

# **Environmental Rights and Principles in the EU Context: Investigating Article 37 of the Charter of Fundamental Rights**

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## **A Introduction**

This chapter considers the legal nature and status of Article 37 of the EU Charter of Fundamental Rights.<sup>1</sup> Article 37 is a contradictory provision. It seems full of promise as a strongly worded provision on environmental protection included in a charter of rights. It is a source of hope and possibility for those interested in the development of an environmental rights paradigm and jurisprudence within EU law and globally.<sup>2</sup> However, Article 37 is also a highly contextualized provision that is inherently compromised as a legal ‘right’.<sup>3</sup> It is a distinct creation and creature of EU law, and its identity in EU law terms is central to understanding its character and legal role. Its compromised nature is highlighted by its drafting history and deliberate inclusion in the Charter as a ‘principle’ rather than a ‘right’, and this background fundamentally shapes its construction and interpretation as a matter of EU law.

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<sup>1</sup> ‘Charter of Fundamental Rights of the European Union’ [2012] OJ C326/391 (‘Charter’).

<sup>2</sup> Eg Roderic O’Gorman, ‘The Case for Enshrining a Right to Environment within EU Law’ (2013) 19 *European Public Law* 583. On international rights and environmental protection generally, see Alan Boyle, ‘Human Rights and the Environment: Where Next?’ (2012) 23(3) *European Journal of International Law* 613.

<sup>3</sup> Elisa Morgera and Gracia Marín Durán, ‘Commentary on Article 37 – Environmental Protection’ in Steve Peers, Tamara Harvey, Jeff Kenner and Angela Ward, *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) (noting that Article 37 ‘fails to take a stance’ on the controversial international law question of the existence of a substantive environmental right and also fails to incorporate environmental rights of a procedural character). See also Sanja Bogojevic, ‘EU Human Rights Law and Environmental Protection: The Beginning of a Beautiful Friendship?’ in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar 2016).

The Chapter explores the legal nature of Article 37 both within the unique structure and terms of the Charter itself, particularly in light of its distinction between rights and principles, and more broadly within the context of ‘environmental principles’ in EU law. The latter lens shows that Article 37, as a ‘Charter principle’, is in fact part of a wider and developing legal discourse concerning EU environmental principles. Rather than seeing that Article 37 is deficient because it is not a fully-fledged EU fundamental or human right, this perspective shows how Article 37 represents a normative progression in EU law, in relation to the principles of integration and sustainable development in particular. EU environmental principles are themselves riddled with uncertainty and continue to evolve legally, but they present a pattern of legal development (and ambiguity) into which Article 37 fits. Article 37 makes more sense as a legal creature within the broader picture of EU environmental principles and their evolving legal roles. The chapter demonstrates this perspective in three parts. First, it examines the legal conundrum presented by Article 37 in the Charter –what is a Charter principle in legal terms? – and the limited resources and answers contained within the Charter itself and its accompanying Explanations for resolving this conundrum. Second, the chapter examines the nature of environmental principles in EU law more broadly and shows how Article 37 fits within this growing body of legal doctrine, with its legal limits and complexities. Third, the chapter considers the justiciability of Article 37, both on the state of current case law and its potential justiciability in light of its identity as an ‘EU environmental principle’. Justiciability is often at the crux of arguments over whether socio-economic concepts are or should be recognized as legal rights.<sup>4</sup> This chapter shows that, whilst Article 37 might fall short

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<sup>4</sup> Particularly whether they can operate as autonomous grounds for challenging public action. See generally Murray Wesson, ‘The Emergence and Enforcement of Socio-Economic Rights’ in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart 2014).

of being an independent ground for reviewing the legality of public action in EU law, its role as an environmental principle suggests a number of interesting and potentially powerful roles in legal reasoning, including through shaping interpretive practice and in otherwise informing the development of EU legal doctrine.

## **B The Legal Conundrum of Article 37**

Article 37 is a perplexing legal provision for a number of reasons. It not expressed as a ‘right’ but it is contained within a Charter of rights. Its wording is similar to the integration principle in Article 11 TFEU, but its phrasing is not equivalent. And it sits within a Charter whose legal and constitutional status is still being explored and understood as a matter of EU law.<sup>5</sup> Article 37 provides that:

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 ensured in accordance with the principle of sustainable development.

This section explains the definitional and legal complexity of this apparently well-meaning provision, first by examining its wording, and then by exploring its nature as a provision of the Charter with its deliberate distinction drawn between ‘rights’ and ‘principles’. The section shows how Article 37 wraps a number of ambiguous elements into a single package that was deliberately left unclear as to its precise legal effect. The Charter has created a provision that is ripe for legal interpretation and application, albeit outside the more established and developing legal paradigms of EU rights.

### *Legal Complexity of Article 37 – Charter Wording*

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<sup>5</sup> See generally Steve Peers, Tamara Harvey, Jeff Kenner and Angela Ward, *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014).

From the wording of Article 37, a number of aspects stand out in analysing its legal meaning. First, it promotes a ‘high level of protection’ and improving environmental quality by requiring these goals to be integrated into the various policy areas that fall within the competence of the European Union. It is thus, similarly to Article 11 TFEU, tied to the limited competences of the EU. This fundamental feature distinguishes Article 37 from other constitutional provisions internationally that guarantee a right to a healthy or clean environment as a freestanding proposition.<sup>6</sup> Its reference to a ‘high level of environmental protection’ also resonates with similar references to attaining a ‘high level of protection’ in other EU laws – both in the Treaties and in secondary legislation.<sup>7</sup> However, the requirement of a ‘high level of protection’ is not used consistently in EU environmental measures and the meaning and significance of this legal imperative remains a matter of debate.<sup>8</sup>

Second, the wording of Article 37 indicates that it is focused on the pursuit of sustainable development. This again tracks Article 11 TFEU in defining integration of environmental protection in terms of sustainable development (albeit that Article 37 is more strongly worded in requiring compliance with the ‘principle’ of sustainable development).<sup>9</sup> This link between integration and sustainable development suggests a number of interpretive possibilities as to how these two concepts might define, mutually

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<sup>6</sup> Eg Article 24 of the Constitution of the Republic of South Africa (1996) provides ‘Everyone has the right (1) to an environment that is not harmful to their health or well-being; and (2) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (a) prevent pollution and ecological degradation; (b) promote conservation; and (c) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.’

<sup>7</sup> See eg TFEU, arts 114(3), 168, 169, 191(2); Regulation 1907/2006/EC of the European Parliament and Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) [2006] 396/1, art 1(1).

<sup>8</sup> Eg Jan Jans and Hans Vedder, *European Environmental Law: After Lisbon* (4<sup>th</sup> ed, Europa Law Publishing 2012) 41-43. For a recent analysis of the meaning of a ‘high level of environmental protection’ as an EU ‘environmental principle’, see Opinion of Advocate General Kokott in Case C-444/15 *Associazione Italia Nostra Onlus* [2016] EU:C:2016:665, paras 24 to 35.

<sup>9</sup> Article 11 TFEU requires integration of environmental protection requirements ‘with a view to promoting sustainable development’.

reinforce or dilute one another. Thus it might be argued that the sustainable development principle acts as a qualification on the provision's integration requirement, which either strengthens or weakens its environmental protection imperative, depending on one's approach to sustainable development.<sup>10</sup> Interpretive possibilities relating to these elements are what we have at this stage, due to the contested nature of sustainable development as a concept,<sup>11</sup> and the equally debated nature of integration as a principle in the EU context.<sup>12</sup> From the perspective of environmental principles, considered further in the following section, this definitional ambiguity and the interconnection of the integration and sustainable development principles are part of the wider legal articulation and evolution of these two EU environmental principles.

The final aspect of Article 37's wording that is noteworthy is how it is different from Article 11 TFEU. Despite the similarities in the wording of these two provisions, they have some potentially significant distinctions. In particular, Article 11 refers to 'environmental protection requirements' that must be integrated into the definition and implementation of EU policies and activities, whereas Article 37 of the Charter refers to a high level of protection rather than any set of 'requirements'. It tends to be assumed that the 'environmental protection requirements' in Article 11 refer to the wide range of environmental objectives, principles and factors that are included in Title XX of the Treaty.<sup>13</sup> On this reading, the wording in Article 11 leaves room for potentially interesting interpretations and linkage to other EU legal provisions,<sup>14</sup> which are not

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<sup>10</sup> Eg Emily Reid, *Balancing Human Rights, Environmental Protection and International Trade* (Hart 2015) 60-61 (arguing that the qualification of sustainable development dilutes the EU integration principle).

<sup>11</sup> Michael Jacobs, 'Sustainable Development as a Contested Concept' in Andrew Dobson (ed), *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* (OUP 1999).

<sup>12</sup> Eloise Scotford, *Environmental Principles and the Evolution of Environmental Law* (Hart 2017) 87-88.

<sup>13</sup> Jans and Vedder (n 8) 23.

<sup>14</sup> Although this has not been definitively decided by a CJEU judgment.

open in the same way on the wording of Article 37.<sup>15</sup> It is thus a mistake to think that Article 11 TFEU and Article 37 are equivalent EU legal provisions, which are simply repeated in different foundational EU texts. In sum, Article 37 is drafted in a distinctive legal form that requires precise analysis and authoritative legal interpretation.

### *Legal Complexity of Article 37 – Charter Explanations*

The above analysis of the wording of Article 37 shows that its appeal to high level concepts and its curious wording give rise to many questions as to its interpretation and practical operation. This ambiguity is compounded by the structure and Explanations of the Charter itself, which give some clues as to the nature of Article 37 but again do not provide clear direction. The official Explanation of Article 37 is brief in giving background to the provision, stating simply that it is ‘based on Articles 2, 6 and 174 of the EC Treaty, which have now been replaced by Article 3(3) [TEU] and Articles 11 and 191 [TFEU]’. The Explanation states that Article 37 ‘also draws on the provisions of some national constitutions’, but offers no further explanation of the role or meaning of the provision. Whilst it is a common form of phrasing in the Explanations document to set out how a Charter Article is based on or relates to other measures in the EU Treaties, the European Social Charter or other measures of EU law or the European Convention of Human Rights, the explanations for many other Charter provisions are more developed, particularly where established CJEU case law informs their meanings.<sup>16</sup> On one reading, this sparse Explanation indicates that Article 37 does not add anything more to Article 3(3) TEU, and Articles 11 and 191 TFEU.<sup>17</sup> This

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<sup>15</sup> Although Article 37 also has stronger wording in terms of its imperative to integrate a high level of environmental protection ‘in accordance with’ the sustainable development principle.

<sup>16</sup> See eg arts 15, 16, 47, 50.

<sup>17</sup> This reading is supported by Gráinne de Búrca’s argument that the Charter was intended as a ‘visibility exercise’ or ‘showcase’ aimed not at the policymaker but at the EU citizen, which declares existing EU’s

explanation seems to clarify that Article 37 was not designed to create any new legal obligations in EU law.<sup>18</sup> However, it is also unhelpful to the extent that the three treaty provisions referred to are very general provisions setting out the environmental protection ambitions of the EU, which have had limited substantive legal effects to date in the jurisprudence of the CJEU in terms of guaranteeing any specific environmental rights or obligations. Article 191 is an overarching provision that defines the scope of EU environmental policy action very widely, if ambitiously, and its primary legal influence is in determining the scope of the EU's lawful action in this area of shared competence. Thus Article 191(1) provides, like Article 37, that Union policy on the environment shall aim to preserve, protect and improve the quality of the environment. Notably, Article 191(2) also contains a list of four further environmental principles – the precautionary principle, the preventive principle, the principle of rectification at source, and the polluter pays principle – which have themselves been generating an interesting body of EU legal doctrine, as discussed in the following section. The Explanation's connection between Article 37 and Article 191 TFEU at least suggests that these Articles can and should be mutually supportive provisions in further doctrinal development by the Court involving environmental principles.

In terms of the potential reach of Article 37 as a general guarantee of environmental protection in EU law, Article 11 TFEU and Article 3(3) TEU are arguably more relevant provisions in explaining Article 37. This is because they are overarching provisions impacting on all areas of EU activity, indicating that the EU's

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commitments publicly to secure more popular legitimacy: Grainne de Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' (2015) 40(6) *EL Rev* 799, 802.

<sup>18</sup> Similarly, Article 51(2) provides that the 'Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union... as defined in the Treaties', although this limit is focused on the Charter and its relationship to the competence of EU law and its institutions (and the nature of that competence might still be developing even if it is not to be widened).

environmental protection goals extend beyond Title XX (the environmental title) to other areas of EU policy competence.<sup>19</sup> However, Article 11 TFEU and Article 3(3) TEU are also legally ambiguous or at least provisions the legal impacts of which are in a state of evolution. As indicated above, Article 11 is a provision with an unsettled meaning in EU law, with limited authoritative jurisprudence clarifying its impact to date. Some commentators highlight that Article 11 is a binding legal obligation, which requires that environmental protection concerns be properly integrated in all relevant EU policy domains.<sup>20</sup> Others suggest that its influence is tempered by the need to balance EU policy priorities and that its enforceability through legal means is limited, despite its strong wording and prominent position in the TFEU.<sup>21</sup> Analysis of the integration principle in the reasoning of the CJEU shows that it is performing notable functions in EU doctrine although its doctrinal use is not yet widespread. The principle has thus played a role in the authoritative interpretation of various EU measures, infusing environmental protection requirements into the application of EU provisions in different policy domains.<sup>22</sup> It has also informed legal review tests in ways that both expand the scope of EU environmental competence,<sup>23</sup> and highlight the role of environmental protection in other areas of EU competence.<sup>24</sup> There are also cases in which Advocates General have suggested that Article 11 has a more fundamental legal impact, possibly acting as a standalone ground of review in EU

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<sup>19</sup> This is seen in more specific treaty provisions, such as Articles 114(3)-(5), both obliging the EU to pursue a high level of environmental protection in adopting internal market measures and allowing Member States to derogate from harmonization measures where justified on environmental protection grounds in certain circumstances.

<sup>20</sup> Gracia Marin Duran and Elisa Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Hart 2012) 29-33.

<sup>21</sup> Ludwig Kramer, *EU Environmental Law* (7<sup>th</sup> ed, Sweet & Maxwell 2012) 20-21.

<sup>22</sup> Eg Case C-513/99 *Concordia Bus Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* [2002] ECR I-7213. See Scotford (n 12) 157-159.

<sup>23</sup> *Commission v Council (Environmental Crime)* [2005] ECR I-7879.

<sup>24</sup> Eg Case C-440/05 *Commission v Council (Ship Source Pollution)* [2007] ECR I-9097.

law,<sup>25</sup> although such suggestions have yet to be fully embraced by the EU courts.<sup>26</sup> By contrast, Article 3(3) TEU acts as an even more high-level, general statement of the EU's ambitions concerning environmental protection and sustainable development, amongst other equivalent priorities, and its doctrinal impact in individual cases relating to environmental protection is limited.<sup>27</sup>

In light of all this, a better reading of the Explanation accompanying Article 37 of the Charter is that, whilst Article 37 adds nothing new and legally radical to Articles 3(3) TEU and 191 and 11 TFEU, it nonetheless adds weight to these fundamental EU legal provisions, which have nascent but evolving roles in developing environmental protection obligations in EU law. This reading serves to accommodate two seemingly opposing approaches to the Charter: that there should be no extension of EU legal or judicial competence in interpreting the Charter,<sup>28</sup> and that the Charter can also be a source of authority for the 'discovery' of new principles of EU law.<sup>29</sup> These different approaches both grasp something important in relation to Article 37 – it is intimately connected with existing EU provisions, but these are themselves still being legally 'discovered'. The Explanation to Article 37 is thus more illuminating if one consciously takes into account the ambiguous and evolving nature of related, existing provisions of EU law.

### *Legal Complexity of Article 37 – Charter Structure*

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<sup>25</sup> Eg Case C-161/04 *Austria v Parliament and Council* [2006] ECR I-7183, Opinion of Advocate-General Geelhoed (26 January 2006) [59] ('where ecological interests manifestly have not been taken into account or have been completely disregarded').

<sup>26</sup> Cf Case T-229/04 *Sweden v Commission* [2007] ECR II-2437.

<sup>27</sup> Article 3(3) is usually drawn on in CJEU Judgments and Opinions to set the background of the high level of environmental protection of EU policy, usually in combination with Article 191(2): eg Case T-57/11 *Castelnou Energía v Commission* [2014] ECLI:EU:T:2014:1021 [211].

<sup>28</sup> Daniel Denman, 'The Charter of Fundamental Rights' (2010) 4 EHRL Rev 349.

<sup>29</sup> Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8(3) ECL Rev 375, 376.

The Charter's structure adds a further fundamental obstacle in discerning the legal meaning of Article 37, through its deliberate division into provisions that contain 'rights' and those that contain 'principles'. This is not simply a Charter of fundamental rights as its title suggests. The final paragraph of the preamble provides: 'The Union therefore recognises the *rights, freedoms and principles* set out hereafter' (emphasis added). The Charter's inclusion of principles as well as rights and freedoms complicates the analysis of Article 37, since a 'rights analysis' is not sufficient in determining the legal nature of the Charter's provisions and the Charter itself leaves unanswered questions about the legal distinction between its rights and principles. Following the preamble, this distinction is not clearly articulated in the layout and language of the Charter<sup>30</sup> until it is further elaborated in the 'general provisions' of the Charter's final title. Thus, in Title VII, Article 51(1) provides that EU institutions and Member States are to 'respect the rights' and 'observe the principles' in the Charter within the scope of their respective powers in implementing EU law.<sup>31</sup> Article 52(5) attempts to clarify further this distinction between rights and principles in the Charter in terms of their legal effects, indicating that the Charter's 'principles' are to be 'implemented' by EU and Member State institutions within the scope of their respective powers and that they are to be 'judicially cognisable' only once so implemented. Background materials to the Charter also indicate that its principles are to be something more than 'objectives'.<sup>32</sup> Beyond these provisions, the Charter is largely silent on the

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<sup>30</sup> There are no separate sections for 'rights' and 'principles' in the Charter, although Title IV contains provisions that are more principle-like than right-like. Certain Articles are explicitly expressed as rights (eg 'Everyone has the right to education and to have access to vocational and continuing training': Charter, art 14), whilst others that have more ambiguous wording (eg 'The arts and scientific research shall be free of constraint. Academic freedom shall be respected': Charter, art 13).

<sup>31</sup> 'Respecting' rights and 'observing' principles might suggest different legal functions for rights and principles in the Charter although Article 51(1) also proves that both rights and principles are to be 'applied'.

<sup>32</sup> The European Council specified the sources on which the Charter should draw, which included the ECHR, Member State constitutional traditions, and provisions of the European Social Charter 'which go beyond mere objectives': Conclusions of the Cologne European Council, June 1999.

legal distinction between rights and principles.<sup>33</sup> This silence reflects the political compromise that was reached in including social rights in the Charter at all, leading to the creation of ‘principles’ for provisions concerning social policy that were seen to be distinct from individual rights exercisable against the state.<sup>34</sup> Charter principles were intended to be ‘weaker and less judicially cognisable’.<sup>35</sup> In relation to Article 37 in particular, Marín Durán and Morgera note that the provision represents ‘is a clear manifestation of a lack of consensus among the Member States on a “substantive” human right to the environment’.<sup>36</sup>

In light of the limited but deliberate reference to the rights-principles distinction in the Charter, a threshold question is how to identify whether particular Articles in the Charter contain rights or principles. States deliberately failed to identify which Charter provisions contain principles as opposed to rights, leaving this to judicial interpretation, although some provisions are obviously rights due to their wording (‘the right to asylum’,<sup>37</sup> ‘everyone has the right to freedom of expression’,<sup>38</sup> and so on). Other provisions are more ambiguous. In some cases, the language of rights might not be used but rights are implied (such as the guarantee of non-discrimination in Article 21 which is phrased without reference to a ‘right’)<sup>39</sup> as they reflect rights that are already well established in EU law. In other cases, including Article 37, some provisions are

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<sup>33</sup> Although the history of the distinction, from its inclusion in the original non-binding incarnation of the Charter through to its further endorsement in the proposed Constitutional Treaty and subsequently adopted Treaty of Lisbon, offers insight into the reasons for its existence: Chris Hilson, ‘Rights and Principles in EU Law: A Distinction without Foundation?’ (2008) 15(2) *Maastricht Journal of European and Comparative Law* 193, section 2.

<sup>34</sup> Lord Goldsmith, ‘A Charter of Rights, Freedoms and Principles’ in Mads Andenas and John A Usher (eds), *The Treaty of Nice and Beyond: Enlargement and Constitutional Reform* (Hart 2003).

<sup>35</sup> Jasper 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(2) *ECL Rev* 321, 328.

<sup>36</sup> Marín Durán and Morgera (n 3).

<sup>37</sup> Charter, art 18.

<sup>38</sup> Charter, art 11.

<sup>39</sup> Charter, art 21 provides: ‘Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.’

identified as illustrative ‘principles’ in the Explanation to Article 52(2). Other provisions can contain elements of both rights and principles.<sup>40</sup> Overall, there is no definitive catalogue of the provisions that fall into each category in the Charter. Thus while we have a clear steer from the Charter’s Explanations that Article 37 is a Charter ‘principle’, there is no bright line conceptual or structural distinction between rights and principles articulated in the Charter itself. This is significant because this ambiguity leaves difficult questions about the respective legal implications of rights and principles in the Charter.

Commentators have adopted various positions in differentiating the legal functions of rights and principles in the Charter. Some focus on the limited justiciability of Charter principles to explain their legal character, picking up on their ‘judicial cognisable’ limitation in Article 52(5). Daniel Denman thus finds that Charter principles ‘do not contain justiciable rights’.<sup>41</sup> Herwig Hoffmann and Burcua Mihaescu similarly argue that Charter principles are incapable of granting subjective rights to individuals since they ‘merely constitute programmatic objectives which have to or might be implemented’.<sup>42</sup> Other commentators also focus on the ‘implementation’ requirement in Article 52(5) in order for Charter principles to be legally effective, finding that they are ‘programmatic norms requiring the intervention of the EU legislator or, as the case may be, of the national legislator’.<sup>43</sup> Jasper Krommandijk goes a step further and proposes three main criteria for identifying those provisions that will fall into these two legal categories in the Charter, drawing on work of other scholars:

(1) the extent to which the provision aims to protect the rights of individuals (how right-

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<sup>40</sup> See the Explanation to Article 52(5).

<sup>41</sup> Daniel Denman, ‘The Charter of Fundamental Rights’ (2010) 4 EHRL Rev 349, 356.

<sup>42</sup> Herwig C H Hoffmann and Burcua C Mihaescu, ‘The Relation Between the Charter’s Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case’ (2013) 9(1) ECL Rev 73, 93.

<sup>43</sup> Leanarts (n 29) 399.

like?); (2) the extent to which the protection provided for depends upon further concretization in laws (how principle-like?); and (3) the margin of discretion left to duty bearers (how principle-like?).<sup>44</sup> However, Krommandijk also notes these tests for distinguishing between rights and principles are not always decisive and that the context of a provision remains important. Taking a broader legal perspective, Chris Hilson makes a compelling argument that there is no bright-line distinction between rights and principles in the Charter when analysed as a matter of legal function in EU law.<sup>45</sup> These various approaches to the Charter's right-principle distinction shows that there is unhelpful uncertainty concerning the legal nature of Charter principles and their relationship to the more well established fundamental rights contained in Charter provisions. Nicole Lazzarini sums up the position nicely in referring to the 'Pandora's box of the right-principles distinction' that judges fear to open,<sup>46</sup> but it is indeed judges that will need to open this to shed more certain light on its legal implications. Section D below explores the extent to which they have done this to date. The analysis above however also highlights that Charter principles constitute something legally distinctive in EU law. The following section considers the nature of environmental principles in EU more broadly in order to shed more light on the legal distinctiveness of Article 37 as a Charter principle.

### **C Article 37 in the Context of EU Environmental Principles**

If Article 37 is a 'principle' in the context of the Charter, we are not operating in a complete vacuum in determining what this means as a matter of EU law. Principles may be ambiguous legal ideas in the Charter's own terms but there is a broader context

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<sup>44</sup> Krommendijk (n 35) 332-334.

<sup>45</sup> Hilson (n 3333).

<sup>46</sup> Nicole Lazzarini, '(Some of) the Fundamental Rights Granted by the Charter May be a Source of Obligations for Private Parties: AMS', (2014) 52(3) CML Rev 907, 931.

of environmental principles in EU law to which Article 37 relates.<sup>47</sup> As the Explanation for Article 37 states, Article 37 as a ‘principle’ of EU law that is based on, amongst other EU law provisions, related environmental principles in Articles 11 (the integration principle) and 191 TFEU (which includes the precautionary principle, the principle of prevention, the polluter pays principle, and the principle of rectification at source as central planks of EU environmental policy). A rich body of law has been developing around these EU environmental principles, particularly through the case law of the CJEU. However, care is required in discerning the legal nature of principles in this context. This is because environmental principles, just like environmental rights, are the subject of much legal hope and aspiration, so that ascertaining their legal roles in EU law requires close legal analysis of EU doctrine and legal culture. This section gives some background to this analysis and the pitfalls to avoid in appraising the landscape of EU environmental principles into which Article 37 fits.

Environmental principles are now popular concepts in environmental law across jurisdictions, including in EU law. This popularity is driven by pragmatism, by political compromise, and by hopes to pursue high ideals for environmental protection as well as legitimacy for environmental scholarship as a discipline.<sup>48</sup> These reasons also apply to Article 37 and its development as a Charter principle: the provision is a product of pragmatism and compromise mixed with high ideals for environmental protection, which has led to high hopes as to its legal impact. The popularity of environmental principles in many jurisdictions, including through their enumeration and articulation in international soft law instruments,<sup>49</sup> has led some scholars and jurists to suggest that

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<sup>47</sup> Hilson makes a similar argument, although he looks at the legal roles of principles in EU law even more broadly, considering principles of EU constitutional and administrative law: Hilson (n 33).

<sup>48</sup> Scotford (n 12) ch 2.

<sup>49</sup> Eg United Nations Environment Programme, ‘Declaration of the United Nations Conference on the Human Environment’ (16 June 1972) UN Doc A/CONF.48/14, 11 ILM 1461 (1972) (‘Stockholm Declaration’); World Commission on Environment and Development, ‘Report of the World Commission

a global environmental jurisprudence is developing based on a set of normatively fundamental environmental principles.<sup>50</sup> As I have argued elsewhere,<sup>51</sup> such claims certainly reflect the growing popularity of environmental principles as legal ideas globally but they risk masking the critical differences that exist across legal cultures in the development and application of environmental principles as legal concepts. These differences relate not only to the specific principles that are developing legal profiles within different legal cultures (the precautionary principle is almost universally popular whilst other principles, such as the principle of rectification at source or the principle of intergenerational equity, have taken hold in certain jurisdictions only),<sup>52</sup> but they relate also to the unique doctrinal, constitutional and institutional legal frameworks in which particular environmental principles are found and in which they are developing their legal identities.

Taking into account this sensitivity to legal culture, I have previously undertaken a study of the evolving legal roles of environmental principles in different jurisdictions, including in the judicial reasoning of their courts. Based on extensive analysis of the case law of the European courts in relation to the six main environmental principles that appear in the EU Treaties and the Charter,<sup>53</sup> this research shows that EU environmental principles have an innovative influence on developing EU law doctrine,

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on Environment and Development: Our Common Future' (20 March 1987) UN Doc A/42/427 ('Brundtland Report') Annexe 1; United Nations Conference on Environment and Development, 'Rio Declaration on Environment and Development' (14 June 1992) UN Doc A/CONF.151/26 (Vol I), 31 ILM 874 (1992); World Summit on Sustainable Development, 'Johannesburg Declaration on Sustainable Development' (4 September 2002) UN Doc A/CONF.199/20.

<sup>50</sup> Eg Ben Boer, 'The Rise of Environmental Law in the Asian Region' (1999) 32 U Rich L Rev 1503, 1508-9; Brian Preston, 'The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific' (2005) 9(2) Asia Pac J Envtl L 109; Tseming Yang and Robert V Percival, 'The Emergence of Global Environmental Law' (2009) 36 Ecology LQ 615.

<sup>51</sup> Scotford (n 12).

<sup>52</sup> Ibid 6-7.

<sup>53</sup> The precautionary principle, preventive principle, polluter pays principle, principle of rectification at source, integration principle and principle of sustainable development: see TFEU, arts 11 and 191(2); TEU, art 3(3); Charter, art 37.

particularly in informing (and generating) legal tests applied by EU courts in reviewing the lawfulness of EU and Member State action within the scope of EU law,<sup>54</sup> and in giving the courts a broad interpretive discretion in construing EU legislation and the Treaties.<sup>55</sup> This analysis confirms that the legal roles of EU environmental principles are intimately tied to existing doctrines in EU law and are shaped by the jurisdictional remit of the EU courts. It also shows that there are limits to the use of environmental principles in legal reasoning. In particular, environmental principles currently have no freestanding roles in legal arguments to compel the exercise of discretion by EU (or Member State) institutions to pursue a particular environmental policy.<sup>56</sup> Thus they cannot be called in aid directly as legal responses to environmental problems. Furthermore, they do not fit existing models of ‘legal principles’ in this legal context. This is an important consideration since it is tempting to suggest that all so-called ‘principles’ in EU law are legally equivalent,<sup>57</sup> but EU environmental principles – as ‘substantive’ principles of EU policy – are distinct from the ‘general principles of EU law’ developed by the Court of Justice in its jurisprudence,<sup>58</sup> which do operate as independent grounds for reviewing all EU action.<sup>59</sup>

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<sup>54</sup> Eg informing the tests of proportionality and manifest error of assessment in appraising the lawfulness of EU action (see eg Case T-13/99 *Pfizer Animal Health SA v Council* [2002] ECR II-3305, discussed below at text accompanying n 64, and Scotford (n 12) ch 4, part V for a detailed explanation of this doctrinal effect).

<sup>55</sup> Eg Joined Cases C-418/97 & C-419/97 *ARCO Chemie Nederland v Minister van Volkshuisvesting* [2000] ECR I-4475. For further explanation and examples of this doctrinal effect, see Scotford (n 12) ch 4, part III.

<sup>56</sup> Furthermore, responding to bolder arguments about the potential legal roles of environmental principles, EU environmental principles do not render EU environmental law comprehensively coherent, and they do not represent a radical new form of law: see Scotford (n 12) ch 4.

<sup>57</sup> Lenaerts thus seeks to align Article 37 and general principles of EU law by giving Charter principles exclusionary effect: Lenaerts (n 29); cf Krommendijk acknowledging the legal differences between different kinds of ‘legal principles’ in EU law: Krommendijk (n 35) 328-330. See also Hilson (n 33).

<sup>58</sup> Takis Tridimas, *The General Principles of EU Law* (2<sup>nd</sup> ed, OUP 2007) 4-5.

<sup>59</sup> Environmental principles have not had such a powerful legal function to date (cf *Sweden v Commission* (n 26)), despite some confusing statements by the EU courts that the precautionary principle in particular is a ‘general principle’ in EU law: Joined Cases T-74/00, T-76/00, T-83/00 to T-85/00, T-132/00, T-137/00, T-141/00 *Artegodan v Commission* [2002] ECR II-4945 [184], and repeated in cases such as Case T-475/07 *Dow AgroSciences Ltd v Commission* [2011] ECR II-05937 and Case T-257/07 *France v Commission* [2011] ECR II-5827. In these cases, the courts are referring to the fact that the precautionary principle acts as a general principle of policy in EU law beyond its articulation in the

These legal roles for EU environmental principles, and their limits, reflect the (often implicit) constitutional limits of the EU courts.<sup>60</sup> As a general rule, EU judges use environmental principles to justify their reasoning only to the extent that they are deciding questions about EU environmental competence<sup>61</sup> that has *already* been exercised by EU and Member State institutions on the basis of environmental principles and which is then tested in court. Notably, this conclusion, which can be deduced from the now extensive body of EU case law concerning environmental principles,<sup>62</sup> mirrors the explicit justiciability limit for Charter principles set out in Article 52(5). This provides that principles are to be judicially cognisable only in interpreting and testing the legality of legislative and executive acts that first ‘implement’ the Charter principles within the scope of EU law. This similarity of legal function is telling and it indicates that Charter principles, including Article 37, are indeed legally similar to other environmental principles in EU law.

In light of this similar legal function, lessons can be drawn from existing jurisprudence on EU environmental principles in making sense of Article 37. As indicated above, environmental principles are used to inform and generate legal review tests and as interpretive aids in EU law, and so we might imagine similar roles for Article 37. However, it is noteworthy that these legal roles are flexible ones. This is due to the fact that, as pithy and undefined general phrases, environmental principles have contested definitions and open meanings, with the result that, legally, they fall

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environmental competence in Title XX TFEU, operating particularly in the field of public health, which is subject to an increasingly robust set of administrative law tests. See Scotford (n 12) 184.

<sup>60</sup> By ‘constitutional’ limits, this refers to the proper role of the Court as an EU institution in constituting – alongside the Council, Commission and Parliament – a governing body of the EU.

<sup>61</sup> ‘EU environmental competence’ here refers to the area of EU-prescribed policy authority concerning environmental matters within which political institutions – legislative and administrative – can lawfully act.

<sup>62</sup> This is one of the key conclusions of my analysis of environmental principles in the legal reasoning of the EU courts to date: see Scotford (n 12) ch 4.

within a ‘category of concealed multiple reference’.<sup>63</sup> Accordingly their use in judicial doctrine as interpretive aids and to inform legal review tests, even when courts are interpreting or reviewing measures deemed to be based on an environmental principle, can give rise to novel interpretive and doctrinal consequences in the environmental sphere and widened EU environmental competence.

The much-referenced decision in *Pfizer v Council* is a good example of innovative reasoning based on an environmental principle.<sup>64</sup> The precautionary principle is used extensively in the reasoning of the Court of First Instance in this case to uphold the Commission’s decision to withdraw authorization for an antibiotic used as a growth promoter in animals. A close reading shows that the precautionary principle is not simply used as a general reason for upholding the Commission’s decision – its legal role is more complex. Thus it informs established tests of EU legality review (proportionality and manifest error of assessment) whilst also generating a new test of review (a test of adequate scientific evidence) in this process.<sup>65</sup> The precautionary principle is both constrained by existing EU law doctrine, but also allows for innovative legal development by the Court which has scope to elaborate its meaning. The novelty of this reasoning is often overlooked in references to this case as a showcase for how the precautionary principle operates legally in EU law.<sup>66</sup> Another example of the doctrinal flexibility inherent in environmental principles can

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<sup>63</sup> Julius Stone, *Legal System and Lawyers’ Reasoning* (Stanford University Press 1964) 246. The connection between amorphous ideas like environmental principles and Stone’s legal categories of ‘illusory reference’ was made by the editors in their introduction to Paul Martin and others (eds), *The Search for Environmental Justice* (Edward Elgar 2015) 2.

<sup>64</sup> *Pfizer* (n 54).

<sup>65</sup> See a full explanation of this reasoning in Scotford (n 12) 171-176.

<sup>66</sup> Including in the Explanation to Article 52(5) which mentions *Pfizer* as notable case for demonstrating how Charter principles do not give rise to direct claims for positive action by the Union’s institutions or Member States authorities and become significant for courts only when such the acts of such institutions are interpreted or reviewed.

be seen in *Waddenzee*,<sup>67</sup> in which the precautionary principle is used to interpret a key provision of the Habitats Directive (since the Directive's provisions were found to be based on this principle), construing its level of protection for special areas of conservation very strictly in light of a very strong interpretation of the precautionary principle.<sup>68</sup> The flexibility of the precautionary principle's definition allows for this doctrinal development, which in this case significantly extended the regulatory reach of EU environmental law. Similarly, as discussed above,<sup>69</sup> the integration principle has a role in expanding EU environmental competence when used both as an interpretive aid and to inform EU legal tests. Thus, whilst environmental principles may have more limited legal functions than fundamental legal rights or general principles of EU law such as the principle of equal treatment, their doctrinal impacts can still be significant in the reasoning of the EU courts.

In considering the legal roles of EU environmental principles, it should be noted that the 'principle' of sustainable development is something of an outlier in terms of its evolution in EU jurisprudence to date. It is inconsistently referred to as a 'principle' in the Treaties (although it is explicitly cast as a principle in Article 37),<sup>70</sup> and it has a derivation that is more connected to international legal developments than any of the other EU environmental principles.<sup>71</sup> Like the integration principle to which it relates in Article 37, the principle of sustainable development is overarching in its Treaty ambition, in terms of aiming to link all areas of EU policy competence in line with environmental protection and sustainable development goals. As mentioned above,<sup>72</sup>

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<sup>67</sup> Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw* [2004] ECR I-7405.

<sup>68</sup> *Ibid* [44]. See also Case C-258/11 *Sweetman v An Bord Pleanála* [2013] ECLI:EU:C:2013:220.

<sup>69</sup> Above nn 22-24.

<sup>70</sup> See TEU, art 3(3) and TFEU, art 11 that refer simply to 'sustainable development'.

<sup>71</sup> See Scotford (n 12) 91-93.

<sup>72</sup> See above n 11.

it is also a contested concept, and it is often shaped by political winds despite the EU's prominent policy agenda in the field of sustainable development.<sup>73</sup> In the reasoning of the EU courts, it is thus perhaps unsurprising that the principle of sustainable development has given rise to the least developed body of doctrine to date. Whilst there are one or two examples of exceptional doctrinal reasoning,<sup>74</sup> the generality of the sustainable development principle makes it challenging for courts to find a firm legal edge to employ it in developing legal doctrine.<sup>75</sup> At the same time, it is a principle that is ripe for creative legal arguments to be made about how it might inform EU legal doctrine. This is particularly in light of its prominent articulation in Article 37, with its connection to the integration principle in Article 11 TFEU, which has played an interesting but so far embryonic role in CJEU reasoning.<sup>76</sup> The potential for Article 37 to foster similar and potentially more extensive doctrinal development is supported by the Charter Explanation of its function, which echoes the roles played by other EU environmental principles in EU doctrine. The link to international norms of sustainable development also provides space for transnational legal developments relating to Article 37 that extend beyond those of EU environmental principles to date.<sup>77</sup> At a minimum, Article 37 reinforces the legal presence and significance of the sustainable development principle (and integration principle) as a matter of EU law. The following and final section of the chapter examines the justiciability of Article 37 to date and the prospects of its justiciability in furthering the legal roles of the principles of sustainable development and integration in EU law.

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<sup>73</sup> Maria Lee, *EU Environmental Law, Governance and Decision-Making* (2<sup>nd</sup> ed, Hart 2014) 64.

<sup>74</sup> Eg Case C-91/05 *Commission v Council (Small Weapons)* [2008] ECR I-3651.

<sup>75</sup> See Scotford (n 12) 192-198.

<sup>76</sup> Above nn 22-26.

<sup>77</sup> Scotford (n 12) 196-198.

## D The Justiciability of Article 37

Ultimately, the unsettled legal meaning of Article 37 of the Charter will be resolved by its judicial interpretation and the roles that it takes on in the reasoning of the European courts. This section considers the justiciability of Article 37 in European judgments to date, and its potential roles in legal reasoning in light of its character as an EU ‘environmental principle’. It concludes that, while the case law to date is limited in illustrating the legal effects of this provision, Article 37 has the potential to be employed in new and interesting lines of doctrinal development in the future.

The starting point for ascertaining the justiciability of Article 37 is Article 52(5). As set out above, Article 52(5) explicitly limits the ‘judicial cognisability’ of principles in the Charter. The Explanation to Article 52(5) elaborates this limit, providing that Charter principles, including Article 37, become ‘significant for Courts only when [legislative or executive acts that implement the relevant principle] are interpreted or reviewed’ for their legality and do not give rise to ‘direct claims for positive action’ by EU or Member State institutions.<sup>78</sup> Article 52(5) was a contentious amendment to the Charter in 2009, seeming to introduce ‘some version of the traditional (and much-criticised) distinction between negatively-oriented civil and political rights and positively-oriented economic and social rights’,<sup>79</sup> minimizing the justiciability of the latter and reflecting that some states (particularly the United Kingdom and Denmark) were uncomfortable with affording social and economic guarantees the status of fully recognized ‘rights’ in the Charter. The Working Group charged with determining how the Charter might be incorporated into the Treaties suggested that Article 52(5) was a ‘technical drafting adjustment’ introduced for ‘legal certainty’, to ‘confirm, and render

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<sup>78</sup> Explanation to Article 52(5).

<sup>79</sup> Paul Craig & Gráinne de Búrca, *EU Law: Text, Cases and Materials* (OUP 2015) 399.

absolutely clear and legally watertight, certain key elements of the overall consensus of the Charter'.<sup>80</sup>

This assertion of absolute clarity and legal certainty is overstated.<sup>81</sup> In terms of the justiciability limit at the heart of Article 52(5), there are two ways in which uncertainty remains. First, the provision is capable of more than one reading. Thus some commentators have sought to give Article 52(5) a wide reading so that Charter principles can still act as grounds for legally challenging EU and relevant Member State measures that violate Charter principles, albeit on an exclusionary basis.<sup>82</sup> Following this school of thought, any narrower reading would 'prevent applicants from challenging EU measures or national measures implementing EU law that, though not giving expression to those principles, clearly violate them'.<sup>83</sup> This wider reading of Article 52(5) seems to go against its explicit wording and reflects frustration with the fact that some Charter provisions were not cast as rights.<sup>84</sup> It also shows that the key issue concerning the justiciability of Article 37 is seen to be whether principles can be used as a basis for striking down EU, and more contentiously Member State, legislation. Other commentators adopt a narrower reading of Article 52(5) as being more compatible with its wording and with the proper role of the courts, so that Charter principles can only be relied on in legal argument before courts 'in relation to EU

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<sup>80</sup> *Final report of Working Group II*, CONV 354/02 (22 October 2002).

<sup>81</sup> It reflects at least a determination to capture the politically negotiated consensus reflected in the Charter's terms.

<sup>82</sup> Lenaerts (n 29); Krommendijk (n 35) 336 (a narrower reading would 'prevent judicial review of clear violations of principles when the EU or Member States fail or refuse to take action or when there are no measures that specifically aim to implement a specific principle').

<sup>83</sup> Lenaerts (n 29) 400.

<sup>84</sup> See eg S Prechal, 'Rights vs Principles, or how to Remove Fundamental Rights from the Jurisdiction of the Courts' in JW de Zwaan et al (eds), *The European Union: An Ongoing Process of Integration* (Asser Press 2004) 179 (arguing that narrow approach would be a 'serious drawback' when compared with earlier protection of fundamental rights by the ECJ).

measures or, where appropriate, national measures implementing EU law which give expression to those principles'.<sup>85</sup>

The other way in which Article 52(5) remains imbued with legal uncertainty is revealed through the legal lens of EU environmental principles. As shown in Section C above, the justiciability limit in Article 52(5) reflects the pattern of legal reasoning already observed in EU case law involving environmental principles. However, whilst environmental principles might be restricted in their legal function to aiding the interpretation of EU measures and to informing legality review, the analysis in Section C above also highlighted that these roles are themselves characterized by uncertainty and potential in light of the flexible and open-ended nature of environmental principles. Article 37 is no exception in this respect, as it incorporates two of the most contested and wide-ranging environmental principles in EU law, the principles of integration and sustainable development.

So far, so theoretical. Whatever approach one takes to Article 52(5), what legal roles for Article 37 have actually been reflected in the case law of the EU courts? The short answer is that Article 37 has had only limited legal effects in EU judicial reasoning to date. In general, CJEU case law has so far been unhelpful in interpreting the Charter's horizontal provisions in Title VII and particularly in construing the difference between rights and principles in the Charter. Pech suggests that the Court's reluctance to consider these issues 'may simply reflect the pragmatic wish... to spare itself the dreadful task of making sense of the Charter's general provisions, which aim to constrain its interpretation and scope of application'.<sup>86</sup> It also may reflect the fact that, as Krommendijk points out, some judges see no useful legal distinction between

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<sup>85</sup> Lenaerts (n 29) 400.

<sup>86</sup> Laurent Pech, 'Between Judicial Minimalism and Avoidance: The Court of Justice's Sidestepping of Fundamental Constitutional Issues in *Romer* and *Dominguez*' (2012) 49 CML Rev 1841, 1861.

principles and rights, indicating how these are legally unsettled concepts in EU law.<sup>87</sup> However, the Charter does make a clear distinction between these concepts and, in relation to one Charter principle at least, the Court has emphasized the narrow reading of Article 52(5) outlined above,<sup>88</sup> finding that Article 26 of the Charter, requiring that persons with disabilities should benefit from integration measures, could only be relied on for the interpretation and review of the legality of EU legislative acts that implement the principle and could not ‘by itself confer on individuals a subjective right which they may invoke as such’.<sup>89</sup> To date, there has not yet been any similar authoritative CJEU reasoning relating to Article 37. There have however been statements by the court that Article 37 does not anything legally to existing Treaty principles concerning environmental protection and cannot add a separate basis for invalidating EU legislation.<sup>90</sup> However, it has been relied on to ‘reaffirm’ the doctrinal importance of the integration principle in justifying breaches of free movement law.<sup>91</sup> Furthermore, at least one Court of First Instance judgment employs Article 37 in an exercise of rights-balancing reasoning without any fanfare.<sup>92</sup>

True to the trend of more adventurous legal reasoning concerning Charter principles appearing in the Opinions of Advocates General, the most developed reasoning concerning Article 37 can be found in AG Opinions.<sup>93</sup> Different Opinions

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<sup>87</sup> Krommendijk (n 35) 340-351, although he notes some judges have written on the difference between rights and principles in terms of possibilities for judicial review.

<sup>88</sup> Above n 85 and accompanying text.

<sup>89</sup> Case C-356/12 *Glatzel v Freistaat Bayern* [2014] ECLI:EU:C:2014:350 [74]-[79].

<sup>90</sup> Case C-444/15 *Associazione Italia Nostra Onlus v Comune di Venezia* [2016] ECLI:EU:C:2016:978 [61]-[64].

<sup>91</sup> Case C-28/09 *Commission v Austria* [2011] ECR I-13525 [121]. See further Bogojevic (n 3) 13-14.

<sup>92</sup> Case T-614/13 *Romonta GmbH v Commission* [2014] ECLI:EU:T:2014:835 [76]-[77].

<sup>93</sup> Advocates General have also been more willing to argue about what constitutes a ‘right’ or ‘principle’ in Article 52(5), and to give principles as much legal influence as possible in judicial review cases. See in particular the Opinion Advocate General Cruz Villalon in Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT* [2013] ECLI:EU:C:2013:491, paras 67-72 (arguing that if the reference to ‘such acts’ in Article 52(5) ‘applied exclusively to implementing legislative acts giving substance to the principle, there would be a “vicious circle”: those implementing legislative acts would be reviewed in the light of a principle whose content, as stated in Article 27 of the Charter, is precisely

have variously suggested that Article 37 raises the importance of environmental protection to the ‘status of a European target’;<sup>94</sup> that Article 37 might resolve doctrinal conflicts;<sup>95</sup> and that it can help inform the interpretation of EU legislative measures as a relevant underlying aim.<sup>96</sup> In the latter sense, Article 37 is cast in a legal role that is well established for EU environmental principles, as discussed above.<sup>97</sup> These cases suggest that Article 37 might continue a trend of progressive CJEU reasoning concerning environmental protection,<sup>98</sup> including through reasoning involving environmental principles. As Advocate General Cruz Villalon put it in the *European Air Transport* case, Article 37 ‘does not arise in a vacuum but instead responds to a recent process of constitutional recognition in respect of protection of the environment’.<sup>99</sup> Article 37 is very much a continuation of this constitutionalisation process, which included the previous introduction of environmental principles into the Treaties, and one might expect that it will have legal impacts along similar lines.

AG Cruz Villalon takes this constitutional recognition process a step further and suggests some innovative reasoning that Article 37 might generate in the future, which draws on its transnational legal foundations. Rather than trying to argue that Article 37 can be a standalone ground of rights-based review, he suggests that its relationship to

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that which is determined by those implementing legislative acts’; this reasoning reflects the wide interpretation of Article 52(5) referred to by some scholars above: see n 82 and accompanying text).

<sup>94</sup> Case C-195/12 *Industrie du Bois de Vielsalm*, Opinion of AG Bot [2013] ECLI:EU:C:2013:293, para 82.

<sup>95</sup> C-204-208/12 *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt*, Opinion of AG Bot [2013] ECLI:EU:C:2013:294, para 95 (seeking to resolve the fraught doctrinal basis for environmental protection in justifying infringements of Art 34 TFEU).

<sup>96</sup> Eg Case C-474/10 *Department of the Environment for Northern Ireland v Seaport* [2011] I-10277, Opinion of AG Bot, para 27 (interpreting the consultation requirements of Directive 2001/42/EC on strategic environmental assessment); Case C-535/15 *Freie und Hansestadt Hamburg v Jost Pinckernelle* [2016] ECLI:EU:C:2016:996, Opinion of AG Tanchev, para 73 (interpreting the enforcement provisions of the REACH regulation).

<sup>97</sup> Above nn 55-69 and accompanying text.

<sup>98</sup> Eg Case C-240/83 *Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU)* [1985] ECR 531; *Case 302/86 Commission v Denmark (Danish Bottles)* [1988] ECR 4607; *Case C-2/90 Commission v Belgium (Walloon Waste)* [1992] ECR I-4431.

<sup>99</sup> 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, Opinion of AG Cruz Villalon, para 78.

the European Convention on Human Rights (ECHR) might nonetheless lead to reasoning in support of environmental rights. Like the Charter, the ECHR contains no explicit environmental right as such, but a number of its provisions have been interpreted to afford environmental protections (in particular Article 8 on the right to respect for private and family life).<sup>100</sup> Since the Charter provides that its provisions are to be interpreted in line with ECHR jurisprudence,<sup>101</sup> Article 37 might be read alongside Article 7 of the Charter (the Charter's parallel right to respect for private and family life) and thus interpreted in light of the evolving ECHR jurisprudence on environmental rights. On this basis, AG Cruz Villalon suggests in the *European Air Transport* case that Directive 2002/30 (relating to aircraft noise) can be read so that it does not limit the discretion of Member States to offer greater protection to residents from aircraft noise pollution.<sup>102</sup> The CJEU agreed with AG Cruz Villalon on the outcome in the case although it did not refer to Article 37 or ECHR jurisprudence in its reasoning.<sup>103</sup> The AG's reasoning in this case shows the doctrinal possibilities of Article 37 as an interpretive tool within the constitutional framework of the EU. Article 37 might not act as a freestanding right to environmental protection that individuals can rely on to strike down any EU measure that arguably fails to pursue environmental protection or sustainable development aims with sufficient vigour, but its doctrinal influence may nonetheless be significant in building a body of EU environmental law that is attuned to environmental protection priorities.

This kind of suggestion for the legal potential of Article 37 links to the role of EU environmental principles in CJEU reasoning to date and develops it further. Like

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<sup>100</sup> *López Ostra v Spain*, App no 16798/90 [1994] ECHR 46; *Hardy v UK*, App 31965/07 [2012] 55 EHR 58.

<sup>101</sup> Charter, art 52(3).

<sup>102</sup> *European Air Transport* (n 99) [82].

<sup>103</sup> 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.

environmental principles as legal phenomena, Article 37 does not present an independent ground of review of EU action, nor does it track pre-existing legal concepts in EU law. Rather, it represents a novel legal form, as highlighted by its legal ambiguity in the context of the Charter, which has the potential for innovative reasoning in shaping EU doctrinal developments, albeit constrained within doctrinal and constitutional limits.

## **E Conclusion**

Article 37 of the Charter of Fundamental Rights represents a step in the constitutional history of environmental protection in EU law. How significant this step will be as a matter of legal reasoning is yet to be seen, but the question of its legal force is more complex than simply inquiring whether Article 37 represents a ‘right’ in EU law. The Charter itself makes clear that Article 37 is not a legal right in its own terms. The assumption of some scholars is that its casting as a Charter ‘principle’ risks making Article 37 less important as a tool or legal basis of environmental protection. Whilst, in any case, it is very unlikely that a ‘right’ to environmental protection would equate to a simple guarantee of beneficial environmental protection outcomes,<sup>104</sup> Article 37 is a different kind of legal creature. Its politically fraught creation resulted in a legal provision that signals the importance of environmental protection within constraints. Those constraints are not clearly laid out in the Charter, as the legal nature of its principles is poorly defined, but the experience of EU environmental principles to date suggests how these constraints might play out in legal reasoning. In particular, whilst environmental principles cannot be used to challenge all forms of action based in EU

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<sup>104</sup> See Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environmental Law: Text, Cases and Materials* (OUP 2013) ch 2.

law and can only be relied on by courts where first relied on by lawmakers, the breadth of meaning of environmental principles has provided opportunities for innovative reasoning that furthers environmental protection goals within existing bodies of EU legal doctrine and within EU constitutional constraints. Article 37 is likely to have a similar legal future in EU law, but with the potential to catalyse and amplify the legal impacts of environmental principles, particularly in relation to the integration and sustainable development principles, which are ripe for further development in EU doctrine. Article 37 also has the potential to forge new transnational legal links to related bodies of law, such as that under the European Convention on Human Rights. In short, Article 37 is not a legal shortcut to a new right of environmental protection in EU law but it has the potential to generate interesting and progressive reasoning in the inevitably complex cases involving environmental issues in the European Union.