> such derogations will only apply in the OCTs, not in the EU in Europe, which means that the same asymmetry observations valid in the context of free movement of persons and goods apply to establishment in the same way.

#### B. ECJ out of line with the spirit of the law?

Although the position of the Court interpreting the essence of the OCTs' association with the EU is very restrictive—its oft-repeated standpoint consists in underlining the position that “failing express provisions, the general provisions of the Treaty do not apply to [such] countries and territories”<sup>250</sup>—this is likely to change.

In addition to the obvious message stemming from the fact that the Treaties are silent on any “principle of non-application” of the general EU *acquis* in the OCTs, an academic consensus championed by Jacques Ziller<sup>251</sup> to treat Article 355(2) TFEU and Part IV TFEU as *lex specialis vis-à-vis* the rules found elsewhere in the Treaties—not as *all the law* applicable to the OCTs<sup>252</sup>—has been arrived at, as exemplified above.<sup>253</sup> The reasons to be suspicious of the sustainability of the Court's approach are numerous and

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247. For the analysis of this issue, see Kochenov, *supra* note 29, at 211.

248. TFEU art. 199(5). The provision contains a direct reference to the provisions of the mainstream *acquis* allowing for derogations on the basis of TFEU art. 203. For an analysis of this freedom see Iris Goldner Lang and Tamara Perišin, *Free Movement of Services and Establishment in the Overseas*, in EU LAW OF THE OVERSEAS, *supra* note 5, at 179; Daniël S. Smit, *The Position of the EU Member States' Associated and Dependent Territories Under the Freedom of Establishment, the Free Movement of Capital and Secondary EU Law in the Field of Company Taxation*, 39 INTERTAX 40 (2011).

249. TFEU art. 203; Joined Cases T-480 & 483/93, *Antillean Rice Mills NV v. Comm'n*, 1995 E.C.R. II-2305, ¶¶ 92-93.

250. Case C-260/90, *Leplat v. French Polynesia*, 1992 E.C.R. I-643, ¶ 10; Case C-110/97, *Netherlands v. Council*, 2001 E.C.R. I-8763, ¶ 49; Case C-300/04, *Eman & Sevinger v. College van Burgemeester en Wethouders van Den Haag*, 2006 E.C.R. I-8055, ¶ 46.

251. Ziller, *Outermost Regions, Overseas Countries and Territories and Others after the Entry into Force of the Lisbon Treaty*, in EU LAW OF THE OVERSEAS, *supra* note 5, at 73. See also Ziller, *Flexibility in the Geographical Scope of EU Law: Diversity and Differentiation in the Application of Substantive Law on Member States' Territories*, *supra* note 11, at 119 (arguing in this direction well before the entry into force of the Treaty of Lisbon).

252. Ziller, *Outermost Regions, Overseas Countries and Territories and Others after the Entry into Force of the Lisbon Treaty*, in EU LAW OF THE OVERSEAS, *supra* note 5, at 73.

253. See *supra* Part II.



vary from the obvious conclusions to be drawn from the careful reading of the text of Article 355(2) TFEU to taking into account the logic of the integrated approach to territory, embraced by the Treaty of Lisbon through Article 52 TEU, as well as the need to pay due regard to the history of the OCT status<sup>254</sup> and the interplay between the scopes *ratione loci* and *ratione personae* explored elsewhere.<sup>255</sup> These factors point to the fact that the position currently embraced by the ECJ not only fails to capture the current state of affairs in OCT–EU relationship—as much more EU law *de facto* applies to their association than is contained in Part IV TFEU—but is also hardly faithful to the spirit of the law.

Therefore, although seemingly falling outside the scope of the mainstream EU *acquis*—which is the only conclusion to be made based on the unequivocal language of the ECJ—the OCTs are nevertheless under growing EU law influence. This is the case not so much because of the wording of Part IV TFEU, which applies to them according to Article 355(2) TFEU, but simply by virtue of the very composition of the EU legal system. In other words, agreeing with Jacques Ziller, *only Part III TFEU will not apply to them*.<sup>256</sup> Only the general euro-*acquis* would be an obvious exception.<sup>257</sup>

The *Eurafrica*-inspired rationale behind the creation of this special group of territories was to exclude them, for a time at least, from the effects of the Internal Market. Consequently, in accordance with Article 3 of the Customs Code<sup>258</sup> they are not part of the Customs Territory of the Union. The application of the other parts of the *acquis* is growing on a constant basis. In *Antillean Rice Mills*, the CFI (then the Court of the First Instance, now the General Court) acknowledged that the regime of association is not shaped exclusively by the rules of Part IV TFEU (then the EC) and stated that the general principles of European law and the objectives of integration should apply equally to the OCT association regime.<sup>259</sup> The judges stressed that “the reference to the ‘principles set out in this Treaty’ is not merely to the principles set out in Part Four of the Treaty but to all the principles set out in the Treaty, in particular those listed in Part One, entitled ‘Principles.’”<sup>260</sup> The ECJ concurred.<sup>261</sup> Interpreting the association described in Part IV

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254. See Custos, *supra* note 11.

255. See Kochenov, *supra* note 29.

256. Ziller, *Flexibility in the Geographical Scope of EU Law: Diversity and Differentiation in the Application of Substantive Law on Member States’ Territories*, *supra* note 11, at 119. See also discussion *supra* Part II.

257. See Fabian Amténbrink, *EMU and the Overseas*, in EU LAW OF THE OVERSEAS, *supra* note 5, at 271.

258. Council Regulation 2913/92, art. 3, 1992 O.J. (L 302) 3 (EEC) (as amended).

259. TFEU art. 203 makes a direct reference to “the principles set out in the Treaties.”

260. Joined Cases T-480 & 483/93, *Antillean Rice Mills NV v. Comm’n*, 1995 E.C.R. II-2305, ¶¶ 92-93.

261. Case C-390/95 P. *Antillean Rice Mills NV v. Comm’n*, 1999 E.C.R. I-769, ¶ 37 (explaining that when adopting Decisions shaping the association, the Council is supposed to

TFEU in a legal vacuum and out of the context of the general principles contained in the EU and TFEU Treaties and unwritten principles of law would be counter-productive and legally unsound, since Part IV TFEU is engrained in the coherent system of EU law, forming an organic part of an infinitely more complicated whole which cannot be dismissed as irrelevant without threatening to undermine the essence of association.

Moreover, going beyond the general principles of EU law, as a consequence of the fact that the absolute majority of the OCTs' inhabitants are European citizens,<sup>262</sup> the scope of EU law applicable to these territories is much greater than what Part IV TFEU describes.<sup>263</sup> This is because all the limitations of the scope of EU law imposed by Article 355 TFEU are uniquely territorial in nature and cannot be construed as capable of also restraining the personal scope of the law. In other words, not limited by Article 355 TFEU, the scope *ratione personae* of EU law plays the key role in the EU Law of the Overseas, including the *acquis* regulating the OCT status.<sup>264</sup> Consequently, Part II TFEU (Non-Discrimination and Citizenship of the Union), which applies to persons and has only an indirect link with territory,<sup>265</sup> applies also in the OCTs, as clarified by the ECJ in *Eman en Sevinger*.<sup>266</sup> Other Parts of the Treaties also obviously apply—and it is absolutely necessary, sooner or later, to admit this reality. No reference from Part IV TFEU is needed for the provisions on Institutions (Title III TEU, Part VI TFEU) or for Part VII TFEU on the General and Final Provisions to govern, even if indirectly, the legal position of the OCTs. Indeed, to take the Institutions as an example, the Minister representing in the Council of the Member State with which a particular OCT is connected is—as happens in numerous cases—also their (*i.e.* OCT-relevant) Minister. Moreover, when the inhabitants of the OCTs vote in the European Parliament elections,<sup>267</sup> how is it possible to state that the provisions on the rules of formation and the powers of the EP do not apply to them? Moreover, the fact that, as the ECJ agreed, the courts of the OCTs can be regarded as courts or tribunals of a Member State in the sense of Article 267

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take into account not only the principles of Part IV TFEU, but also other principles of the Treaties).

262. Kochenov, *supra* note 29, at 209.

263. The EU's Overseas will be increasingly integrated into the scope of EU law given the rapid rise in the importance of EU citizenship provisions for the construction of such scope. Dimitry Kochenov & Sir Richard Plender, *EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text*, 37 Eur. L. Rev. (2012, forthcoming).

264. See Dimitry Kochenov, *Regional Citizenships in the EU: An Example of the Åland Islands and New Caledonia*, 35 Eur. L. Rev. 307 (2010).

265. Kochenov, *supra* note 29, at 211.

266. Case C-300/04, *Eman & Sevinger v. College van Burgemeester en Wethouders van Den Haag*, 2006 E.C.R. I-8055, ¶ 72.

267. For the analysis of the political rights of OCTs inhabitants with EU citizenship, see Kochenov, *supra* note 29, at 216.

TFEU (formerly Article 234 EC),<sup>268</sup> which provides another argument for treating the position embraced by the ECJ with deep suspicion. *Tout court*, it is simply impossible to claim at this point that Part IV TFEU is the only part of the Treaties to apply to the OCTs, rhetoric notwithstanding. Crucially, asymmetry remains the main principle of association, which is entirely in line with the goals of association set out in Article 198 TFEU.

In short, agreeing with Professor Ziller, while Part III TFEU does not apply in full, as the majority of derogations contained in Part IV TFEU actually concern the provisions of the mainstream *acquis* on the four freedoms and the Internal Market, other parts of the Treaties should be deemed to have at least potential legal effects with regard to the situation of the OCTs. Going even further along the path of the integrationalist vision of the OCTs, Dominique Custos is absolutely right that, notwithstanding the Part IV TFEU derogations, it is possible to speak of the application of the four freedoms to the OCTs,<sup>269</sup> some of them virtually unrestrictedly.<sup>270</sup>

#### IV. TERRITORIES *SUI GENERIS* IN THE EU LAW OF THE OVERSEAS

In addition to the ORs and OCTs, EU law applies in the most exceptional manner in a number of territories of the Member States not covered by these statuses. The situation of such territories, where profoundly atypical application of EU law is not based on Article 355(1) or (2) TFEU, is joined here in a category of *sui generis* territories. This group covers a number of territories where the degree of application of EU law varies from virtually full (territorial) non-application<sup>271</sup> to significant inclusion into the scope of the *acquis*.<sup>272</sup>

The legal regime of the application of the *acquis* to the *sui generis* territories is regulated by Article 355(3)–(5) TFEU, alongside the other primary law of the Union. The TFEU thus incorporates specific provisions limiting the application of EU law to the Channel Islands,<sup>273</sup> the Isle of Man<sup>274</sup> and the Åland Islands,<sup>275</sup> and contains a list of the territories to which Community law does not apply, including the Færø Islands<sup>276</sup> and

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268. Joined Cases C-100 & 101/89, *Kaefer & Procacci v. French State*, 1990 E.C.R. I-4647, ¶¶ 7, 9-10; Broberg, *supra* note 11, at 138; Kochenov, *supra* note 3, at 253-54.

269. See Custos, *supra* note 11, at 108.

270. For detailed analysis of the application of specific areas of EU law in the Overseas, see EU LAW OF THE OVERSEAS, *supra* note 26.

271. E.g., the Færø Islands. See TFEU art. 355(5)(a).

272. E.g., Gibraltar or the Åland Islands. See TFEU arts. 355(3) & (4).

273. TFEU art. 355(5)(c).

274. *Id.*

275. TFEU art. 355(4).

276. TFEU art. 355(5)(a). The Islands are willing to rethink their status. See Helena Spongenberg, *Faro Islands Seek Closer EU Relations*, EUOBSERVER (Oct. 8, 2007), <http://euobserver.com/24/24907>.

the UK Sovereign Base Areas in Cyprus (SBAs).<sup>277</sup> Some relevant sections of Article 355 TFEU contain references to the specific provisions of the Acts of Accession, which entered into force at the moment of the accession to the Union of the Member States in charge of particular *sui generis* territories.<sup>278</sup> However, a direct reference to the provisions of the Treaties of Accession limiting the extent to which the *acquis* applies in certain territories should not necessarily be contained in the TFEU, since the primary law status of such treaties is undisputed. Moreover, even failing to mention a territory in Article 355 TFEU directly does not exclude the possibility of a *sui generis* status for it. Examples of Gibraltar—which is covered by Article 355(3) TFEU—or the Holy Mount Athos—covered by a Declaration Appended to an Act of Accession<sup>279</sup>—are cases in point.

The *de facto* disapplication of either particular elements or even the whole body of the *acquis* can also stem from the particular circumstances in which a Member State finds itself, especially when unable to exercise sovereignty over the whole state territory, which is the case of the Republic of Cyprus, for instance.<sup>280</sup> The example of Cyprus is used more in the legal comparative vein, however, as it would be somewhat unjust to add the so-called Turkish Republic of Northern Cyprus (TRNC) on the list of the

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277. TFEU art. 355(5)(b). The exceptional status of the Sovereign Base Areas is related to the non-economic nature of the British presence on Cyprus, as clarified in the Joint Declaration on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus, appended to the 1972 Treaty of Accession, *supra* note 38. For an analysis see, e.g., Stéphanie Lahlé Shaelou, *The Principle of Territorial Exclusion in the EU: SBAs in Cyprus—A Special Case of Sui Generis Territories in the EU*, in EU LAW OF THE OVERSEAS, *supra* note 5, at 153.

278. The Treaties of Accession and Acts of Accession (making integral parts of the former) regulate the special status of Gibraltar. Accession to the European Communities of the Kingdom of Denmark, Ireland, and the United Kingdom of Great Britain and Northern Ireland, Jan. 22, 1972, 1972 O.J. (L 73) 5 (First Accession Treaty); Spain and Portugal Accession Treaty, *supra* note 80, art. 25 (explaining that the Canary Islands and Ceuta and Melilla may be decided to be included the Community).

Protocols appended to the Acts of Accession also play an important role in the delimitation of the territorial scope of application of the Treaties. See, e.g., Protocols No. 2 & 3 to the 1972 Treaty of Accession, *supra* note 38; Protocol No. 2 to the 1985 Act of Accession Concerning the Canary Islands and Ceuta and Melilla, Nov. 15, 1985, 1985 O.J. (L 302) 400; Protocol No. 3 on the Sami People, *supra* note 38. The same applies to the Declarations appended to the Acts of Accession. See, e.g., Joint Declaration on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus, appended to the 1972 Treaty of Accession, *supra* note 38; Declaration on Mount Athos, *supra* note 24.

279. Declaration on Mount Athos, *supra* note 24.

280. On the special position of the Cypriot territories not controlled by the government of Cyprus, see, for example, NIKOS SKOUTARIS, *THE CYPRUS ISSUE: THE FOUR FREEDOMS IN A MEMBER STATE UNDER SIEGE* (2011); STÉPHANIE LAULHÉ SHAELOU, *THE EU AND CYPRUS: PRINCIPLES AND STRATEGIES OF FULL INTEGRATION* (2010).

territories *sui generis* in the chosen sense of the term.<sup>281</sup> Former examples of Hong Kong and Macao are equally not without interest.<sup>282</sup>

All in all, the most important conclusion to be drawn from the very existence, as well as particular legal configuration of the modalities of *sui generis* application of the *acquis* in some Member States' territories is that primary law of the Union provides enough flexibility for accommodating a broad array of far-reaching derogations, meeting the specific needs of those territories which are not satisfied with OR or OCT statuses. In other words, for the Member States it is theoretically possible to negotiate "in-between" statuses for specific territories virtually from scratch, should they be able to convince their other partners that there is sufficient need to deviate from the existing legal solutions.

#### V. EU LAW OF THE OVERSEAS AND OPT-OUTS AND DEROGATIONS FROM THE *ACQUIS*

The derogations and opt-outs from the *acquis* are essential in shaping the legal essence of the special statuses granted to the Overseas in EU law. In fact, the EU Law of the Overseas is nothing but a law of derogations: it covers the special system of rules governing the adaptation of the familiar norms of the *acquis* to the specificities of the Overseas context.

Assessed from this vantage point, OCT status can be regarded as a derogation in itself, as Jacques Ziller rightly noted,<sup>283</sup> given that on the basis of Article 355(2) TFEU such countries and territories do not normally fall within the scope of EU law in its classical sense, as Part IV TFEU applies, supplying a derogatory *lex specialis* for the ordinary provisions of the *acquis* contained in Part III TFEU.

The same can be said about all the *sui generis* statuses granted to Member States' territories in EU law. The presumption is always absolutely clear: unless there is an unequivocal statement to the contrary, EU law, including the principle of the inclusive unitary interpretation of Member State territory, will be applicable to the whole of the territory of each of the Member States in full. In other words, even the total non-application of EU law, which can be witnessed in the context of some *sui generis* statuses,

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281. Nikos Skoutaris, *The Status of Northern Cyprus Under EU Law: A Comparative Approach to the Territorial Suspension of the Acquis*, in EU LAW OF THE OVERSEAS, *supra* note 5, at 401.

282. For an analysis of the dubious legal position of Macao and Hong Kong in Community law before these territories were transferred to China (also differentiating between the *sui generis* statuses applicable to these territories), see Karagiannis, *supra* note 19, at 338 n.26. See also Brian Hook & Miguel Santos Neves, *The Role of Hong Kong and Macau in China's Relations with Europe*, 169 CHINA Q. 108 (2002).

283. Ziller, *Outermost Regions, Overseas Countries and Territories and Others after the Entry into Force of the Lisbon Treaty*, in EU LAW OF THE OVERSEAS, *supra* note 5, at 73.

such as that enjoyed by the Færøe Islands,<sup>284</sup> for instance, is still to be regarded as a derogation or opt-out granted in EU law. Such opt-outs are not unilateral and require the consent of all the Member States to address the starting presumption of the application of the *acquis* in full.

Similarly, the OR status, even though it is rooted in the principle of the application of the *acquis* in the ORs, only acquires its meaning once derogations from the main principle are thoroughly considered. In fact, OR status has only acquired legal substance as a result of the articulation of the rules on how far and to what extent the *acquis* can be deviated from—which is the sole aim and purpose of Article 349 TFEU in the first place. The possibility to derogate is at the core of each of the statuses in question and forms the essence of the EU Law of the Overseas.

In this context, a distinction should be made between the derogations in primary law, including total opt-outs, and derogations in secondary law. While the former can be permanent and it is up to the Member States to establish how far such derogations will actually go, the latter are quite different, as the approach to them is generally much stricter. Accordingly, following the Court's case law, the reading of derogations should be as narrow as possible<sup>285</sup> and their strict application should apply to the Member State subject to the derogation, other Member States<sup>286</sup> and to the Institutions equally.<sup>287</sup> These key attributes of derogations, whatever legal basis they have and whatever goals they are set out to achieve, remain largely intact also in the context of the Overseas. All derogations must deviate from the *acquis* as little as possible, and only as far as it is demonstrably necessary to achieve their specific goals. Moreover, they must be time-bound. There is thus no possibility of derogating from the *acquis* permanently under Article 349 TFEU, since, according to the Commission, the Treaty “does [not] provide a generalised ‘opt-out’ [for the ORs],”<sup>288</sup> which is a position also reflected in the ECJ's *Chevassus-Marche* case law.<sup>289</sup>

The nature of derogations may vary. In general, derogations can create legal consequences of different nature, depending on the type of the derogation in force. Four main types of derogations can be distinguished in this regard: opt-outs granted in the primary law of the Union (*e.g.* those included into the Treaty of Accession signed with an incoming Member State possessing special territories); dynamic derogations, rooted in primary

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284. TFEU art. 355(5)(a).

285. *E.g.*, Case 58/83, *Comm'n v. Hellenic Republic*, 1984 E.C.R. 2027; Case 192/84, *Comm'n v. Hellenic Republic*, 1985 E.C.R. 3967.

286. *E.g.*, Case 77/82, *Peskegloglou v. Bundesanstalt für Arbeit*, 1983 E.C.R. 1085.

287. *E.g.*, Case 11/82, *Piraiki-Patraiki v. Comm'n*, 1985 E.C.R. 207, ¶¶ 24-46.

288. *Commission Report on the Measures to Implement Article 299(2)*, *supra* note 113, at 31.

289. *See generally* Case C-212/96, *Paul Chevassus-Marche v. Conseil Régional de la Réunion*, 1998 E.C.R. I-743.



EU law, but essentially depending on the assessment of the situation in place in the regions enjoying a special status (*e.g.* when the Treaty of Accession allows for the broadening of the scope of derogations, or, on the contrary, narrowing their scope or shortening the time of applicability of derogations); derogations arising from secondary EU law and enabled by the use of the provisions on the special status of the Overseas as a legal basis (*e.g.* the ones contained in the Overseas Association Decisions and POSEI programmes); and derogations in secondary law not based on the special provisions in the Treaties on the Overseas, but *de facto* aiming to achieve objectives very similar or identical to those spelled out in the Overseas provisions.

Opt-outs in primary law enjoy the most far-reaching effects among all the four types of derogations. They are capable of altering the very nature of the *acquis* applicable to a particular territory and—by virtue of being part of the Primary law—cannot be challenged in Court.<sup>290</sup> The non-application of Part III TFEU in the OCTs, or the placement of the Færø Islands outside the framework of the Treaties are good examples of such opt-outs. Unlike any other derogations, these are permanent: it takes a treaty revision to change them.

Dynamic derogations in primary law function differently. They allow for the reassessment of the term of their validity upon expiry of a certain period contained in the derogating measure. The special legal regime applying to the Nordic territories inhabited by the Sami people, granted by virtue of Protocol No. 3 to the 1994 Act of Accession,<sup>291</sup> illuminates how such derogations function. The Protocol established an ethnicity-based monopoly on the reindeer breeding in those regions,<sup>292</sup> the extent of which can be altered in the future to exclude other traditional Sami activities from the scope of application of Community law, as long as it is deemed necessary for the preservation of their culture.<sup>293</sup> An example of the same type of derogations applied in the context of the Overseas are the derogations contained in the Act of Accession that enlarged the Communities to incorporate the Iberian states, which allowed for the exclusion of the Canary Islands from the *acquis* and opened the way to reverse this position by Secondary law.<sup>294</sup> Consequently, the Canary Islands were included into the

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290. Joined Cases 31 & 35/86, *Levantina Agrícola Indus. SA (Laisa) & CPC España SA v. Council*, 1988 E.C.R. 2285, ¶ 22. The Court can only *interpret* the provisions of the Treaties of Accession, Acts of Accession and Annexes to the Acts of Accession. *See also*, *e.g.*, Case C-355/97, *Landesgrundverkehrsreferent der Tiroler Landesregierung v. Beck Liegenschaftsverwaltungsgesellschaft mbH*, 1999 E.C.R. I-4977. On the practical functioning of such derogation in the context of the recent enlargement of the Union, see Dimitry Kochenov, *European Integration and the Gift of the Second Class Citizenship*, 13 MURDOCH U. ELECTRONIC J. L. 209 (2006).

291. *See* Perrot & Miatti, *supra* note 38, at 672-76.

292. Protocol No. 3 on the Sami People, *supra* note 38, art. 1.

293. *Id.* art. 2. *See also* Perrot & Miatti, *supra* note 38, at 674.

294. Spain and Portugal Accession Treaty, *supra* note 80, art. 25(4).

scope of EU law and the customs territory of the Union by Council Regulation 1911/91.<sup>295</sup> This regulation started the process of integration of the Canary Islands into the EU and ultimately resulted in the grant of OR status to the Islands.

Derogations in secondary law, based on the specific provisions in the Treaties on the Overseas, have a much more dynamic character than primary law opt-outs and derogations. In the context of the ORs, such derogations are based on the Council Decisions that have Article 349(1) TFEU as a legal basis, while in the context of the OCTs, such a special derogatory regime is established by Council Decisions adopted on the basis of Article 203 TFEU. The goals of such derogations would be to fully utilise the potential of the special statuses in question to meet the needs of the Overseas. Controversies can arise, with respect to the extent to which the Council can employ the special legal bases in the TFEU Treaty in derogating from the main rules of the *acquis* designed for each of the particular statuses in question. Interestingly, although neither Article 349(1) nor Article 203 TFEU spell out clear limits for Council action, a systemic reading of the Treaties along with the relevant case law makes it absolutely clear that those limits are there and that they should always be taken into account. Although the tension over the possible depth of derogations was somewhat relieved by *Chevassus-Marche* and other relevant cases in the context of the ORs, in the context of the OCTs such clarification is yet to come. Amusingly, the Overseas Association Decisions seem to derogate even from primary law, which is hardly acceptable. The strangest example is placing Bermuda, a British OCT included in Annex II TFEU, outside the scope of Association.<sup>296</sup> The legality of this approach is very questionable indeed.<sup>297</sup> Importantly, the derogations based on secondary law are not reshaping the essence of the *acquis*, like the primary law opt-outs, but are rooted in the spirit and the letter of the *acquis* itself, which indicates their different nature, compared with the first two types of derogations, and subordinates them *vis-à-vis* the primary law of the Union.

Sometimes derogations of entirely different natures can be hardly distinguished from each other due to the similarities in the legal situations they create. The *octroi de mer* levied in the *DOM* thus used to have exactly the same practical consequences for the free-movement of goods as the *arbitrio insular—tarifa especial* levied by the Spanish authorities on the Canary Islands. However, due to their different nature, the legal status of the two taxes differed entirely. The French one was based on a Council

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295. Council Regulation 1911/91, of 26 June 1991 on the Application of the Provisions of Community Law to the Canary Islands, 1991 O.J. (L 171) 1 (EEC).

296. See Council Decision 2001/822, On the Association of the Overseas Countries and Territories with the European Community, pmbl. para. 22, 2001 O.J. (L 314) 3 (EC).

297. E.g., Karagiannis, *supra* note 19, at 338-39 n. 27.

Decision adopted on the legal basis of the former Article 227(2) EEC<sup>298</sup> and was thus an attempt to use a special legal basis provided in the EEC Treaty for the accommodation of the needs of the ORs. The Spanish one could be levied as part of a transitional regime applied to Spain following its accession to the EC and could remain in force until 31 December 2001.<sup>299</sup> It was thus used to better prepare Spain for the eventual complete embrace of the *acquis*. Consequently, the Court could strike down<sup>300</sup> and later adopt a milder position<sup>301</sup> *vis-à-vis* the French tax, but the issue of the validity of a Spanish tax, which had identical implications for the free-movement of goods, could not even be raised before it.

Not all the derogations aimed at meeting the special needs of the Overseas are based on the specific provisions designed for that purpose in the Treaties. This is particularly the case of the ORs. The use of multiple other legal bases both in Primary and Secondary EC law is possible. A virtually infinite number of examples can be provided, ranging from the rules on the operation of subsonic private jets,<sup>302</sup> the definition of marine waters for the purposes of the marine environmental policy,<sup>303</sup> to the regulation of electricity markets.<sup>304</sup> What unites all the known examples is the link made between the derogation and the specificity of the region or territory overseas where such derogation applies.

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298. Council Decision 89/688/EEC, of 22 December 1989 Concerning the Dock Dues in the French Overseas Departments, 1989 O.J. (L 399) 46 (EC). The dock dues system presently in force is based on Council Decision 2004/162, of 10 February 2004 Concerning the Dock Dues in the French Overseas Departments and Extending the Period of Validity of Decision 89/688/EEC, 2004 O.J. (L 52) 64 (EC). This decision has EC Treaty art. 299(2) (now TFEU art. 349(1)) as a legal basis.

299. Protocol No. 2 of the Spain and Portugal Accession Treaty, *supra* note 80, art. 6.

300. Joined Cases C-363 & 407/93, 408/93, 409/93, 410/93 & 411/93, René Lancry v. Direction Générale des Douanes, 1994 E.C.R. I-3978.

301. *See generally* Case C-212/96, Paul Chevassus-Marche v. Conseil Régional de la Réunion, 1998 E.C.R. I-743.

302. Directive 2006/93/EC, of the European Parliament and of the Council of 12 December 2006 on the Regulation of the Operation of Aeroplanes Covered by Part II, Chapter 3, Volume 1 of Annex 16 to the Convention on International Civil Aviation, Second Edition (1988), art. 2, 2006 O.J. (L 374) 1, 2 (codified version) (not applicable to *DOM*).

303. Directive 2008/56, of the European Parliament and of the Council of 17 June 2008 on Establishing a Framework for Community Action in the Field of Marine Environmental Policy, art. 3(1), 2008 O.J. (L 164) 19, 24 (EC) (putting the *DOM* on equal footing with the OCTs).

304. *See, e.g.*, Commission Decision 2004/920, On a Derogation from Certain Provisions of Directive 2003/54/EC of the European Parliament and of the Council Concerning the Archipelago of the Azores, 2004 O.J. (L 389) 31 (EC). The Derogation in question is based on Directive 2003/54/EC, Concerning Common Rules for the Internal Market in Electricity and Repealing Directive 96/92/EC, art. 26(1), 2003 O.J. (L 176) 51. Commission Decision 2004/920/EC, pmb. para. 4, 2004 O.J. (L 389) 31 (referencing the handicaps mentioned in EC Treaty art. 299(2) (as in effect 2002) (now TFEU art. 349)).

All in all, the EU Law of the Overseas is clearly the law of derogations and should be regarded as such, the Overseas being firmly rooted in the letter and the spirit of the *acquis* unless the contrary is provided for.

## VI. CHANGING THE STATUS OF AN OVERSEAS REGION OR TERRITORY

Having provided for two main legal statuses for the Overseas in addition to special accommodations for the *sui generis* territories, the Treaties obviously had to be able to accommodate the desire of particular overseas regions and territories to change status in EU law. That such change can be required is not an overstatement. Moreover, the order of importance of the status change will vary. Three different situations can be distinguished in this regard.

The simplest among them concerns the reflection in the Treaties of the change in the constitutional structure of the Member State, which does not actually entail a status change for the particular territory in EU law. Therefore, when Saint-Barthélemy and Saint-Martin became separate entities in French law,<sup>305</sup> independent of the DOM Guadeloupe, it became necessary to have them included in the list of what is now Article 355(1) TFEU, even though their OR status was not at issue: after the entry into force of the Treaty of Lisbon, those territories simply became ORs in their own right.

More interesting examples concern the change of the status of an overseas territory from OR to OCT or vice versa, driven by a belief that the new status will be better suited to guaranteeing the well-being of the population of the territory in question. Mayotte, a French OCT located between Madagascar and the African continent is currently on the way to OR status, to which end a special Declaration has been appended to the Treaty of Lisbon.<sup>306</sup> Saint-Barthélemy, endowed with OR status upon splitting from Guadeloupe, demonstrated an intention to move in the opposite direction, towards the acquisition of OCT status.<sup>307</sup> To provide another example, following the splitting of the Federation of the Netherlands Antilles, the so-called BES-eilanden (i.e. Bonaire, Sint-Eustasius, and Saba) ended up incorporated within the constitutional structure of the European part of the Kingdom of the Netherlands, which could eventually result in pressure to change status from the current OCT to OR too.<sup>308</sup> Currently, it has been decided to wait five years before reopening

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305. See, e.g., André Oraison, *Le statut nouveau de collectivité d'outre-mer des îles de Saint-Barthélemy et de Saint-Martin*, in *REVUE DU DROIT PUBLIC*, 154 (2008).

306. Declaration No. 43 on Article 355(6) of the TFEU, 2010 O.J. (C 83) 351. See also its predecessor, Declaration on Article IV-440(7), appended to the Treaty Establishing a Constitution for Europe, 2004 O.J. (C 310) 463 (never ratified) [hereinafter TCE].

307. Oraison, *supra* 305, at 164.

308. Discussions to this end are ongoing. See, e.g., Hoogers, *supra* note 107; F.H. van den Brug, *De BES-eilanden van buiten de Europese Unie naar binnen de Europese Unie*

the issue.<sup>309</sup> Such status change requires a lot of preparation, since the legal position of an OR, where the *acquis* applies by default, is quite different from that of an OCT, where derogations constitute the main rule. Consequently, the territories willing to undergo the change need to be adequately prepared for what lies ahead.<sup>310</sup> The same can be said about changing from OR to OCT status, however. The challenges here are different, since the territory in question will need to be capable of handling a greater measure of autonomy in EU law and thus needs to be adequately prepared for the responsibilities and the challenges accompanying a greater degree of self-government.

It can also be foreseen that a third, more complicated type of status change might also become an issue in the near future—moving the Overseas not currently subject to EU law within the realm of the *acquis*, or moving ORs or OCTs into the group of the territories *sui generis*. This could even result in the creation of new legal statuses for the Overseas in EU law. The possibilities for the creation of new, mixed-bag legal regimes are clearly foreseeable and virtually infinite. With the entry of Iceland into the EU, it can be expected that the Færø Islands (a *sui generis* territory where EU law does not apply)<sup>311</sup> and possibly Greenland (an OCT included in Annex II TFEU), would decide to amend their status in EU law, which might be required to meet the challenge of the changes in the fisheries regime applicable to Iceland after its accession.

The Treaties regard such situations differently. The difference in approach does not only depend on the type of the status change in question, but also on the Member State with which a particular overseas region or territory is connected. Two Articles are applicable in this respect. *Lex generalis* is provided by Article 48 TEU, which contains a description of the procedures for Treaty amendment. Given that the subject matter of the status change of the Overseas is not covered by Article 48(6) TEU, simplified revision procedures outlined by Article 48 TEU are not applicable in this case, and the ordinary revision procedure applies.<sup>312</sup> *Lex*

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[The BES Islands from Outside the European Union Within the European Union], 24 REGELMAAT 230 (2009). See, e.g., H.G. Hoogers et al., *Staatsrechtelijke consequenties van de toekenning van een UPG-status aan Aruba en de Eilandgebieden van de huidige Nederlandse Antillen*, 26 TIJDSCHRIFT VOOR ANTILLIAANS RECHT—JUSTICIA (2010) (Neth.) for an analysis of the constitutional consequences of a more global shift from the OCT to the OR status among the Netherlands Overseas.

309. Hoogers, *supra* note 107, at 6.

310. A good example of the depth of the preparation required is the gradual change of the law of Mayotte, done in preparation to making it an OR in EU law. See, e.g., MINOM DAESC AE DEU, *Evolution du Statut Européen de Mayotte en RUP* (June 16, 2004) (unpublished document) (on file with the author). See also Hugues Béringer, *Departementalisation de Mayotte: Un changement de régime statutaire aux enjeux internationaux*, 2 in REVUE JURIDIQUE ET POLITIQUE 176 (2010).

311. TFEU art. 355(5)(a).

312. TEU art. 48(2)–(5).

*specialis*, concerning a possibility of simplified status change via a Decision of the European Council is contained in Article 355(6) TFEU and only applies to “amending the status, with regard to the Union, of a Danish, French, or Netherlands country or territory referred to in paragraphs 1 and 2.”<sup>313</sup> Given that Article 355(1) and (2) refers to the ORs and the OCTs, the ordinary Treaty amendment procedure will not apply to the Danish, French, and Netherlands Overseas wishing to amend status in line with the first two categories of status change outlined above—which includes the conferral of a particular status in its own right on a territory already enjoying such a status via affiliation with a larger entity, such as the grant of OR status to Saint-Martin on its split from Guadeloupe, which is also an OR—or moving a territory from one status to another.

Whether the third type of status change outlined above would be covered by Article 355(6) TFEU is not entirely clear. Given that the provision allows for “amending the status, with regard to the Union,”<sup>314</sup> it can be concluded that such a possibility exists. In other words, a simplified procedure for Article 355(6) TFEU can even be used to create new, *sui generis* statuses in EU law—and no formal Treaty amendment in line with Article 48 TEU would be required.<sup>315</sup>

The reach of such *lex specialis* is limited in two respects, however. Firstly, geographically, the Spanish, Portuguese and British Overseas cannot benefit from Article 355(6) TFEU and are bound to rely on *lex generalis*—*i.e.* an ordinary treaty amendment procedure—in all the situations involving a change of a status of such territories with regard to EU law, including even the simplest ones. Secondly, since the simplified status change procedure only applies to the *current* OCT and ORs, it is impossible to employ this procedure to change the status of a Member State region or territory even if they are referred to in Article 355(6) TFEU, if such a region or territory does not fall within the two statuses. Consequently, while the simplified procedure might enable Greenland to amend its status in EU law, it is not applicable to the Færø Islands, which, although Danish, enjoy a *sui generis* status under Article 355(5)(a) and are thus not covered.

Needless to say, the differences between the two procedures are truly fundamental to say the least. While it is abundantly clear after a number of negative referenda and in a situation where the number of the Member

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313. TFEU art. 355(6). For analysis Ziller, *Outermost Regions, Overseas Countries and Territories after the Entry into Force of the Lisbon Treaty*, in *EU LAW OF THE OVERSEAS*, *supra* note 5, at 78; Perrot, *Les régions ultrapériphériques françaises selon le traité de Lisbonne*, *supra* note 27, at 736-39. This provision is rooted in TCE art. IV-440, which never entered into force.

314. TFEU art. 355(6).

315. Danielle Perrot shares this position: “[TFEU art. 355(6)] n’exclut nullement que puisse être donné une suite juridique à une volonté politique de forger un statut encore inédit.” Perrot, *Les régions ultrapériphériques françaises selon le traité de Lisbonne*, *supra* note 27, at 736.



States is only growing, that amending the Treaties will not become any easier in the years to come, recourse to an ordinary treaty amendment procedure can potentially be problematic. This is exactly the problem that Article 355(6) TFEU—inserted into the treaties by the Lisbon amendment—was intended to solve (for the ORs and the OCTs connected with some Member States at least). Puzzlingly, the Treaties do not make any reference to the democratic principles behind such status changes.<sup>316</sup> Faithful to the language of the primary law of the Union, it is only possible to wonder at how not a single word about the will of the people inhabiting the territories concerned entered the Treaty of Lisbon provision.

Comparing the procedures, while Article 355(6) TFEU requires a unanimous decision of the European Council, with Commission consultation, on a proposal from the Member State connected with the territory subjected to the status change, Article 48 TEU is full of procedural complications and requires the involvement of a huge number of actors, the convening of a Convention “composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission,”<sup>317</sup> as well as the Conference of the representatives of the Governments of the Member States (IGC),<sup>318</sup> the signing of the new Treaty by all the Member States and its ratification in accordance with their respective national constitutional requirements.<sup>319</sup> It should be quite clear at this point that the employment of Article 48 TEU is not easy at all. At the same time, there is no obligation to draft a separate amending Treaty for every change in status of each overseas territory. The relevant changes can be made in the course of an IGC having a much broader mandate, thus becoming part of a somewhat more encompassing Treaty amendment procedure.

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316. The Kingdom of the Netherlands appended a special Declaration to the Treaty of Lisbon in order to remedy this deficiency in the context of the eventual change in the EU legal status of one of its OCTs. See Declaration by the Kingdom of the Netherlands on Article 55 of the on the Treaty on the Functioning of the European Union, 2010 O.J. (C 83) 358. See also its predecessor, Kingdom of the Netherlands on Article IV-440, appended to the TCE, *supra* note 303 (never entered into force).

317. TEU art. 48(3).

318. TEU art. 48(4).

319. TEU art. 48(4), para. 2.

Before the inclusion of Article 355(6) TFEU into the Treaties by the Treaty of Lisbon,<sup>320</sup> Treaty amendment was the only way to change a status of an overseas territory or region of a Member State *vis-à-vis* EU law, which can be illustrated by the change of the status of the Netherlands Antilles,<sup>321</sup> Greenland,<sup>322</sup> or, with the Treaty of Lisbon, the update of the ORs list to include Saint-Barthélemy and Saint-Martin. Consequently, unilateral action by a Member State cannot possibly lead to a change in the legal status of an overseas region or territory in EU law.<sup>323</sup>

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320. Such provision was actually first included in the Treaty Establishing a Constitution for Europe which, however, never entered into force. See TCE art. IV-440(7). For an analysis see, for example, Jacques Ziller, *Les collectivités des outre-mer de l'Union européenne*, in *L'OUTRE-MER FRANÇAIS: LA NOUVELLE DONNE INSTITUTIONNELLE* 105–114 (Jean Yves Faberon ed., 2004). For the general analysis of the likely influence of the TCE in the context of the Overseas, see Nadège Damoiseau, *La portée du projet de Traité européen pour les DOM/ROM*, 42 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN [RTDE] 649 (2006).

321. See de Overeenkomst tot wijziging van het Verdrag tot oprichting van de Europese Economische Gemeenschap ten einde de bijzondere associatieregeling van het vierde deel van het Verdrag op de Nederlandse Antillen te doen zijn, of 13 November 1962, 1964 J.O. (2413) 64.

322. See Greenland Treaty, Mar. 13, 1984, 1985 O.J. (L 29) 1. See also Weiss, *supra* note 84, at 173-75; Hylke Dijkstra et al., *The European Union as an Actor in Arctic Governance*, 16 EUR. F. AFF. REV. 227 (2011).

323. See also Perrot, *Les régions ultrapériphériques françaises selon le traité de Lisbonne*, *supra* note 27, at 719; The “seemingly illegal” example of Saint-Pierre-et-Miquelon is the only precedent known today of an attempt at a unilateral change of a status of a territory by a Member State. Ziller, *supra* note 11, at 120. This territory, lying off the North-Eastern coast of Canada, was unilaterally proclaimed by France to have changed its status from an OCT to an OR (a status entirely reserved for the French *DOM* at the time, following the independence of Algeria) since it became a *DOM* in French law in 1976. France assumed that being a *DOM* in national law was enough to qualify as a *DOM* in the sense of EEC art. 227(2) (then in force), which made a general reference to the constitutional status of such territories in French law, instead of naming them all, which the Treaty of Lisbon has introduced. Consequently, according to the French, Saint-Pierre-et-Miquelon held the *DOM* status in the sense of national law and, also, in the sense of Community law until 1985 when a reverse switch occurred, making it an OCT again. A number of French legal scholars assumed that such a change had legal effects in Community law. Coussirat-Coustère, *supra* note 82, at 1425 n.28. The study of the Community documents demonstrates, however, that Saint-Pierre-et-Miquelon was, in fact, treated as an OCT, not as an OR during its short-lived “éphémère période départementale” between 1976 and 1985. Ziller, *L'Union Européenne et l'outre-Mer*, *supra* note 27, at 151. Therefore, it was not made part of the customs territory of the Community, which can be regarded a necessary element of the OR status. Moreover, it has always been mentioned in the Annex to the EEC Treaty listing the associated countries and territories (now TFEU Annex II). Nevertheless, in an answer to a written question, the Commission stated unequivocally that it was covered by the status of EEC art. 227(2), *i.e.*, that it was in fact an OR. See *Written Question No. 400/76 by Mr. Lagorce to the Commission Concerning the Situation of the Islands Saint-Pierre-and-Miquelon*, 1976 O.J. (C 294) 16 [hereinafter *Written Question by Mr. Lagorce*]. The fact that it was not treated as one in Community law is indicative of the fact that *de facto* the change of status has never occurred. The Treaty of Lisbon made the repetition of such misunderstandings impossible, since from the date of its entry into force no connection is made between the legal status of an overseas territory or region in national law of the

## VII. THE FUTURE OF EU OVERSEAS LAW

Upon an overview of the essential principles and instruments affecting the legal regime of the Overseas, a contradictory picture emerges. On one hand, the Treaties unquestionably recognise the innate specificity of these regions compared with the Member States' territories lying in the European continent—where the *acquis* applies in full—and provide for a clear demarcation of three legal statuses to be awarded to such regions in EU law. On the other hand, from the analysis presented above, it is clear that the essential content of the legal statuses in question is very fluid and can largely overlap from one status to another. Although the starting principles currently governing the operation of EU law in each of the three legal regimes analysed are very different, according to the Treaties and to the case law of the Court, the analysis of the practical consequences of the application of these differences shows that, in some fields at least, these differences can be truly negligible. The problematic nature of this state of affairs should not be overstated, however. Given the profound discrepancies between the conditions of particular Overseas, whatever category they fall in, flexibility, also within EU Law of the Overseas, is to be regarded as an essential and necessary principle. In fact, all the relevant law can be reinterpreted in this light—the special legal statuses for the Overseas were created for no other reason than for ensuring the maximum level of flexible application of law in these regions, to adjust the *acquis* optimally to make it suit their needs. Which starting assumption is adopted in this respect—*i.e.* whether it be the application of EU law in full with possible far-reaching derogations, or a general exclusion from the scope of the Internal Market law, again, with far-reaching derogations—ultimately changes little, if not nothing. These are simply two sides of the same coin and have to be regarded as such.

The story of the Overseas in the EU is a story of constant readjustment of their legal position. In essence a circular move can be observed in this respect. Having started as a potentially key element of the Eurafrikan project, the Overseas that remained connected to the Member States upon the finalization of decolonization largely fell into oblivion and lost any relevance whatsoever in the eyes of the Union, except for the constant refrain about their “under-development” and “handicaps.” No distinction is to be made between the OCTs and the ORs in this respect, since both have enjoyed the same treatment. The situation seems to be changing at the moment, however, as the Commission and other Institutions have started paying greater attention to the Overseas, recognizing their potential.<sup>324</sup> The

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Member State with which they are connected and EU law, making the claims that one should follow another untenable.

324. *E.g., Communication from the Commission on Halting the Loss of Biodiversity by 2010—and Beyond: Sustaining Ecosystem Services for Human Well-being*, COM (2006)

circle is thus rounding; hopefully, the Overseas will regain their initial importance in the eyes of the Union, which will benefit all the three sides involved: the EU, the Member States and, of course, the Overseas themselves. In addition to this welcome circular move, the dynamics of the Overseas' law development over recent decades permits the outlining of four profoundly interrelated trends affecting the legal situation of the Overseas in the Union.

The first trend concerns the gradual rise in attention paid to the needs of the Overseas, as well as clearer articulation of their statuses, allowing a substantial increase in flexibility. Although the ECJ can clearly be criticized for embracing a somewhat limiting approach to the two main Overseas statuses—which can be exemplified by *Lancry*<sup>325</sup> and *Antillean Rice Mills*<sup>326</sup>—ultimately the Court undoubtedly played a leading role in the articulation of the legal specificity of the Overseas, using those limited opportunities which arose to clarify their status. In fact, before *Hansen*,<sup>327</sup> the distinction between the ORs and the OCTs, which is stated in the Treaties quite clearly, was virtually ignored in practice, so it is due to the Court that the current statuses took shape in an atmosphere of waning interest on the part of the Member States and the Institutions. Now that the Commission has joined in with its recent Papers,<sup>328</sup> the situation is changing for the better for the Overseas and promises due attention in future, as well as clarity of status and better opportunities for development in a situation where their specificity is duly recognised.

The second trend in the evolution of the EU Law of the Overseas is the gradual rise in the flexibility of the reading of the essential elements of each of the legal statuses concerned. It is now abundantly clear to the Institutions, and most importantly, the Court, that the status of an OR or an OCT is unlikely to be productive if construed too rigidly. Moving away from rigidity in the framing of these statuses is to be witnessed at all the three relevant levels of legal-political regulation. This is happening at the policy level, with the Commission unequivocally recognizing the need for the special treatment of the Overseas in its recent policy documents; at the level of law-making (including primary law) where each Treaty revision has added more subtlety to the legal construction of the Overseas, to which the removal of the list of the “untouchable” areas of the *acquis* from the

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216 final (May 22, 2006) [hereinafter *Communication on Halting the Loss of Biodiversity*]; *Commission Green Paper*, *supra* note 29.

325. Joined Cases C-363 & 407/93, 408/93, 409/93, 410/93 & 411/93, René Lancry v. Direction Générale des Douanes, 1994 E.C.R. I-3978.

326. See Case C-390/95 P. Antillean Rice Mills NV v. Comm'n, 1999 E.C.R. I-769, ¶ 37.

327. Case 148/77, H. Hansen Jun & O.C. Balle GmbH & Co. v. Hauptzollamt de Flensburg, 1978 E.C.R. 1787.

328. E.g., *Communication on Halting the Loss of Biodiversity*, *supra* note 324; *Commission Green Paper*, *supra* note 29.

relevant Article in Amsterdam<sup>329</sup> is a great illustration; and also at the level of interpreting the law, where the Court embraced OR flexibility, going far beyond what had previously been seemingly permitted in the *Chevassus-Marche* line of case law,<sup>330</sup> as well as recognized the influence on the OCTs' *acquis* from different sources, ranging from the general principles of EU law to EU citizenship.<sup>331</sup> As a result of the recent reshuffling of the way the Overseas are regarded in EU law, the legal regimes in question became much better suited to the full reflection of the specificity of the regions concerned.

It became clear, at the same time, that the special legal regimes created for the Overseas in the Treaties recognize many more limitations than initially thought, which forms the third notable trend in the development of the EU Overseas law. Being essentially territorial in nature, the special clauses in the Treaties dealing with the Overseas are powerless in the face of the penetration of EU law via other routes, especially the scope *ratione personae*, which has received a notable boost with the articulation of the importance of the concept of EU citizenship by the ECJ during the last ten years.<sup>332</sup> Although the inherent limitations of the territorial logic of all the derogations marking the legal situation of the Overseas in the Treaties can be regarded favourably, given that EU citizens residing there are not always affected by such limitations and can, as a consequence, invoke EU law on some occasions even when residing largely outside the scope *ratione loci* of EU law—to of which *Eman and Sevinger*<sup>333</sup> is a perfect illustration<sup>334</sup>—this development can also have a negative side to it, since it limits the extent of possible derogations from the mainstream *acquis* in the Overseas, thus undermining the very rationale for the creation of the special statuses. This mostly concerns the OCTs, of course, but can also become acute in the OR context, since the rights of EU citizenship not connected to territory can potentially come into conflict with the special derogatory regime of the application of EU law in such regions. The same largely also applies to the

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329. EC Treaty art. 227(2).

330. Case C-212/96, *Paul Chevassus-Marche v. Conseil Régional de la Réunion*, 1998 E.C.R. I-743. *See also* Joined Cases C-37 & 38/96, *Sodiprem SARL & Others v. Direction Générale des Douanes*, 1998 E.C.R. I-2039.

331. Case C-300/04, *Eman & Sevinger v. College van Burgemeester en Wethouders van Den Haag*, 2006 E.C.R. I-8055.

332. *See, e.g.*, Case C-85/96, *Martínez Sala v. Bayern*, 1998 E.C.R. I-2691; Case C-200/02, *Zhu v. Sec'y of State for Home Dep't*, 2004 E.C.R. I-9925; *See generally* Case C-192/05, *K. Tas-Hagen and R.A. Tas v. Raadskamer WUBO van de Pensioen- en Uitkeringsraad*, 2006 E.C.R. I-10451; Case C-135/08, *Rottmann v. Bayern*, 2010 E.C.R. I-1449. For an analysis see Kochenov & Plender, *supra* note 263; Dimitry Kochenov, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights*, 15 COLUM. J. EUR. L. 169 (2009).

333. *See generally* Case C-300/04, *Eman & Sevinger v. College van Burgemeester en Wethouders van Den Haag*, 2006 E.C.R. I-8055.

334. *See* Kochenov, *supra* note 29.

*sui generis* statuses.<sup>335</sup> All in all, the last ten years have demonstrated that the derogatory essence of the Overseas' legal regime in EU law should not be overstated, as its territorial nature competes with other scopes of EU law, the latter not acknowledging any exceptional statuses for the Overseas.

Taking all the aforementioned aspects marking the evolution of the legal position of the Overseas in the Union together, the fourth trend worth mentioning emerges. It concerns the on-going convergence in the essence of the majority of the legal statuses demarcated by Article 355 TFEU. In other words, considering the effects of the rise in the flexibility coupled with the effects of the rising awareness of the limitations inherent in the territorial logic marking the essence of Article 355 TFEU, as well as the willingness of the Institutions to do more in connection with meeting the needs of the Overseas related to their special position, all act to blur the border between the OCTs and the ORs. This development should not be lamented and could even probably be predicted, given the stunning diversity observable from one EU overseas region or territory to another. Consequently, it is not surprising in the slightest that the main legal framework designed to cater for the needs of the Overseas demands increasingly flexible approaches to achieve its stated goals, even if the result of such evolution tends to undermine the crisp distinction set out in the initial design of the legal regime of the Overseas in EU law.

Accordingly, approaching all the special legal statuses created for the Overseas in the EU separately, and viewing the Overseas in isolation from the mainstream *acquis* and other, non-territorial, scopes of EU law except *ratione loci*, is currently impossible. An integrated approach to the Overseas in the EU is indispensable in studying the legal aspects of the EU's Overseas.

In the context of the main trends in the development of the EU Law of the Overseas, a number of important questions arise, signposting the likely evolution of this branch in the near future. The most important foundational question in this context is related to the need to repeatedly find the right balance between integration and differentiation. Undoubtedly, it equally concerns all the known types of the Overseas in EU law. A number of related issues emerge, involving the necessity to pay due attention to the actual needs of the Overseas when derogating from the *acquis*, to take into account the main rationale and principles of European integration and EU citizenship when framing the Overseas *acquis*, and to avoid post-colonialist attitudes in EU–Overseas interactions.

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335. For an analysis focusing especially on the potential influence of EU citizenship on the law of the Åland Islands see Kochenov, *supra* note 37.



TABLE 1: OUTERMOST REGIONS OF THE EU

OR	Member State	Location	Capital	Surface Area	Population
Azores	Portugal	Atlantic	Ponta Delgada	2.333 km <sup>2</sup>	237.900
Canary Islands	Spain	Atlantic	Las Palmas	7.447 km <sup>2</sup>	1.755.700
Guadeloupe	France	Caribbean	Pointe-à-Pitre	1.710 km <sup>2</sup>	425.700
French Guiana	France	South America	Cayenne	84.000 km <sup>2</sup>	161.100
Madeira	Portugal	Atlantic	Funchal	795 km <sup>2</sup>	244.800
Martinique	France	Caribbean	Fort-de-France	1.080 km <sup>2</sup>	383.300
Réunion	France	Indian Ocean	Saint-Denis	2.510 km <sup>2</sup>	715.900
Saint-Martin	France	Caribbean	Marigot	53 km <sup>2</sup>	35.000

TABLE 2: EXAMPLES OF TERRITORIES *SUI GENERIS*

TSG	Member State	Location	Capital	Surface Area (km <sup>2</sup> )	Population
Åland Islands	Finland	Baltic	Mariehamn	13.517	27.700
Færø Islands	Denmark	North Atlantic	Tórshavn	1.399	48.917
Gibraltar	United Kingdom	Mediterranean	Gibraltar	6,8	29.431
Guernsey	United Kingdom	English Channel	Saint Peter Port	78	65.573
Isle of Man	United Kingdom	Irish Sea	Douglas	572	80.085
Jersey	United Kingdom	English Channel	Saint Helier	116	91.626
Sovereign British Bases on Cyprus (Akrotiri and Dhekelia)	United Kingdom	Mediterranean	Episkopi	254	14.500

TABLE 3: OVERSEAS COUNTRIES AND TERRITORIES ASSOCIATED WITH THE EU

OCT	Member State	Location	Capital	Surface Area (km <sup>2</sup> )	Population
Anguilla	United Kingdom	Caribbean	The Valley	91	11.430

Aruba	Netherlands	Caribbean	Oranjestad	180	90.508
Bermuda	United Kingdom	Atlantic	Hamilton	53	62.059
Bonaire	Netherlands	Caribbean	Kralendijk	288	15.414
British Antarctic Territory	United Kingdom	Antarctica	Rothera	1.709.400	250
British Indian Ocean Territory	United Kingdom	Indian Ocean	Diego Garcia	60	4.000
British Virgin Islands	United Kingdom	Caribbean	Road Town	153	27.000
Cayman Islands	United Kingdom	Caribbean	George Town	264	60.456
Curaçao	Netherlands	Caribbean	Willemstad	444	142.180
Falkland Islands	United Kingdom	Atlantic	Stanley	12.173	3.140
French Polynesia	France	Pacific Ocean	Papeete	4.167	26.000
French Southern and Antarctic Territories	France	Indian Ocean, Antarctica	Port-aux-Français	439.781	140
Greenland	Denmark	Arctic	Nuuk	2.166.0	56.452
Mayotte	France	Indian Ocean	Mamoudzou	374	194.000
Montserrat	United Kingdom	Caribbean	Plymouth (Brades)	102	4.655
New Caledonia and Dependencies	France	Pacific	Nouméa	18.575	249.000
Pitcairn	United Kingdom	Pacific	Adamstown	47	50
Saba	Netherlands	Caribbean	The Bottom	13	2.000
Saint-Barthélemy	France	Caribbean	Gustavia	25	8.300
Saint Helena and Dependencies	United Kingdom	Atlantic	Jamestown	122	4.255
Saint-Pierre- et-Miquelon	France	Atlantic	Saint-Pierre	242	7.063
Sint Eustasius	Netherlands	Caribbean	Oranjestad	21	3.100
Sint Maarten	Netherlands	Caribbean	Philipsburg	34	71.000
South Georgia and South Sandwich Islands	United Kingdom	Atlantic	King Edward Point	3.903	30
Turks and Caicos Islands	United Kingdom	West Indies	Cockburn Town	430	36.605
Wallis and Futuna Islands	France	Pacific	Mata-Utu	264	15.289

TABLE 4: KEY PROVISIONS RESPONSIBLE FOR THE STATUS OF THE OVERSEAS: PRE-LISBON AND LISBON VERSIONS COMPARED.<sup>336</sup>

TFEU	EC Treaty
<p><i>Article 203 (formerly Article 187 EC)</i></p> <p>The Council, acting unanimously <i>on a proposal from the Commission</i>, shall, on the basis of the experience acquired under the association of the countries and territories with the <i>Union</i> and of the principles set out in the <i>Treaties</i>, lay down provisions as regards the detailed rules and the procedure for the association of the countries and territories with the <i>Union</i>. <i>Where the provisions in question are adopted by the Council in accordance with a special legislative procedure, it shall act unanimously on a proposal from the Commission and after consulting the European Parliament.</i></p>	<p><i>Article 187 (formerly Article 136)</i></p> <p>The Council, acting unanimously, shall, on the basis of the experience acquired under the association of the countries and territories with the Community and of the principles set out in this Treaty, lay down provisions as regards the detailed rules and the procedure for the association of the countries and territories with the Community.</p>
<p><i>Article 349</i> (formerly Article 299(2), second, third and fourth subparagraphs, EC)</p> <p>Taking account of the structural social and economic situation of Guadeloupe, <i>French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin</i>, the Azores, Madeira and the Canary Islands, which is compounded by their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development, the Council, on a proposal from the Commission and after consulting the European Parliament, shall adopt specific measures aimed, in particular, at laying down the conditions of application of the Treaties to those regions, including common policies. <i>Where the specific measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act on a proposal from the Commission and after consulting the European Parliament.</i></p> <p>The measures referred to in the first paragraph concern in particular areas such as customs</p>	<p><i>Article 299 (formerly Article 227)</i></p> <p>2. [ . . . ] <i>However</i>, taking account of the structural social and economic situation of the French overseas departments, the Azores, Madeira and the Canary Islands, which is compounded by their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development, the Council, <i>acting by a qualified majority</i> on a proposal from the Commission and after consulting the European Parliament, shall adopt specific measures aimed, in particular, at laying down the conditions of application of the present Treaty to those regions, including common policies.</p> <p><i>The Council shall</i>, when adopting the relevant measures referred to in</p>

336. Emphasis indicates changes in wording other than mere change in style. Ziller, *Outermost Regions, Overseas Countries and Territories and Others after the Entry into Force of the Lisbon Treaty*, in EU LAW OF THE OVERSEAS, *supra* note 5, at 86-88.

<p>and trade policies, fiscal policy, free zones, agriculture and fisheries policies, conditions for supply of raw materials and essential consumer goods, State aids and conditions of access to structural funds and to horizontal Union programmes.</p> <p>The Council shall adopt the measures referred to in the first paragraph taking into account the special characteristics and constraints of the outermost regions without undermining the integrity and the coherence of the <i>Union</i> legal order, including the Internal Market and common policies.</p>	<p>the second subparagraph, <i>take into account</i> areas such as customs and trade policies, fiscal policy, free zones, agriculture and fisheries policies, conditions for supply of raw materials and essential consumer goods, State aids and conditions of access to structural funds and to horizontal Community programmes.</p> <p>The Council shall adopt the measures referred to in the second subparagraph taking into account the special characteristics and constraints of the outermost regions without undermining the integrity and the coherence of the Community legal order, including the Internal Market and common policies.</p>
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FIGURE 1:



