

Article 37

Article 37

Environmental Protection

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and assured in accordance with the principle of sustainable development.

Text of Explanatory Note on Article 37

The principles set out in this Article have been based on Articles 2, 6 and 174 of the EC Treaty, which have now been replaced by Article 3(3) of the Treaty on European Union and Articles 11 and 191 of the Treaty on the Functioning of the European Union. It also draws on the provisions of some national constitutions.¹

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A. Field of Application of Article 37

* The authors are very grateful to Miranda Geelhoed and Mara Ntona of the Strathclyde Centre for Environmental Law and Governance (SCELG - Strathclyde University, Glasgow) for their excellent research assistance.

¹ Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/17 (Explanatory Notes), at 27.

37.01 Article 37 belongs to the category of ‘principles’ in the Charter, and lays down the duties of public authorities in relation to environmental integration in policy-making and implementation. It does not, however, establish any individually justiciable right to environmental protection, or to an environment of any particular quality. As will be seen, this contrasts with the approach taken in several national constitutions of the Member States,² which not only place a responsibility on governmental authorities to protect the environment, but also recognise an autonomous right to a healthy environment.³

37.02 In omitting any reference to environmental rights, Article 37 also falls short of explicitly incorporating in the Charter environmental rights that have been recognised under the European Convention on Human Rights (ECHR) and other international human rights treaties.⁴ This lacuna is particularly striking with regard to environmental rights of a procedural character (ie access to environmental information, participation in the decision-making concerning the environment, and access to justice in environmental matters). There had been significant EU legislative activity on these rights, before the adoption of the Charter, to ensure implementation of the international obligations binding the EU and its Member States under the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.⁵ We will thus explore whether Article 37, short of asserting any right related to the environment, may nevertheless influence the interpretation and application of EU law and of Charter provisions guaranteeing individual rights.

37.03 In light of its cross-cutting nature, the field of application of the principle of environmental integration enshrined in Article 37 is not, a priori, limited to measures adopted in the field of environmental policy,⁶ or any other particular area of EU law. Quite to the contrary, the requirement to integrate a ‘high level of environmental protection’ and ‘the improvement of the quality of the environment’ extends, in principle, to *all* Union policies. These include both internal and external ones. Furthermore, the reference to ‘policies of the Union’ seems to indicate that Article 37 applies to, and binds primarily, the Union institutions,⁷ and in particular the Commission, the Council and the European Parliament for their legislative functions. Yet, Article 52(5) of the Charter

² Eg Spanish Constitution (version 2011) Art 45; see further section C.II below.

³ A Boyle, ‘Human Rights or Environmental Rights: A Reassessment?’ (2007) 18 *Fordham Environmental Law Review* 471, 478–82.

⁴ As summarised in Report of the Special Rapporteur on the Issue of Human Rights and the Environment John Knox: Framework Principles on Human Rights and the Environment (2017) UN Doc A/HRC/34/49. See brief discussion from an EU law perspective (pre-dating the UN Framework Principles), S Kingston, V Heyvaert and A Cavoski, *European Environmental Law* (Cambridge, CUP, 2017), ch 5.

⁵ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, 2161 UNTS 447 (Aarhus Convention), to which the EU and almost all of its Member States are parties: see further section D below.

⁶ That is, acts adopted pursuant to Arts 191(4) and 192 TFEU (below n 79).

⁷ Explanatory Notes, n 1 above, at 32: ‘the Charter applies primarily to the institutions and bodies of the Union, in compliance with the principle of subsidiarity.’

clarifies that the provisions containing principles, such as Article 37, ‘may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers.’ Therefore, not only EU institutions and other bodies are required to ‘observe’ the principle of environmental integration, but also the Member States themselves whenever they are implementing EU law. The latter expression may be understood as applying to Member States’ measures falling ‘within the scope of’ EU law, thereby including measures taken by Member States not only with a view to implementing, but arguably also derogating from, Union rules.⁸

37.04 It is quite difficult to detail specific instruments of EU law falling within the field of application of Article 37, for two reasons. First, in light of the prolific law-making activity in the environmental policy field, EU legislation covers a wide variety of issues. These range from climate change, to biodiversity, water protection, air pollution, noise, hazardous substances, genetically modified organisms, waste management, nuclear safety, as well as horizontal measures on environmental assessments, integrated pollution prevention and control, integrated product policy and environmental liability.⁹ As a result, about 70–80 per cent of environmental law implemented in the Member States is of EU origin.¹⁰ Second, several pieces of EU legislation adopted in other policy fields may be considered as falling within the scope of application of Article 37, as they have implemented, to different degrees, the principle of environmental integration. The most prominent examples can be found in the areas of the Common Agricultural Policy, the Common Fisheries Policy, transport, energy, and external policies.¹¹ Accordingly, the scope of application of Article 37 is wide-ranging, if not almost all-encompassing, both at EU and Member State level. As will be shown, however, the enforceability of the principle faces significant limitations.

⁸ D Anderson and C Murphy, ‘The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe’ EUI Working Papers LAW 2011/08, 8, on the basis of Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* (ERT) [1991] ECR I-2925, para 43.

⁹ Eg, J Jans and H Vedder, *European Environmental Law* 4th edn (Europa Law Publishing, 2012); D Langlet and S Mahmoudi, *EU Environmental Law and Policy* (Oxford, Oxford University Press, 2016) Pt II; Kingston, Heyvaert and Cavoski, n 4 above, chs 8–14; and G Van Calster and L Reins, *EU Environmental Law* (Cheltenham, Edward Elgar, 2017), Pt II. The Court, for instance, confirmed that Art. 37 is applicable to the field of nuclear energy in Case C-594/18 P *Republic of Austria v European Commission* [2020] ECLI:EU:C:2020:742, para 42.

¹⁰ L Kramer, ‘Regional Economic International Organizations: The European Union as an Example’ in D Bodansky et al (eds.), *The Oxford Handbook of International Environmental Law* (Oxford, Oxford University Press, 2007) 860.

¹¹ For a succinct overview, see L Kramer, *EU Environmental Law* 8th edn (London, Sweet & Maxwell, 2016), ch 11; and for a more comprehensive examination, see N Dhondt, *Integration of Environmental Protection into Other EC Policies—Legal Theory and Practice* (Europa Law Publishing, 2003); G Marín Durán and E Morgera, *Environmental Integration in the EU’s External Relations—Beyond Multilateral Dimensions* (Oxford, Hart Publishing, 2012).

B. Interrelationship of Article 37 with Other Provisions of the Charter

37.05 While the Charter does not explicitly establish a direct link between Article 37 and other provisions, some of the Charter rights ‘shall’, and others may, be interpreted as including environmental rights. Within the first group, Charter rights which correspond to the rights protected under the European Convention on Human Rights must be given the ‘same meaning and scope’ by virtue of Article 52(3) of the Charter. Thus, the Charter integrates both substantive and procedural rights recognised under the ECHR.¹² Among these, the following rights¹³ have been interpreted by the European Court of Human Rights (ECtHR) as providing indirect protection with regard to environmental matters:¹⁴

- Article 2 of the Charter on the right to life corresponds to Article 2 ECHR, which has been interpreted as placing a positive obligation on States to protect individuals’ life from dangerous activities, such as nuclear tests, the operation of chemical factories with toxic emissions or waste-collection sites, whether carried out by public authorities themselves or by private companies;¹⁵
- Article 7 of the Charter on the right to respect for private and family life corresponds to Article 8 ECHR, which has been interpreted as giving rise to a positive duty for States, under certain circumstances, to protect individuals from environmental factors that directly and seriously affect their private and family life, or their home;¹⁶ and

¹² C Hilson, ‘The Visibility of Environmental Rights in the EU Legal Order: Eurolegalism in Action?’ (2018) 25 *Journal of European Public Policy* 1589, 1593.

¹³ Explanatory Notes, n 1 above, 33–34.

¹⁴ Council of Europe, *Manual on Human Rights and the Environment—Principles derived from the Case law of the European Court of Human Rights* 2nd edn (Council of Europe Publishing, 2012). The literature is extensive: for a discussion connected to the purpose of the present chapter, see N de Sadeleer, ‘Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases’ (2012) 81 *Nordic Journal of International Law* 81, 60–73.

¹⁵ See summary of relevant ECtHR case law in Council of Europe, n 14 above, 35–41.

¹⁶ See summary of relevant ECtHR case law in Council of Europe, n 14 above, 44–60. The environmental dimension of Art 8 ECHR has been extensively covered by other commentaries on Art 37 of the Charter, noting in particular the wide margin of appreciation left to public authorities in the *Hatton II* case (*Hatton and Others v UK* (2003) Report 2003-VIII), see eg, F Benoît-Rohmer, ‘Article 37—Protection de l’environnement’ in EU Network of Independent Experts on Fundamental Rights, ‘Commentary on the Charter of Fundamental Rights of the European Union’ (June 2006), 316, http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm; K Hectors, ‘The Chartering of Environmental Protection: Exploring the Boundaries of Environmental Protection as a Human Right’ (2008) 17(3) *European Energy and Environmental Law Review* 165, 169–70; M Lombardo, ‘The Charter of Fundamental Rights and the Environmental Policy Integration Principle’ in G Di Federico (ed), *The EU Charter of Fundamental Rights—From Declaration to Binding Instrument* (Springer, 2011), 235–38. It should be noted,

- Article 17 of the Charter on the right to property corresponds to Article 1 of Protocol No 1 to the ECHR, which has been interpreted as imposing a positive obligation on States to put in place environmental standards necessary to protect individuals' peaceful enjoyment of their possessions.¹⁷

37.06 In addition, Article 11 of the Charter on freedom of information corresponds to Article 10 ECHR,¹⁸ which has been interpreted as giving rise to a positive obligation for public authorities to establish effective and accessible procedures that would enable individuals to seek all relevant and appropriate environmental information when their right to life, or/and their right to respect for private and family life, are threatened.¹⁹ Article 42, however, is the most relevant provision in the Charter in relation to access to environmental information, which is based on EU law²⁰—namely Article 15(3) TFEU and Regulation 1049/2001 on access to documents.²¹ These norms provide a significant level of access to environmental information,²² and have been complemented by more specific rules under the so-called Aarhus Regulation (1367/2006).²³

37.07 Furthermore, other provisions of the EU Charter²⁴ must be read as incorporating a right to participate in environmental decision-making when individuals' right to life, or/and their right to respect for private and family life, are threatened,²⁵ and a right to access to justice and to effective remedy in environmental matters.²⁶

however, that the ECtHR case law has further evolved on this point, notably in *Taşkin and Others v Turkey*, 46117/99 [2004] ECHR 621 (10 November 2004). For a discussion, see de Sadeleer, n 14 above, 64–72.

¹⁷ See summary of relevant ECtHR case law in Council of Europe, n 14 above, 62–73.

¹⁸ Explanatory Notes, n 1 above, 21.

¹⁹ See summary of relevant ECtHR case law in Council of Europe, n 14 above, 76–85.

²⁰ Explanatory Notes, n 1 above, 28.

²¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

²² Jans and Vedder, n 9, 373–74.

²³ Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L264/13.

²⁴ Arts 2, 7, 17, 42 and 47 Charter. See E Morgera, A Cardesa-Salzmänn, A McHarg, M Geelhoed and M Ntona, 'Rights protected under EU law concerning the environment', SCELG Policy Brief No 6, 2016, for the Scottish Government Roundtable on Human Rights and Brexit,

https://www.strath.ac.uk/media/1newwebsite/departmentsubject/law/strathclydecentreforenvironmentallawandgovernance/pdf/brexit/Policy_Brief_No_6_November_2016.pdf, 4.

²⁵ Arts 10, 2 and 8 ECHR; Council of Europe, n 14 above, 76–85.

²⁶ Arts 6(1) and 13 ECHR; Council of Europe, n 14 above, 94–109.

37.08 While the environmental dimension of the above-mentioned provisions of the Charter derives from either other sources in EU law, or the case law of the ECtHR, this does not exclude the possibility for other Charter provisions to be ‘greened’ when read in conjunction with Article 37. This may be the case of the right of EU citizens²⁷ to refer to the Ombudsman cases of maladministration by Union institutions or bodies (Article 43 of the Charter), since the notion of maladministration could, for instance, include departures from guidelines and procedures to implement environmental integration.²⁸ It may well be the case also of the right to petition the European Parliament (Article 44 of the Charter), which could provide an avenue to enquire about the observance of the environmental integration principle in the legislative process.

C. Sources of Article 37

37.09 As stated in the Explanatory Notes to the Charter, both EU law (Articles 3(3) TEU, 11 and 191 TFEU) and some Member States’ constitutions are sources of Article 37 of the Charter. As opposed to other Charter provisions, the drafters of the Charter did not draw inspiration from relevant UN treaties or the case law of the ECtHR. However, they could have, as discussed below, drawn from the Aarhus Convention in relation to procedural environmental rights and general UN human rights treaties that are widely considered to imply a human right to a healthy environment. In addition, they could have, as discussed above, drawn on the ECtHR case law that has gradually developed an environmental dimension to certain rights protected under the European Convention on Human Rights.²⁹

I. EU Law

37.10 At first glance, the wording of Article 37 appears to be a combination of Article 3(3) TEU, which is part of the general provisions setting forth core objectives of the Union,³⁰ and Article 11 TFEU,³¹ which proclaims environmental integration as a general principle of EU law. In fact, environmental integration was first introduced in EU primary law by the Single European Act of 1986³² as a principle of EU environmental policy within the title conferring express competence on environmental matters to the then European

²⁷ Or of any natural or legal person residing or having its registered office in a Member State (Art 228 TFEU; Art 44 Charter).

²⁸ The argument has been put forward by Marín Durán and Morgera, n 11 above, 288, and was inspired by A Alemanno, ‘The Better Regulation Initiative at the Judicial Gate: A Trojan Horse within the Commission’ s Walls or the Way Forward?’ (2009) 15(3) *European Law Journal* 382, 388.

²⁹ See section B above.

³⁰ Former Art 2 EC Treaty.

³¹ Former Art 6 EC Treaty.

³² Single European Act [1987] OJ L169/1 (SEA).

Economic Community.³³ It was only with the Treaty of Amsterdam of 1997³⁴ that environmental integration was upgraded to a general principle of EU law.³⁵

37.11 Article 3(3) TEU provides that the EU ‘shall work’, inter alia, for a ‘high level of protection and improvement of the quality of the environment’.³⁶ Both of these terms have been reiterated in Article 37 as the object of the environmental integration principle, but cannot be found in the text of Article 11 TFEU. This and other differences can, in fact, be noticed when comparing the language of Article 37 with that of Article 11 TFEU, which provides that ‘*environmental protection requirements* must be integrated into the *definition and implementation* of the Union’s policies *and activities*, in particular *with a view to promoting* sustainable development’ (emphases added). The inclusion of environmental protection in the Charter thus raises a number of interpretative questions, when examined against the backdrop of the *acquis* of the EU Treaties: is Article 37, in essence, just a reaffirmation of Article 11 TFEU, or are the textual differences emphasised above of any legal significance?

37.12 Finally, the Explanatory Notes also refer to Article 191 TFEU, which is the legal basis for EU environmental policy, as a source of Article 37 of the Charter. Article 191 TFEU is broadly formulated and allows for including all conceivable environmental issues within the remit of EU environmental competence. Its first paragraph sets out four objectives for EU action (both internal and external) in the field of the environment, namely: ‘preserving, protecting and improving the quality of the environment’; ‘protecting human health’; ‘ensuring the prudent and rational utilisation of natural resources’, and ‘promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.’ In addition, Article 191(2) TFEU lays down a number of principles to guide law-making and interpretation, namely: high level of environmental protection; precaution; prevention; rectification at source; and the polluter pays.³⁷ Against

³³ Title VII ‘Environment’ SEA. For an overview of the emergence and evolution of EU competence on environmental matters, see Marín Durán and Morgera, n 11 above, 9–13; and Langlet and Mahoudi, n 9, 58–61; Jans and Vedder, n 9, 22–29.

³⁴ Treaty of Amsterdam [1997] OJ C340/1 (Treaty of Amsterdam).

³⁵ See Marín Durán and Morgera, n 11 above, 25–28, for an overview of the emergence and evolution of the environmental integration principle. This upgrading does not seem, however, to have had the effect (as discussed below) of making the principle of environmental integration an independent ground for reviewing all EU actions, which would be the main legal difference from it being a principle of EU environmental policy: see E Scotford, ‘Environmental Rights and Principles: Investigating Article 37 of the EU Charter of Fundamental Rights’ in S Bogojević and R Rayfuse, *Environmental Rights in Europe and Beyond* (Oxford, Hart, 2018) 145.

³⁶ These terms were added to former Art 2 EC Treaty by the Treaty of Amsterdam.

³⁷ See also Art 191(3) TFEU, listing a number of criteria that the EU legislator ‘shall take into account’ when ‘preparing’ its policy on the environment (eg, available scientific and technical data; environmental conditions in the various regions of the EU; potential benefits and costs of action or lack of action). Because of the comparatively weak language of this provision, however, such criteria may exert less influence, than the objectives and principles, in determining the content of the environmental

this background, the reader may wonder whether Article 191 TFEU has, in fact, served as a source of Article 37 beyond the literal reference to the ‘high level of environmental protection.’ All these questions will be addressed in section D below.

II. National Constitutional Law

37.13 The Explanatory Notes state that Article 37 of the Charter draws inspiration from ‘the provisions of *some* national constitutions’ (emphasis added), with no further indication as to the relevant countries. In fact, a brief overview of the constitutional texts³⁸ reveals a lack of ‘constitutional traditions common to the Member States’³⁹ with regard to environmental rights.

37.14 In the constitutions of some Member States, environmental protection is expressly recognised and protected, not only as a duty of governmental authorities, but also as a right (and duty) of the individual. For instance, the Spanish Constitution first declares that ‘everyone has the right to enjoy an environment suitable for the development of the person, as well as the duty to preserve it’.⁴⁰ It then directs public authorities to ‘watch over a rational use of all natural resources with a view to protecting and improving the quality of life and preserving and restoring the environment, by relying on an indispensable collective solidarity’.⁴¹ Any infringement of these provisions is subject to criminal or administrative sanctions, as provided in national law, as well as to an obligation to repair the damage caused.⁴² Similarly, the Greek Constitution affirms that ‘the protection of the natural and cultural environment constitutes a duty of the State and a right of every person’, and as a result, the State is bound to adopt ‘special preventive or repressive measures for the preservation of the environment’.⁴³ A trend towards proclaiming a substantive right to a healthy environment is also found in the constitutional texts of Central European

protection requirements to be integrated pursuant to Art 11 TFEU. For a more detailed examination of Art 191 TFEU, see Marín Durán and Morgera, n 11 above, at 13–17.

³⁸ This section is based on the translated texts of the national constitutions provided by the European Union Agency for Fundamental Rights:

<https://fra.europa.eu/en/charterpedia/Art/37-environmental-protection>.

³⁹ Case C-11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para 4.

⁴⁰ Spanish Constitution (as amended in 2011), Art 45(1).

⁴¹ *Ibid*, Art 45(2).

⁴² *Ibid*, Art 45(3). See also, Art 23(4) of the Belgian Constitution (as amended in 2014) on the ‘right to enjoy the protection of a healthy environment’ ; and Art 20 of the Finnish Constitution (as amended in 2011) stating that ‘public authorities shall endeavour to guarantee for everyone the right to a healthy environment and for everyone the possibility to influence the decisions that concern their own living environment’ ; Art 66 of the Portuguese Constitution (as amended in 2005) stating that ‘[e]veryone shall possess the right to a healthy and ecologically balanced human living environment and the duty to defend it’ , and setting out in detail the principal responsibilities of the State.

⁴³ Greek Constitution (as amended in 2008), Art 24(1), spelling out also in more detail the principal responsibilities of the State (Art 24(2)–(6)).

countries, which have acceded to the EU since 2004. For instance, the Slovak Constitution first stipulates that ‘everyone has the right to a favourable environment’,⁴⁴ and is equally ‘obliged to protect and enhance the environment and the cultural heritage’.⁴⁵ A procedural right to environmental information is also guaranteed,⁴⁶ and the State is generally directed to ‘look after a cautious use of natural resources, the protection of agricultural and forest lands, ecological balance, and effective environmental care’.⁴⁷

37.15 Short of adopting a right-based formulation, other national constitutions do nonetheless recognise environmental protection as a constitutional value and obligate the State to protect the environment. For instance, the German Constitution declares that ‘mindful also of its responsibility toward future generations, the State shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action ...’⁴⁸ Using softer terms, the Dutch Constitution also requires the public authorities to concern themselves with ‘keeping the country habitable and to protect and improve the environment’.⁴⁹ These constitutional obligations on the State to protect the environment have been considered as equivalent, in fact, to the recognition of an individual right, since the concerned persons can ask public authorities to respect it.⁵⁰

37.16 Even though there is a number of EU Member States where environmental protection is not enshrined in formal constitutional texts, or that lack such a text altogether,⁵¹ the environment may be protected in the national constitutional framework via other laws⁵² or/and case law.⁵³ To be sure, the presence or absence

⁴⁴ Constitution of the Slovak Republic (as amended in 2004), Art 44(1). See also Art 53 of the Estonian Constitution (as amended in 2011); Art 21 of the Hungarian Constitution (as amended in 2017); Art 115 of the Latvian Constitution (as amended in 2009); Art 5 of the Polish Constitution (1997); Art 72 of the Slovenian Constitution (as amended in 2013).

⁴⁵ Constitution of the Slovak Republic (as amended in 2004), Art 44(2).

⁴⁶ *Ibid*, Art 45 reads: ‘Everyone has the right to timely and complete information on the state of the environment and the causes and consequences of its condition’.

⁴⁷ *Ibid*, Art 44(4).

⁴⁸ Basic Law of the Federal Republic of Germany (as amended in 2014), Art 20(a).

⁴⁹ Dutch Constitution (as amended in 2008), Art 21. See also Art 2(2) of the Swedish Constitution (as amended in 2012).

⁵⁰ A Kiss, ‘Environmental and Consumer Protection’ in S Peers and A Ward (eds), *The EU Charter of Fundamental Rights* (Oxford, Hart Publishing, 2004), 253.

⁵¹ This is notably the case of the UK which, however, formally withdrew from the EU on 31 January 2020.

⁵² Eg French Code on the Environment (as amended in 2012); Arts 11 and 35 of the Charter of Fundamental Rights and Freedoms of the Czech Republic (as amended in 1999). See further, A Lucarelli, ‘Art 37—Environmental Protection’ in WBT Wolk (ed), *Human Rights in Europe—Commentary on the Charter of Fundamental Rights of the European Union* (Carolina Academic Press, 2010), 221–22.

⁵³ The Italian Constitutional Court, for instance, interpreted the right to health that is protected by the Italian Constitution as including the right to a healthy environment: Italian Constitutional Court judgment n. 5172 of 6 October 1976. In addition, the Italian

in national constitutions of a right to a healthy environment, or/and of a public duty to protect it, may be determined by several legal and other factors. The exact implications ultimately depend on how national courts interpret and use existing constitutional provisions. Yet, the overview just exposed appears to show that the constitutional provisions on environmental protection in most Member States are more ambitious, even if only in terms of asserting governmental responsibilities, than the letter of Article 37 of the Charter. This may be explained by the heightened concern of a minority of Member States about ‘avoiding the doubt’ that the solidarity rights under Title IV of the Charter created justiciable rights, such as a right to a healthy environment, where such a right was not already provided for under national laws.⁵⁴

D. Analysis

I. General Remarks

37.17 Article 37 of the Charter is a clear manifestation of a lack of consensus among the EU Member States on a ‘substantive’ human right to a healthy environment.⁵⁵ Such a disagreement was already manifest at the international level in the Aarhus Convention, which refers to a substantive right to a healthy environment in an operative provision only as a rationale for guaranteeing procedural environmental rights, which constitute the core of the Convention:⁵⁶

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention.⁵⁷

Constitution has been amended so as to include an explicit competence for the State, which is shared with the regions, to protect the environment and ecosystems: Art 117(s) of the Italian Constitution, as amended by Constitutional Law No 3/2001.

⁵⁴ Art 1(2) of the UK-Poland Protocol; see discussion by Anderson and Murphy, n 8 above, 11–12.

⁵⁵ According to C Coffey, ‘The EU Charter of Fundamental Rights: the Place of the Environment’ in K Feus (ed), *The EU Charter on Fundamental Rights: Text and Commentaries* (Federal Trust, 2000), 132, ‘limited discussion of the possibility of explicitly incorporating environmental rights into the EU Treaties’ had occurred during the last Intergovernmental Conference leading to the adoption of the Amsterdam Treaty, on the basis of a proposal by the Commission to include a ‘right to a healthy environment, and the duty to ensure it’. According to J Meyer, *Kommentar zur Charta der Grundrechte der Europäischen Union* 2nd edn (Helbing & Lichtenhahn, 2006), para 5, the proposal for an environmental provision in the Charter was made ‘relatively late’ in the Convention and the views of the members ‘diverged considerably.’

⁵⁶ Council of Europe, n 14 above, 12.

⁵⁷ Aarhus Convention, Art 1.

37.18 In fact, this understanding was specifically spelt out in the UK Declaration to the Aarhus Convention:

The United Kingdom understands the references in article 1 ... to the 'right' of every person 'to live in an environment adequate to his or her health and well-being' to express an aspiration which motivated the negotiation of this Convention and which is shared fully by the United Kingdom. The legal rights which each Party undertakes to guarantee under article 1 are limited to the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention.⁵⁸

37.19 That said, substantive rights related to a healthy environment have increasingly been protected through interpretation, under the European Convention on Human Rights, as well as under other international human rights treaties. This is reflected in the 2018 UN Framework Principles on Human Rights and the Environment,⁵⁹ where the UN Special Rapporteur John Knox indicated that *existing* or emerging human rights obligations to protect against environmental harm include substantive obligations to regulate private actors and protect from environmental harm vulnerable groups (such as indigenous peoples and local communities, women and children).⁶⁰ Knox cautioned that 'not all States have formally accepted' the international norms upon which such a coherent interpretation is based,⁶¹ but even those States should consider the UN Framework Principles 'best practices that they should move to adopt as expeditiously as possible.'⁶² While therefore Article 37 of the Charter is not aligned with international best practice, pursuant to Article 53 of the Charter on level of protection,⁶³ the environmental rights recognised under international agreements to which the Union or all the Member States are party may not be 'restricted or adversely affected' by the interpretation of the Charter.

37.20 While a certain degree of disagreement persists on substantive environmental rights internationally, the choice of the drafters of the Charter not to incorporate at least the *procedural* environmental rights that are binding on

⁵⁸Declaration of the Kingdom of Great Britain and Northern Ireland (at that time, an EU Member State),

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=XXVII-13&chapter=27&lang=en.

⁵⁹ Which the Human Rights Council 'took note with appreciation of ... and call[ed] upon States to implement fully their obligations to respect and ensure human rights without distinction of any kind, including in the application of environmental laws and policies': HRC Res 37/8 (2018) para 3.

⁶⁰ Knox, n 4 above, para 9 (emphasis added).

⁶¹ Ibid para 8.

⁶² Ibid, paras 7–8. For a discussion from an international law perspective, see E. Morgera, 'Dawn of a New Day? The Evolving Relationship between the Convention on Biological Diversity and International Human Rights Law' (2018) 54 *Wake Forest Law Review* 691–712.

⁶³ M Cartabia, 'Article 53—Level of Protection' in G Di Federico (ed), *The EU Charter of Fundamental Rights—From Declaration to Binding Instrument* (Springer, 2011).

the EU and its Member States and that have been long protected under the EU law to implement the Aarhus Convention,⁶⁴ appears quite puzzling. Once again, however, one can rely on Article 53 of the Charter on level of protection to assert that the procedural environmental rights recognised under the Aarhus Convention, or other applicable international human rights treaties, may not be ‘restricted or adversely affected’ by the interpretation of the Charter.

37.21 Absent any explicit proclamation of environmental rights in the Charter, the analysis in the following sections will first explore what the principle of environmental integration means and what its legal significance is in EU law, drawing on Article 11 TFEU as the main source of Article 37 of the Charter. The analysis will return to the question of the relevance of the Aarhus Convention in the discussion of remedies.

II. Specific Provisions

37.22 The rationale behind the principle of environmental integration first promulgated in Article 11 TFEU, and then in Article 37 of the Charter, lies in the realisation that progress in the environmental field by itself is not sufficient and may be countered by developments in other policy fields that disregard environmental protection requirements.⁶⁵ To put this in EU law terms, the very essence of the environmental integration principle resides in the fact that Treaty provisions other than the environmental legal bases⁶⁶ may be used by the EU legislator to adopt measures that may (negatively) affect the environment. In broad terms, the environmental integration principle calls therefore for a ‘continuous greening’ of Union policies.⁶⁷ Yet, what does environmental integration exactly mean in EU law? And does it have a different meaning under Article 37 of the Charter and Article 11 TFEU?

37.23 As anticipated above, the language of these two provisions differs in a number of ways. First of all, the object of Article 37 of the Charter refers to a ‘high level of environmental protection’ and to the ‘improvement of the quality of the environment’, whereas that of Article 11 TFEU to ‘environmental protection requirements’ more broadly. Two interpretative questions arise: what do ‘high level of environmental protection’ and ‘improvement of the quality of the environment’ mean? And does the differently worded object of environmental integration under Article 11 TFEU have any bearing on the interpretation of Article 37 of the Charter?

⁶⁴ It has been noted, however, that the implementation of the Aarhus Convention at EU level has been less ambitious than at Member State level, because it has explicitly aimed at implementing minimum international requirements: Van Calster and Reins, n 9 above, 83 based on Recital 23 of Directive 2003/4/EC [2003] OJ L41/26 and recital 12 of Directive 2003/35 [2003] OJ L156/17.

⁶⁵ J Holder and M Lee, *Environmental Protection: Law and Policy* (Cambridge, Cambridge University Press, 2007), 164.

⁶⁶ Namely, Arts 191(4) and 192 TFEU (below n 79).

⁶⁷ Kramer, n 11 above, 20.

37.24 As to the first question, none of the terms is defined in the EU Treaties. The expression ‘high level’ of environmental protection is considered ‘one of the most important substantive principles of European environmental policy.’⁶⁸ It is in fact reiterated as a principle of EU environmental policy in Article 191 TFEU, although it is made subject to consideration of the ‘diversity of situations in the various regions of the Union’.⁶⁹ While this cannot be understood as allowing the EU to adopt the lowest common denominator among the Member States’ standards of environmental protection,⁷⁰ the Court of Justice has clarified that such a level of protection does not necessarily have to be the highest that is technically possible.⁷¹ This seems logical, given the fact that Member States are allowed, by virtue of Article 193 TFEU, to adopt and maintain more stringent environmental protection measures than those adopted at EU level.⁷² By the same token, the EU legislator is not required to adopt the highest level of environmental protection that exists in a particular Member State.⁷³ Overall, it can be concluded that the principle reflects a moving target –the idea of continuous improvement of environmental protection within the EU.⁷⁴ The expression ‘improvement of the quality of the environment’ is perhaps easier to interpret as implying that any measure leading to environmental degradation runs counter the spirit of Article 37 of the Charter.⁷⁵ However, none of these clarifications serves to establish what it is exactly that needs to ‘be integrated’ in Union policies pursuant to the environmental integration principle. It seems therefore useful and necessary to look at the wording of Article 11 TFEU, as one of the sources of Article 37, with a view to shedding light on the interpretation of the latter.

37.25 The substance of the ‘environmental protection requirements’ that are the object of the integration obligation in Article 11 TFEU is to be inferred from (albeit not explicitly limited to) the objectives and principles of EU environmental policy prescribed in Article 191 TFEU.⁷⁶ This indirectly serves to clarify also the role of Article 191 TFEU as a source of Article 37 of the Charter. Those objectives are framed in very broad terms.⁷⁷ Rather than seeking to (unduly) restrict the substantive scope of EU environmental competence, Article 191 TFEU leaves the EU legislator a wide margin of appreciation in deciding

⁶⁸ Jans and Vedder, n 9 above, 41.

⁶⁹ Art 191(2) TFEU; see section C.I. above.

⁷⁰ Kramer, n 11 above, 11–12.

⁷¹ Case C-284/95 *Safety High-Tech v S. & T. Srl (Safety High-Tech)* [1998] ECR I-4301, para 49; for a discussion, see D Misonne, ‘The Importance of Setting a Target: the EU Ambition of a High Level of Protection’ (2015) 4(1) *Transnational Environmental Law* 11, at 19–20. See also Opinion of AG Kokott in Case C-444/15 *Associazione Italia Nostra Onlus*, EU:C:2016:665, paras 24–35.

⁷² As most recently confirmed in Case C-444/15 *Associazione Italia Nostra Onlus v Comune di Venezia and Others*, ECLI:EU:C:2016:978, para 44.

⁷³ Misonne, n 71 above, 18.

⁷⁴ Kramer, n 11 above, 12.

⁷⁵ Benoît-Rohmer, n 16 above, 315.

⁷⁶ Jans and Vedder, n 9 above, 23.

⁷⁷ See section C.I. above.

what action, if any, is necessary to achieve the environmental objectives stipulated in the Treaty.⁷⁸

37.26 The substantive content of EU environmental policy is therefore gradually defined by the EU political institutions⁷⁹ as they adopt measures in pursuance of the broadly framed Treaty objectives, whether unilaterally or by concluding international agreements. By the same token, the broad formulation of Article 191 TFEU supports a non-restrictive interpretation of the substantive scope of Article 11 TFEU. Ultimately, it is a matter of political choice which specific environmental issues are to be integrated in the ‘Union policies and activities’.⁸⁰ In addition, the ‘environmental integration requirements’ under Article 11 TFEU include the environmental principles laid down in Article 191(2) TFEU, which go beyond a ‘high level of environmental protection’.⁸¹

37.27 Besides the object of environmental integration, other textual differences may be noted between Article 37 of the Charter and 11 TFEU, notably in defining the scope of application. Whereas Article 37 succinctly refers to ‘policies of the Union’, Article 11 TFEU is more specific, and arguably comprehensive, in referring, first, both to the ‘definition’ and ‘implementation’ of Union policies, and second, not only to EU ‘policies’ but also its ‘activities.’ As to the latter, it could be inferred that the Charter takes a more restrictive approach and excludes Union’s activities that are not formally labelled as ‘policies’ of the EU in the Treaties.⁸² This would be the case, for instance, of competition rules and the internal market freedoms. As to the former, Article 11 TFEU encompasses both the stages of ‘definition’ (which includes every step of the EU legislative processes, such as identification of regulatory objectives, development of proposals and adoption of legislation, as well as their review) and of ‘implementation’ (which includes the adoption of further implementing acts and of decisions outside the legislative process, and enforcement).⁸³

⁷⁸ See also Art 192 TFEU, granting the EU legislator a more general power to decide ‘what action is to be taken by the Union in order to achieve the objectives referred to in Art 191.’

⁷⁹ That is, the Commission, the Council and the European Parliament, as the adoption of measures in this policy field is subject to the ‘ordinary legislative procedure’, see Arts 192(1) and 294 TFEU. The conclusion of agreements with third countries and international organisations based on Art 191(4) TFEU is undertaken in accordance with the general procedure laid down in Art 218 TFEU, also involving these three institutions.

⁸⁰ Case C-157/96 *The Queen and Ministry of Agriculture, Fisheries and Food, Commissioners of Customs & Excise ex parte National Farmers Union et al (National Farmers Union)* [1998] ECR I-2211.

⁸¹ See section C.I. above, and, for instance, Case T-13/99 *Pfizer Animal Health v Council* [2002] ECR II-3305, paras 114–15 in relation to the application of the precautionary principle to measures adopted to protect human health in the context of the common agricultural policy. Note that this is the case that is explicitly referred to in the Explanatory Notes to the Charter, n 1 above, 35.

⁸² Arts 3–6 TFEU.

⁸³ Dhondt, n 11 above, 45–52.

37.28 In addition, while both Article 37 of the Charter and Article 11 TFEU contain a link to ‘sustainable development’, they seem to differ in approach. Under Article 11 TFEU, environmental integration is conceived as a means for the realisation of sustainable development as a broader ‘objective’ (ie ‘with a view to promoting sustainable development’). Conversely, the language of Article 37 seems to subordinate environmental integration to sustainable development (ie ‘in accordance with’), which appears to be elevated as to the ‘main principle and bearer of an outright value’.⁸⁴ The concept of sustainable development is primarily an international construct: it is widely accepted as a principle of international environmental law,⁸⁵ possibly of a customary nature.⁸⁶ Notably, the principle has been invoked by the ECtHR to ascertain if States have conducted a balancing of individuals’ environmental concerns and States’ general interests, without exceeding reasonable margins of appreciation.⁸⁷ However, sustainable development is not a monolithic, well-defined, notion in international law, and arguably even less so in EU law. Since the Treaty of Amsterdam, sustainable development has been part of the ‘raison d’être’ of the EU, given its inclusion among the foundational objectives of the Union’s internal and external action as a whole.⁸⁸ Just as for any other objectives, the EU Treaties offer no definition of sustainable development, and the Court has barely engaged with its contested meaning.⁸⁹ In EU legislation and policy documents, this concept has been interpreted flexibly and adapted to different contexts and new developments.⁹⁰ On the whole, it has been suggested that the EU’s most prevalent understanding of sustainable development is a transition towards a low-carbon economy that does not question present neo-liberal modes of capitalism for its past and present socio-environmental equity deficits.⁹¹

⁸⁴ Lucarelli, n 52 above, 233. See also de Sadeleer, n 14 above, at 48.

⁸⁵ What is traditionally considered the first definition of sustainable development is that proposed by the World Commission on Environment and Development, *Our Common Future* (Oxford, Oxford University Press, 1987) (Brundtland Report), ch 2, para 1: ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’. See also, Rio Declaration, particularly Principles 1–3. For a recent discussion, see V Barral, ‘The Principle of Sustainable Development’ in L Kramer and E Orlando (eds), *Principles of Environmental Law* (Cheltenham, Edward Elgar, 2018) 103.

⁸⁶ P Sands and J Peel, *Principles of International Environmental Law* (Cambridge, CUP, 2018) at 219.

⁸⁷ V Barral and P.M. Dupuy, ‘Principle 4: Sustainable Development through Integration’ in J. Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (Oxford, Oxford University Press, 2015) 157, 176, referring to: *Hatton v UK*, Grand Chamber, ECtHR App no 36022/97, judgment of 8 July 2003 and *Fadeyeva v Russia*, ECtHR App no 55723/00, judgment of 9 June 2005.

⁸⁸ Arts 2, 3(3) and (5) and 21(2)(f) TEU.

⁸⁹ Among the few examples, see Case C-91/05 *Commission v Council* [2008] ECR I-3651.

⁹⁰ See Marín Durán and Morgera, n 11 above, 35–40; and for a more in-depth discussion, SRW van Hees, ‘Sustainable Development in the EU: Redefining and Operationalizing the Concept’ (2014) 10(2) *Utrecht Law Review* 60.

⁹¹ C Burns and N Carter, ‘Environmental Policy’, in Erik Jones, Anand Menon and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (Oxford,

37.29 This lack of precise definition renders it difficult to identify the exact implications of the link between environmental integration and sustainable development in Article 37 of the Charter and Article 11 TFEU. However, in declaring that environmental integration needs to be carried out in respect of the principle of sustainable development, Article 37 renders the need for a definition of such a principle more pressing.⁹² That is, how exactly should environmental protection be integrated with, and balanced against, the other two (and potentially competing) pillars of sustainable development (social and economic development)?⁹³ In effect, the ‘inflationary use’ of sustainable development by the EU has been criticised as putting forward a separate concept from environmental protection, and for the lack of systematic attempts to assess whether self-proclaimed sustainable development measures comply with environmental protection requirements.⁹⁴ This has led to concerns over a risk of ‘squeezing out’ environmental protection from sustainable development,⁹⁵ to the benefit of policy interests under the other two pillars.⁹⁶ It has been argued that sustainable development is increasingly ‘fragile’ in the EU law context, particularly when compared to increasing calls within the scientific community to prioritise ecological sustainability,⁹⁷ or at least to respect, according to best scientific knowledge, long-term ecological limits.⁹⁸

37.30 The textual and contextual analysis thus far seems to indicate a more restrictive enunciation of the principle of environmental integration under the Charter, when compared to the *acquis* of the EU Treaties. However, a systemic, rather than literal, reading of Article 37 in light of the broader wording of Article

Oxford University Press 2012) 511–25; and A Cardesa-Salzman and E Morgera, ‘The EU’s External Action after Lisbon: Competences, Policy Consistency and Participation in International Environmental Negotiations’ in Marjan Peeters and Mariolina Eliantonio (eds), *Research Handbook on EU Environmental Law* (Cheltenham, Edward Elgar, forthcoming).

⁹² Lucarelli, n 52 above, 233.

⁹³ The Political Declaration of the World Summit on Sustainable Development, UN Doc A/CONF.199/20 Resolution 1, 4 September 2002 (WSSD Declaration), para 5 recognises: ‘three interdependent and mutually reinforcing pillars of sustainable development: economic development, social development and environmental protection’. See further, Marín Durán and Morgera, n 11 above, 41.

⁹⁴ L Kramer, ‘Sustainable Development in the EC’ in H Bugge and C Voigt (eds), *Sustainable Development in International and National Law* (Europa Law Publishing, 2008), 391–93.

⁹⁵ See A Ross-Robertson, ‘Is the Environment Getting Squeezed Out of Sustainable Development?’ (2003) *Public Law* 249.

⁹⁶ See S Kingston, ‘The Uneasy Relationship between EU Environmental and Economic Policies’ in B Sjøfjell and A Wiesbrock (eds), *Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder* (Cambridge, CUP, 2015), 27–32.

⁹⁷ M Lee, *EU Environmental Law, Governance and Decision-Making*, 2nd edn (Oxford, Hart, 2014), 79–80.

⁹⁸ Langlet and Mahmoudi, n 9 above, 46.

11 TFEU seems preferable for ensuring a harmonious relationship between the Charter and the EU Treaties.⁹⁹

III. Legal Nature

37.31 Having addressed the meaning of environmental integration in EU law, we can now turn to the legal nature and strength of Article 37. Article 51 of the Charter distinguishes between ‘rights’ which the institutions and bodies of the Union, or its Member States when implementing EU law, ‘shall respect’, on the one hand, and ‘principles’ which they ‘shall observe’, on the other hand. This distinction, which is given more precise elaboration in Article 52 of the Charter, is of legal significance: while it seems clear that ‘rights’ are justiciable and can be invoked by individuals before EU courts, the degree of justiciability and direct effect of ‘principles’ is not as straightforward.¹⁰⁰ Notwithstanding the importance of this distinction, the Charter does not offer a neat catalogue of ‘rights’ and ‘principles’,¹⁰¹ nor is it always possible to conclusively assert from the wording of a particular Charter provision whether it contains a ‘right’ or a ‘principle’.¹⁰² Nevertheless, there is little doubt that Article 37 of the Charter, which is the object of our analysis, belongs to the category of ‘principles’.¹⁰³ It articulates a principle of environmental integration, without any further legal content in the sense of a ‘fundamental right’.

37.32 Article 37 addresses the duties of public authorities in relation to environmental protection: that is, to ensure that a ‘high level of environmental protection’ and ‘the improvement of the quality of the environment’ is integrated into ‘the policies of the Union’, ‘in accordance with the principle of sustainable development’. Its wording differs strikingly from that of a classical right provision: the term ‘right’ itself is omitted, as are similar terms used in other Charter provisions that do grant and protect individual rights (e.g. ‘everyone is entitled’,¹⁰⁴ ‘no one shall be subjected, held, required’).¹⁰⁵ In addition, the provision ‘take[s] care not to specify any beneficiary’ of EU action, thereby avoiding the creation of an ‘individual entitlement guaranteed to the victims of pollution’.¹⁰⁶ Article 37 is thus a declaration of principle, which can be

⁹⁹ R. Schütze, ‘Three “Bills of Rights” for the European Union’ (2011) 30 *Yearbook of European Law* 131, 146. This would be in line with the spirit of Art 52(2) of the Charter, albeit reference is only made to ‘rights’ in that context.

¹⁰⁰ See further section D.IV below; and more generally, J Krommendijk, ‘Principled Silence or Mere Silence on Principles? The Role of the EU Charter’s Principles in the Case Law of the Court of Justice’ (2015) 11 *European Constitutional Law Review* 321.

¹⁰¹ Explanatory Notes, n 1 above at 35, only offer a non-exhaustive list of the principles recognised in the Charter, which notably includes Art 37.

¹⁰² Explanatory Notes, n 1 above, 35 noting that some provisions of the Charter may contain elements of both a ‘right’ and a ‘principle’.

¹⁰³ Explanatory Notes, n 1 above, 33, indeed, make reference to the ‘principles set out in this Article’.

¹⁰⁴ Eg, Arts 34(2) and 46 of the Charter.

¹⁰⁵ Eg, Arts 4, 5(1), 49(1), and 50 of the Charter.

¹⁰⁶ de Sadeleer, n 14 above, 44.

interpreted as being of a ‘policy-objective’ nature.¹⁰⁷ Such a reading has been confirmed by the EU General Court, holding that Article 37 ‘only contains a principle providing for a general obligation on the European Union in respect of the objectives to be pursued in the framework of its policies, and not [an individual] right to bring actions in environmental matters before the Courts of the European Union’.¹⁰⁸

37.33 Against this background, to what extent are the EU political institutions under a *legal obligation* to integrate environmental concerns into Union policies? Is the environmental integration principle intended to act as a mere procedural requirement to consider the environmental dimension of other Union policies, or does it demand a substantive integration of environmental concerns? And how much discretion is left to the EU legislator in balancing environmental protection and other (at times) conflicting policy objectives?

37.34 In the scholarship, we find three views on the legal significance of the environmental integration principle.¹⁰⁹ The first, and weakest, interpretation would view the principle largely as a procedural tool, imposing a duty to simply ‘take into account’ environmental concerns in the development of other Union policies, while leaving the EU decision-makers with a broad discretion as to whether or not to adjust such policies in practice.¹¹⁰ The second, and stronger, interpretation of the principle would, instead, require the EU decision-makers to pursue environmental aims in a systematic manner alongside the specific sectoral objectives of other Union policies. In other words, it would demand substantive integration of environmental concerns into other Union policies, without however prescribing a clear precedence of environmental protection over other EU policy objectives.¹¹¹ Finally, under the third and strongest interpretation, environmental protection requirements would need to be applied at all times in priority to other (potentially conflicting) policy objectives.¹¹²

37.35 In our opinion, the second interpretation seems most correct on the basis of a close analysis of the wording of Article 37 Charter and Article 11 TFEU. Both of these provisions are clearly framed in mandatory and justiciable terms: ‘must be integrated’. Furthermore, Article 11 TFEU stands out as the only integration clause that uses the term ‘must’, as opposed to ‘shall aim at’¹¹³ or

¹⁰⁷ Kiss, n 50 above, 252; Lucarelli, n 52 above, 230.

¹⁰⁸ Case T-600/15 *Pesticide Action Network Europe v Commission*, ECLI:EU:T:2016:601, para 47.

¹⁰⁹ See S Kingston, ‘Integrating Environmental Protection and EU Competition Law: Why Competition Isn’t Special?’ (2010) 16(6) *European Law Journal* 780, 788.

¹¹⁰ See eg, M Montini, ‘The Principle of Integration’ in Krämer and Orlando, n 85 above, 145–46.

¹¹¹ See eg, B Sjøfjell, ‘The Legal Significance of Article 11 TFEU for EU Institutions and Member States’ in B Sjøfjell and A Wiesbrock (eds), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (Abingdon, Routledge, 2014).

¹¹² See eg, JK Knudsen and WM Lafferty, ‘Environmental Policy Integration: The Importance of Balance and Trade-Offs’ in D Fisher, *Research Handbook on Fundamental Concepts of Environmental Law* (Cheltenham, Edward Elgar, 2016), positing environmental integration as a ‘first-order principle’.

¹¹³ Which is used in Art 8 TFEU (gender equality) and Art 10 TFEU (non-discrimination).

‘shall take into account’¹¹⁴ which are found in other mainstreaming clauses in the EU Treaties. Hence, Article 11 TFEU would appear to limit more significantly the margin of institutional discretion.¹¹⁵ Since its early case law on Article 11 TFEU, the Court seems to have interpreted the principle as legally binding.¹¹⁶ As was noted by Advocate General Jacobs: ‘[a]s its wording shows, [Article 11 TFEU] is not merely programmatic: it imposes legal obligations’.¹¹⁷

37.36 In addition, the terms ‘be integrated’ in both provisions point to a substantive legal obligation, rather than a mere policy guideline or procedural rule that could be easily satisfied by the EU legislator through a superficial examination of the environmental implications of the measure envisaged (eg by simply taking note of the environment in a preambular recital).¹¹⁸ Both provisions require that environmental objectives and principles are pursued and applied in all Union policies in a systemic manner. That being said, they do not prescribe a clear primacy for environmental protection to the detriment of other EU policy objectives. This is further corroborated by Article 7 TFEU requiring the Union to ensure consistency between *all* its policies and activities,¹¹⁹ as well as the lack of a hierarchy between the environmental integration principle and other mainstreaming clauses in EU primary law.¹²⁰ Nonetheless, Article 11 TFEU and Article 37 of the Charter impose a general obligation on the EU institutions to carry out, at the very least, an integrated and balanced assessment

¹¹⁴ Which is used in Art 9 TFEU (employment and social protection) and Art 12 TFEU (consumer protection). Art 13 TFEU on animal welfare uses also a weaker term (‘pay full regard’).

¹¹⁵ Dhondt, n 11 above, 101-03; E Psychogiopoulou, ‘The Integration of Cultural Considerations in EU Law and Policies’ (Doctoral thesis, European University Institute, 2006) 68-73, offering a comparative analysis of the legal strength of the environmental integration requirement.

¹¹⁶ Case C-62/88 *Greece v Council* [1990] ECR I-1527, para 20 (referring to former art 130r(2) SEA): ‘[t]hat provision, which reflects the principle whereby *all* Community measures *must satisfy* the requirements of environmental protection, implies that a Community measure cannot be part of Community action on environmental matters merely because it takes account of those requirements’ (emphasis added). The Court reiterated this interpretation in Case C-405/92 *Etablissements Armand Mondiet v Société Armement Islais* (Mondiet) [1993] ECR I-6133, para 27.

¹¹⁷ Opinion of AG Jacobs in Case C-379-98 *PreussenElektra* [2001] ECR I-2099, para 231.

¹¹⁸ M Wasmeier, ‘The Integration of Environmental Protection as a General Rule for Interpreting Community Law’ (2001) 38(1) *Common Market Law Review* 159, 164.

¹¹⁹ Art 7 TFEU reads: ‘The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers’ .

¹²⁰ H Vedder, ‘The Treaty of Lisbon and European Environmental Policy’ (2010) 22(2) *Journal of Environmental Law* 285, 289. Before the Lisbon Treaty, environmental integration, together with gender equality (former Art 3(2) EC Treaty, now Art 8 TFEU) were the only mainstreaming requirements enjoying the status of general principle of EU law. With the Lisbon Treaty, this prominent position has been extended to employment and social and human health protection (Art 9 TFEU), non-discrimination (Art 10 TFEU); consumer protection (Art 12 TFEU); and animal welfare (Art 13 TFEU).

of all the relevant environmental aspects when defining and implementing Union policies.¹²¹

IV. Limitations and Derogations

37.37 While it is plain that the environmental integration principle is construed as a legal obligation under both Article 37 of the Charter and Article 11 TFEU, it is less clear the extent to which these provisions are judicially cognisable and enforceable. In this regard, Article 52(5) of the Charter states that provisions containing principles, such as Article 37, ‘shall be judicially cognisable only in the interpretation of [acts that implement them] and in the ruling on their legality’. Such a restriction is not placed on ‘rights’ and ‘freedoms’ referred elsewhere in Article 52 of the Charter. If read literally and in isolation, Article 52(5) of the Charter would seem to impose a significant limitation on the justiciability of Article 37. It can only be invoked before a court to challenge the legality of *an act implementing* (ie explicitly referring to) the principle of environmental integration. But, presumably, it is not relevant to the interpretation or legality of EU acts that do not *do not implement* (ie make no reference to) the principle.

37.38 However, the case law on Article 11 TFEU¹²² does not make such a distinction and is less restrictive on the justiciability of the environmental integration principle. Article 11 TFEU has been relied upon by the Court not only to review the legality of EU acts specifically ‘implementing’ environmental integration, but more generally.¹²³ Given its status of general principle of EU law,¹²⁴ Article 11 TFEU is crucial to the interpretation of EU law as a whole, both primary and secondary, whether it explicitly or implicitly gives effect to the

¹²¹ Jans and Vedder, n 9 above, 23.

¹²² Note that most of the case law on Art 11 TFEU (and former Art 6 EC Treaty) has dealt with the role of that provision in the choice of the appropriate legal basis of EU acts, rather than with its implications for the normative content of such acts: Case C-62/88 *Greece v Council (Chernobyl I)* [1990] ECR I-1527; Case 155/91, *Commission v Council (Waste Directive)* [1993] ECR I-939; *Opinion 2/00 pursuant to Article 300(6) EC, Cartagena Protocol* ECR I-9713; Case C-336/00 *Republik Österreich v Martin Huber* [2002] ECR I-7699; Case C-94/03 *Commission v Council (re Rotterdam Convention)* [2006] ECR I-1; Case C-178/03 *Commission v European Parliament and Council* [2006] ECR I-107; Case C-440/05 *Commission v Council* [2007] ECR I-9097; Joined Cases C-626/15 and C-659/16 *Commission v Council* [2018] ECLI:EU:C:2018:925. For an overview of this case law, see M. Cremona, ‘Coherence and EU External Environmental Policy’ in E. Morgera (ed.), *The External Environmental Policy of the European Union—EU and International Law Perspectives* (Cambridge, Cambridge University Press, 2012), 45–51; and Dhondt, n 14 above, 169–75.

¹²³ Most obvious in Case C-284/95 *Safety High-Tech v S. & T. Srl (Safety High-Tech)* [1998] ECR I-4301; and Case C-341/95 *Bettati v Safety Hi-Tech (Bettati)* [1998] ECR I-4355. See Dhondt, n 14 above, 144–64 for an overview of case law applying former Art 6 EC Treaty (now Art 11 TFEU) and Art 174 EC (now Art 191 TFEU) in judicial review cases.

¹²⁴ See Kingston, n 109 above, 787.

principle of environmental integration.¹²⁵ That is to say, the ECJ may only opt for an interpretation whose effects are positive or neutral on the environmental interests involved. An interpretation which does not favour the proper integration of environmental protection requirements in EU law or, ultimately, their reconciliation with other competing policy goals, is a priori inconsistent with Article 11 TFEU. It would need to be justified on the basis of Treaty exceptions or other overriding reasons.¹²⁶ A systemic reading of Article 37 of the Charter, in light of Article 11 TFEU and its status as general principle of EU law, would therefore require a broader justiciability than that suggested by the letter of Article 52(5) of the Charter.

37.39 It would seem evident, as a consequence, that *any* piece of EU legislation that has a harmful effect on the environment breaches a clear Treaty (Article 11 TFEU) and Charter (Article 37) obligation, and may be liable to annulment by the Court.¹²⁷ However, such a breach may be difficult to prove in practice. This is because of the broad margin of discretion that is generally left to the EU political institutions when implementing and striking a balance between the various policy objectives and principles in the Treaties. The exercise of judicial review is usually restricted to verifying whether the competent institution has manifestly exceeded the bounds of its discretion or misused its powers.¹²⁸ For instance, in disputes over the legality of a regulation prohibiting the use of ozone-depleting substances,¹²⁹ the ECJ confirmed the wide discretionary powers of the EU institutions with respect to the Treaty-based environmental objectives and principles. The Court justified this approach on the need for a margin of institutional appreciation in making complex assessments of, and balancing between, these objectives and principles.¹³⁰ This is precisely where the explicit

¹²⁵ Former Art 6 EC Treaty was used as a tool in interpreting Treaty provisions as well as secondary law in e.g.: Opinion of AG Jacobs in Case C-379/98 *Preussen-Elektra AG v Schlesweg AG* [2001] ECR I-2099, paras 231–32; Joined Cases T-74/00 etc, *Artegodan and Others v Commission* [2002] ECR II-4945, paras 183–84; Opinion of AG Jacobs in Case C-126/01 *Ministère de l'Économie, des Finances et de l'Industrie v GEMO SA* [2003] ECR I-13769, paras 65–67; Opinion of AG Alber in Case C-444/00 *The Queen on the application of Mayer Parry Recycling Ltd v The Environment Agency and Secretary of State for Environment, Transport and the Regions* [2003] ECR I-6163, para 124.

¹²⁶ See Wasmeier, n 118 above, 160–163 and 175–176; and more generally, F. Jacobs, 'The Role of the European Court of Justice in the Protection of the Environment' (2006) 18(2) *Journal of Environmental Law* 185.

¹²⁷ An action for annulment can be brought pursuant to Art 263 TFEU.

¹²⁸ See eg Cases C-331/88 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex p Fedesa and others* [1990] ECR I-4023, para 8, Case *Mondiet*, n 117 above, para 32, C-180/96 *United Kingdom v Commission* [1998] ECR I-2265, para 60; and C-120/97 *Upjohn v The Licensing Authority* [1999] ECR I-223, para 34. On this point, see J Nowag, 'Article 11 TFEU and Environmental Rights' in S Bogojević and R Rayfuse, *Environmental Rights in Europe and Beyond* (Oxford, Hart, 2018), 169–71.

¹²⁹ Case *Bettati*, n 123 above, especially paras 32–35; Case *Safety Hi-Tech*, n 123 above, especially paras 34–37.

¹³⁰ See also Opinion AG Geelhoed in Case C-161/04 *Austria v Parliament and Council* [2006] ECR I-9097, para 59, referring to the environmental integration principle as

recognition of environmental rights by the Charter would have made a difference. That is, it could have contributed to clarify the limits of legislative discretion by reference to the need to avoid unjustified and foreseeable infringements of human rights that could arise from the regulation of environmental matters or of activities that may have negative impacts on the environment.¹³¹

37.40 It is therefore hard to imagine a situation where the environmental integration principle could, in practice, be the successful basis of a legal challenge of an EU measure which does not (or not sufficiently) integrate environmental protection requirements.¹³² In fact, the EU courts have thus far never invalidated a particular piece of EU legislation on the sole basis that it breaches the environmental integration principle.¹³³ Nor does there appear to be any cases where the principle has been relied on in order to challenge the validity of national legislation.¹³⁴

37.41 A second limitation to the justiciability of the environmental integration principle emerges from the Explanatory Notes on Article 52(5) of the Charter, which provide that ‘principles’, unlike rights, in the Charter do not ‘give rise to direct claims for positive action by the Union’s institutions or Member States authorities’.¹³⁵ In other words, as stated by the EU General Court, Article 37 of the Charter cannot provide the basis for challenging a failure to act on the part of the EU institutions.¹³⁶ A paradoxical result would ensue: that the EU legislator may be condemned for mis-implementing the principle of environmental integration, but not for failing to act upon it altogether. It has been noted, furthermore, that the Charter approach in this regard appears stricter than that of

follows: ‘[a]lthough this provision is drafted in imperative terms ... it cannot be regarded as laying down a standard according to which in defining [EU] policies environmental protection must always be taken to be the prevalent interest. Such an interpretation would unacceptably restrict the discretionary powers of the [EU] institutions and the [EU] legislature. At most it is to be regarded as an obligation on the part of the [EU] institutions to take due account of ecological interests in policy areas outside that of environmental protection *sensu stricto*. It is only where ecological interests manifestly have not been taken into account or where they have been completely disregarded that [Art 11 TFEU] may serve as the standard for reviewing the validity of [EU] legislation.’

¹³¹ Report of the UN Special Rapporteur on Human Rights and the Environment John H Knox: Biodiversity and ecosystem services (2017) UN Doc. A/HRC/34/49, para 34.

¹³² For a similar view, see Cremona, n 122 above, 39; and Dhondt, n 11 above, 181.

¹³³ Exceptionally in Case T-229/04 *Sweden v Commission* [2007] ECR II-2437, para 262, the General Court did find that the challenged Commission decision was in breach of the integration principle, together with the precautionary and high level of protection principles. However, its reasoning on the breach of the integration principle is succinct and appears largely to rely on finding that the other environmental principles have been infringed: for further discussion, see Missone, n 71 above, 21; E Scotford, *Environmental Principles and the Evolution of Environmental Law* (Oxford, Hart, 2017), 145–46; and Langlet and Mahmoudi, n 9 above, 50.

¹³⁴ D Denman, ‘The Charter of Fundamental Rights’ (2010) 4 *European Human Rights Law Review* 349, 354.

¹³⁵ Explanatory Notes, n 1 above, 35.

¹³⁶ Case *Pesticide Action Network Europe v Commission*, n 108 above, para 48. An action for failure to act may generally be brought pursuant to Art 265 TFEU.

the ECJ in relation to the enforceability of EU environmental directives, whereby an individual can challenge a national agency before a national court for failing to take action under the directive.¹³⁷

37.42 In short, real substantive integration of environmental concerns into Union policies is largely a matter of legislative and executive discretion, with which the EU judiciary is unlikely to interfere. At most, the role of the Court in operationalising the environmental integration principle lies in its willingness to use it as tool to interpret and apply EU law.

V. Remedies

37.43 Article 47 of the Charter declares the right to an effective remedy and to a fair trial in instances where ‘rights and freedoms guaranteed by the law of the Union are violated’. At first sight, the relevance of this provision to Article 37 of the Charter itself seems rather limited given that, as we have seen, it falls short of ‘guaranteeing’ any individual ‘right’ to environmental protection. At the same time, as we have also noted,¹³⁸ Article 47 of the Charter must be given the ‘same meaning and scope’ than corresponding provisions in the ECHR, in this case: Articles 6(1) and 13.¹³⁹ These two provisions have been interpreted by the ECtHR as guaranteeing access to justice and an effective remedy in environmental matters.¹⁴⁰ In principle, therefore, EU and national courts¹⁴¹ should apply Article 47 of the Charter in light of this case law. This interpretation is further supported by the international obligations related to access to justice in environmental matters that bind the EU and its Member States under the Aarhus Convention.¹⁴²

37.44 In practice, however, access to justice and remedies in environmental matters is particularly deficient both at EU and Member State level. With regards to the latter, there is still a significant level of disparity in the national procedures on access to courts for environmental matters.¹⁴³ This may be partly due to lack of progress on the Commission’s legislative proposal for a Directive

¹³⁷ de Sadeleer, n 14 above, 45, relying on Case C-237/07 *Janecek* [2008] ECR I-06221.

¹³⁸ By virtue of Art 52(3) of the Charter; see section B above.

¹³⁹ Explanatory Notes, n 1 above, 34 and 29, respectively.

¹⁴⁰ See summary of relevant ECtHR case law in Council of Europe, n 14 above, 94–109; and de Sadeleer, n 14 above, 63–64.

¹⁴¹ This could make a significant difference in some Member States. For instance, in the UK, the Charter provides a stronger remedy than domestic law against acts of UK public authorities that violate procedural and substantive environmental rights recognised under the ECHR: the offending law can be struck down, rather than merely declared incompatible, which is the only remedy available under UK Human Rights Act: *Morgera et al*, n 24 above on the basis of *Benkharbouche & Anor v Embassy of the Republic of Sudan* [2015] EWCA Civ 33, 5th February 2015.

¹⁴² Aarhus Convention, Art 9.

¹⁴³ N de Sadeleer, G Roller and M Dross (eds), *Access to Justice in Environmental Matters and the Role of NGOs: Empirical Findings and Legal Appraisal* (Europa Law Publishing, 2005).

implementing the provisions in the Aarhus Convention on access to justice in environmental matters at the Member State level.¹⁴⁴ Furthermore, levels of implementation at national level remain unsatisfactory with regards to specific provisions on access to justice in existing EU environmental law.¹⁴⁵ The ECJ has, however, seized the opportunity to assert that national regulations on access to justice in environmental matters need to be interpreted so as to give full effect to the standards of the Aarhus Convention and avoid making the exercise of the right impossible, or excessively difficult, in practice.¹⁴⁶

37.45 The same reasoning has been conspicuously not applied at EU level, however.¹⁴⁷ Here, the ECJ has ‘obstinately clung to its rigid [Plaumann] doctrine’ on standing, and ‘practically barred’ environmental NGOs and individuals from bringing cases to EU courts to review the legality of EU environmental acts.¹⁴⁸ The practice has continued after the adoption of the Charter, and does not seem to be set to change, notwithstanding the amendments introduced by the Lisbon Treaty.¹⁴⁹ The ECJ has indicated that Article 47 of the Charter does not ‘require that any individual should have an unconditional entitlement to bring an action

¹⁴⁴ Commission, ‘Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters’ COM(2003) 624 final, Brussels 24 October 2003; and Commission, Notice on Access to Justice in Environmental Matters C/2017/2616, which provides interpretative guidance to Member States (and indications of how the Commission will use infringement proceedings to ensure compliance with it) based on ‘provisions of EU law, including the Charter of Fundamental Rights, and the case-law of the CJEU’ in order to ensure effective judicial protection according to the EU Treaties and Art 47 of the Charter and to recognise ‘that, in the domain of the environment, access to justice needs to reflect the public interests that are involved’ (paras 11, 13 and 2–3). Note that in 2017, the Aarhus Compliance Committee considered that not having adopted a directive on access to justice does not amount to non-compliance (ACCC/C/2014/123, UN Doc ECE/MP.PP/C.1/2017/21, 2017).

¹⁴⁵ C Poncelet, ‘Access to Justice in Environmental Matters—Does the European Union Comply with its Obligations?’ (2012) 24(2) *Journal of Environmental Law* 287, 289–95; and Jans and Vedder, n 9 above, 228–37.

¹⁴⁶ Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-1255, paras 46–51; AG Sharpston in Case C-664/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd* (Opinion AG Sharpston), ECLI:EU:C:2017:760, para 95.

¹⁴⁷ Aarhus Convention Compliance Committee, Findings and Recommendations with regard to Communication ACCC/C/2008/32 (Part II) concerning Compliance by the European Union (17 March 2017), paras 73–76 and 83.

¹⁴⁸ Poncelet, n 145 above, 298. See also L Kramer, ‘Environmental Justice in the European Court of Justice’ in J Ebbesson and P Okowa (eds), *Environmental Law and Justice in Context* (Cambridge, Cambridge University Press, 2009).

¹⁴⁹ See new provision in Art 263(4) TFEU and pessimistic views on whether it can have any impact on access to justice for environmental matters at EU level by Jans and Vedder, n 9 above, 250. This is confirmed, inter alia, by Case T-125/18 *Associazione GranoSalus v Commission*, ECLI:EU:T:2019:92.

for annulment’ on environmental grounds.¹⁵⁰ The invocation of substantive environmental rights implicitly protected under the Charter by virtue of Article 52(3), as a ground to meet the Plaumann test has also proven so far unsuccessful to challenge EU legislative acts.¹⁵¹

37.46 In effect, the EU has been repeatedly censured by the Aarhus Convention Compliance Committee,¹⁵² which has found that if the [relevant] jurisprudence of the EU Courts on access to justice, were to continue, *unless fully compensated for by adequate administrative review procedures*, the [EU] would fail to comply with Article 9(3) of the Aarhus Convention (emphasis added).¹⁵³

37.47 Regrettably, the scope for administrative review of EU acts under the Regulation implementing the Aarhus Convention at the level of the EU institutions¹⁵⁴ is very narrow and applied in an ‘extremely restrictive’ manner.¹⁵⁵ It seems therefore hardly capable of ‘fully compensating’ for the lack of access to justice to EU courts.¹⁵⁶ Indeed, the General Court explicitly affirmed that this

¹⁵⁰ C-583/11 P *Inuit Papriit Kaatami and Others v Parliament and Council*, EU:C:2013:21, para 105; and Case T-330/18 *Carvalho and Others v Parliament and Council*, ECLI:EU:T:2019:324, para 52.

¹⁵¹ *Ibid.*, *Carvalho* case, paras 48–49. The applicants had argued that ‘[t]he effects of climate change, to which the legislative package contributes, and, accordingly, the infringement of those rights will be unique to and different for each individual. According to the applicants, a farmer affected by drought is in a different situation to a farmer whose land is flooded and made saltier by seawater. Even within a group of farmers affected by drought, each farmer will experience the effects differently’ (para 31).

¹⁵² A non-judicial, consultative body that reviews compliance with the Aarhus Convention by its parties, including on the basis of communications from the public: Aarhus Convention, Art 15.

¹⁵³ Communication to the Aarhus Convention Compliance Committee ACCC/C/2008/32, 2008; in particular, the Compliance Committee’s Findings and Recommendations (2011) UN Doc ECE/MP.PP/C.1/2011/4/Add.1, para 88. See also Aarhus Convention Compliance Committee, n 147 above.

¹⁵⁴ Regulation (EC) 1367/2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies [2006] OJ L264/13, Arts 10–11.

¹⁵⁵ J. Jans and G. Harryvan, ‘Internal Review of EU Environmental Matters: It’s True. Baron Van Munchausen Doesn’t Exist! Some Remarks on the Application of the So-called Aarhus Regulation’ (2010) 3(2) *Review of European and Administrative Law* 53; and GC Leonelli, ‘GMO Authorization and the Aarhus Regulation: Paving the Way for Precautionary Risk Regulation?’ (2019) 26(4) *Maastricht Journal of European and Comparative Law* 505–23. See also, Case T-12/17, *Mellifera v Commission*, ECLI:EU:T:2018:616.

¹⁵⁶ Jans and Vedder, n 9 above, 249. This seems confirmed by the Aarhus Convention Compliance Committee, which in draft findings published in January 2021, recommended ‘necessary legislative, regulatory and other measures to ensure that the Aarhus Regulation is amended, or new European Union legislation is adopted, to clearly provide members of the public with access to administrative or judicial procedures to challenge decisions on state aid measures taken by the European

provision is ‘not compatible’ with the relevant provision of the Aarhus Convention,¹⁵⁷ but this was reversed on appeal.¹⁵⁸ The Aarhus Convention Compliance Committee, however, has come to the same conclusion than the General Court.¹⁵⁹

37.48 Limited access to justice in environmental matters within the EU sheds light on yet another motive behind the unwillingness of the drafters of the Charter to proclaim any environmental rights. Without the shadow of a doubt, there is a host of compelling legal arguments for the ECJ to depart from its (excessively) restrictive approach to standing: notably, a consistent interpretation of Articles 37 and 47 of the Charter with the Aarhus Convention, as well as with the relevant ECtHR case law.¹⁶⁰ Fears of opening the ‘floodgates’ could be managed from a legal perspective,¹⁶¹ but political considerations seem to be preventing this development: the reluctance not only of (some) Member States, but also of the ‘EU institutions to be challenged by environmental organisations.’¹⁶²

E. Evaluation

37.49 Unlike some of the constitutions of the EU Member States, Article 37 of the Charter does not proclaim an autonomous right to a healthy environment. It does not make explicit the procedural and substantive environmental rights that have been derived from the ECHR and UN human rights treaties. In fact, Article 37 even fails to codify and elevate to a constitutional level procedural environmental rights that are already binding upon the EU and its Member States, both under international law and EU secondary law. Rather than embodying a ‘limit’ on public authorities’ action in order to protect an individual right to a healthy environment, or a positive obligation to act to fulfil such a right, Article 37 articulates a principle of environmental integration as a ‘policy aim’ for public authorities.¹⁶³ By itself, it simply provides an undetermined ‘yardstick against

Commission under article 108(2) TFEU which contravene EU law relating to the environment, in accordance with article 9(3) and (4) of the Convention.’

([ACCC/C/2015/128](#)).

¹⁵⁷ Case T-338/08 *Stichting Natuur en Milieu and Pesticide Action Network Europe v European Commission*, ECLI:EU:T:2012:300, paras 76–83.

¹⁵⁸ Case C-404/12 P *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, ECLI:EU:C:2015:5, para 47.

¹⁵⁹ Aarhus Convention Compliance Committee, n 147 above, para 98.

¹⁶⁰ Jans and Vedder, n 9 above, 244; Poncelet, n 145 above, 302; M Pallemmaerts, ‘Access to Justice at EU Level’ in M Pallemmaerts (ed), *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law* (Europa Law Publishing, 2011), 273–312, 311.

¹⁶¹ See, for instance, the solution proposed by Pallemmaerts, n 160 above, 312 based on TFEU Art 257(1–3).

¹⁶² Poncelet, n 145 above, 307.

¹⁶³ Schütze, n 99 above, 146.

which to measure the relative success (or otherwise) of Union/national regulatory activities.¹⁶⁴

37.50 Against this background, prominent scholars have argued that ‘an exceptional occasion has been missed’ to make progress in a field of fundamental importance for the life of European citizens, especially in the context of the rule of the free market.¹⁶⁵ This assessment, in effect, is mainly focused on Article 37 in isolation from the rest of the Charter. By virtue of Article 52(3),¹⁶⁶ the Charter does contribute, albeit implicitly and in a roundabout way, to embed into the EU legal order the procedural and substantive environmental rights that have been recognised by the ECtHR. This overall contribution is often overlooked by environmental law scholars that have commented on the Charter. Even though procedural environmental rights are already part of the EU legal system on the basis of the Aarhus Convention (and under the ECHR, they have been interpreted in a way that is aligned with the Aarhus Convention),¹⁶⁷ the contribution of Charter is significant in embedding into the EU legal system the substantive environmental rights recognised under the ECHR.¹⁶⁸ That being said, the fact that the Charter only recognises these environmental rights implicitly in provisions other than Article 37, while not making a difference in terms of normative content, does negatively affect the prospects of practical implementation. An explicit recognition of the procedural and substantive environmental rights protected under the ECHR in the Charter would have contributed to ‘raise awareness that human rights norms require protection of the environment and highlight that environmental protection is on the same level of importance as other human interests that are fundamental to human dignity, equality and freedom, ...as a basis for the enactment of stronger environmental laws’ and ‘as a safety net’ for courts to protect individuals and groups against legislative gaps.¹⁶⁹

37.51 This being so, one may still question: what is the place of an environmental integration principle in a Charter of ‘Fundamental Rights’, and indeed its added legal value to the Treaties *acquis*? Given its status of general principle of EU law, Article 11 TFEU already plays, as we have seen, a significant role as a source of interpretation of EU primary and secondary law, and at least potentially as a basis for reviewing the legality of EU acts. In this regard, Article 37 of the Charter adds nothing to Article 11 TFEU, but actually attempts to limit the substantive scope and degree of justiciability of the environmental integration principle.¹⁷⁰ Does this mean, in essence, that Article 37 is only of a symbolic value,¹⁷¹ a mere reminder to readers of a possible environmental dimension of the Charter? Or, as

¹⁶⁴ M. Dougan, ‘The Treaty of Lisbon 2007: Winning Minds, not Hearts’ (2008) 34 *Common Market Law Review* 617, 663.

¹⁶⁵ Kiss, n 50 above, 268.

¹⁶⁶ As discussed in section B above.

¹⁶⁷ Morgera et al, n 24, 1.

¹⁶⁸ See section B above.

¹⁶⁹ Knox, n 4 above, para 13.

¹⁷⁰ Along similar lines, see Hectors, n 16 above, 167–68, considering Art 37 as a ‘politically-driven weakened version of what European legal practice is now in general’.

¹⁷¹ Lombardo, n 16 above, 221.

cautiously advanced by AG Léger, a sign that environmental protection will be accorded ‘increasing importance’ in the future?¹⁷²

37.52 Taking an optimistic standpoint, one could foresee an added value in Article 37 and its inclusion in a Charter of ‘Fundamental Rights’ as a supplementary legal argument and ‘persuasive authority’.¹⁷³ Article 37 could also be seen as a strategic framing of environmental integration as a principle that could gradually contribute to ‘normative progression in EU law’ to review lawfulness of EU and Member States’ acts¹⁷⁴ ‘outside the more established and developing legal paradigms of EU rights’,¹⁷⁵ to avoid the political divisions that still surround environmental rights. Or one could consider that the purposely uncertain line drawn by the Charter between principles and rights may allow courts to gradually support the transition of environmental integration from a principle to a right ‘as a result of societal, legal and political developments’.¹⁷⁶ Either way, Article 37 could support ‘greening’ the practice of EU institutions—both political and judicial—vis-à-vis environmental rights guaranteed under the Aarhus Convention, the ECHR and other applicable international human rights treaties in the future. This is particularly pressing for access to justice in environmental matters at EU level which, as we have seen, is not only below ECHR standards,¹⁷⁷ but has also been censured by the Aarhus Convention Compliance Committee. Ultimately, if the very rationale for ‘constitutionalising’ the Charter was ‘the need for robust and accessible judicial protection for individuals against the ever-increasing powers of the Union and of the Member States when acting within the scope of Union law’,¹⁷⁸ then improved individual access to justice in environmental matters is not only urgent from the viewpoint of the Union’s extensive environmental action internally, but also increasingly desirable in relation to its external environmental action.¹⁷⁹ In addition, the reference in the Charter Preamble to sustainable development and the ‘responsibilities and duties with regard to other persons, to the human community and to future generations’ may arguably hint at the potential of the Charter to broaden standing beyond a traditional victim-based paradigm in the case of environmental harm.¹⁸⁰

37.53 From a more pragmatic perspective, judicial references to Article 37 of the Charter have been thus far limited in both quantitative and qualitative terms,

¹⁷² Opinion of AG Léger in Case C-277/02 *EU-Wood-Trading GmbH* [2004] ECR I-11957, para 9.

¹⁷³ Art 37 was explicitly referred to as such by the ECtHR in *Hatton and Others v UK* (2002) 34 EHRR 1; see comments in Anderson and Murphy, above n 8, 16.

¹⁷⁴ Scotford, note 35 above, 140–42.

¹⁷⁵ *Ibid*, 135, 139 and 144.

¹⁷⁶ Krommendijk, n 100 above, 331.

¹⁷⁷ Schütze, n 99 above, 155.

¹⁷⁸ Anderson and Murphy, n 8 above, 20.

¹⁷⁹ D Augenstein, ‘The Human Rights Dimension of Environmental Protection in EU External Relations After Lisbon’, in E Morgera (ed), n 122 above, 263–86; and E Morgera, ‘The Promotion of Environmental Rights through EU Bilateral Agreements: Mapping the Field’ in F Lenzerini and A Vrdoljak (eds), *International Law for Common Goods* (Oxford, Hart, 2014) 421–41.

¹⁸⁰ Kingston, Heyvaert and Cavoski, n 4 above, 167.

referring to it as justification for the breach of other Charter rights, or as validation for environmental protection coupled with other Charter rights¹⁸¹ or Treaty provisions (notably, Article 3(3) TEU and 191 TFEU).¹⁸² Only in an isolated case has Article 37 been used to ‘add weight to the environmental protection imperative when balanced against other (individual) human rights’.¹⁸³ Moreover, the Court has hinted that it does not add anything legally to the existing Treaty provisions on environmental protection and cannot provide a separate basis for invalidating EU legislation.¹⁸⁴ Nonetheless, a more extensive use of Article 37 is found in AG Opinions, ranging from ambitious but isolated suggestions that it offers a free-standing justiciable right to environmental protection,¹⁸⁵ to more modest statements that it raises the importance of environmental protection to the ‘status of a European target’.¹⁸⁶ It has also been considered an expression of the need to protect both individual rights and the public interest,¹⁸⁷ and a step in the ‘recent process of constitutional recognition in respect of protection of the environment’.¹⁸⁸ But how significant this step will be is yet to be seen, as Article 37 of the Charter has thus far played a very modest role in judicial reasoning.

¹⁸¹ S Bogojević, ‘EU Human Rights Law and Environmental Protection: The Beginning of a Beautiful Friendship?’ in S Douglas-Scott and N Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Cheltenham, Edward Elgar, 2017), 459–64.

¹⁸² Case C-128/17 *Poland v Parliament and Council*, ECLI:EU:C:2019:194, para 127-138; Case C-24/19 *A and Others (Wind turbines at Aalter and Nevele)*, ECLI:EU:C:2020:503, paras 44-45; and Case C-197/18 *Wasserleitungsverband Nördliches Burgenland and Others*, ECLI:EU:C:2019:824, para 49.

¹⁸³ Case T-614/13 *Romonta v Commission*, ECLI:EU:T:2014:835: Kingston, Heyvaert and Cavoski, n 4 above, 168.

¹⁸⁴ Case *Associazione Italia Nostra Onlus*, n 72 above, paras 62–63: ‘[t]he principles set out in [Art 37 of the Charter] have been based on Articles 2, 6 and 174 [EC], which have now been replaced by Article 3(3) [TEU] and Articles 11 and 191 [TFEU]. Since Article 3(3) of Directive 2001/42 has revealed nothing which could affect its validity in the light of Article 191 TFEU, it follows that that provision also reveals nothing which could affect its validity in the light of Article 37 of the Charter’; and Case C-28/09 *Commission v Austria* [2011] ECR I-13525, para 121: ‘[i]n accordance with Articles 6 EC and 152(1) EC, the requirements of environmental protection and public health must be taken into account in the definition and implementation of Community policies and activities ... The transversal and fundamental nature of those objectives is also reaffirmed in Articles 37 and 35 respectively of the Charter.’

¹⁸⁵ Opinion of AG Colomer in Case C-87/02 *Commission v Italy* [2004] ECR I-05975, para 36: ‘[e]nvironmental protection currently occupies a prominent position among Community policies. Furthermore, the Member States also have a crucial responsibility in that area. [EU] citizens are entitled to demand fulfillment of that responsibility under Article 37 of the Charter of Fundamental Rights of the European Union, which guarantees a high level of environmental protection and the improvement of the quality of the environment’ (emphasis added).

¹⁸⁶ Opinion of AG Bot in Case C-195/12 *Industrie du Bois de Vielsalm v Région Wallonne*, EU:C:2013:293, para 82.

¹⁸⁷ Opinion of AG Kokott in Case C-260/11 *Edwards et Pallikaropoulos*, ECLI:EU:C:2012:645, para 39.

¹⁸⁸ Opinion of AG Cruz Villalon in Case C-120/10 *European Air Transport SA v Collège d’Environnement de la Région de Bruxelles-Capitale and Région de Bruxelles-Capitale* [2011] ECR I-07865, para 78.

