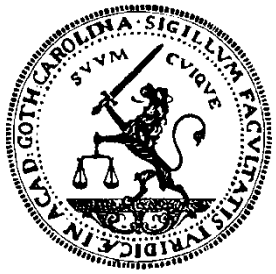

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Article 37 Charter of Fundamental Rights of the European Union: On the way to a fundamental right upgrade?

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Table of Contents

Summary

Environmental law is an area of law that has been under constant development in the European Union especially over the last decades. This has resulted in a variety of legally binding instruments. At the same time the European Union has also improved its fundamental rights regime with tools like the now binding Charter of Fundamental Rights. This Charter also contains an article on "Environmental Protection" in Article 37 Charter.

The use of this article has been scarce. One of the reasons might be because of the unclear status of the article in the Charter and EU law. As a starting point it is considered as a principle as prescribed by Article 52(5) Charter and the Explanations of the Charter. The distinction between rights and principles of the Charter remains unclear. Principles face some limitations in respect to rights of the Charter. This might be overcome through other ways of interpreting Article 37 Charter. The purpose of this thesis is to show the ways Article 37 Charter has been considered. This includes the legal background and framework of Article 37 Charter and its possible limitations.

The limitations will cover some of the core concepts of EU law like the principle of proportionality, the internal market freedoms and other rights of the Charter. Since they are primary law and established general principles of the EU they are naturally at the border of the scope of application of Article 37 Charter. This is also the cases with individual freedoms of others that are challenged when Article 37 Charter becomes something like a super-justification since the courts respect the discretion of the institutions of the EU. This remains to be a difficult situation to assess and a careful balancing by the courts is of great importance. This might be one of the reasons why the CJEU has scarcely applied Article 37 Charter so far. The Advocate Generals seem to be willing to use it more often.

This thesis finds that the distinction between rights and principles remains inconclusive and should not be used to restrict the application of Article 37 Charter. A fundamental rights Charter should be empowered and should not stop at a weakening distinction of rights and principles. The limitation to a principle will restrict access of individuals to courts. This is especially important in the field of environmental law which among its aims has in Article 37 Charter sustainable development. To achieve this and to also allow for a powerful usage of Article 37 Charter even by individuals it should be considered whether Article 37 Charter is ready for a fundamental right upgrade.

Preface

In challenging times for the ideas of the European Union it is necessary to show that only this European Union has the answers for tomorrow. Visionary ideas will always face the distrust by cynics and the challenges of a too pragmatic approach in day-to-day business but this does not mean the end to an idea but rather the beginning. This is why I wanted to take a closer look at a field of law that is under a dynamic development and that has a lot of potential.

Reading parts of the Charter makes it sound like a great catalog of fundamental rights. These norms face their daily tests in the European forum. This is a good sign. It is one of the positive things that benefits every European citizen without being very visible most of the time. The European idea will be empowered if a constructive catalog of fundamental rights changes the realities of everyone in a positive way. May this research contribute to taking an open minded look at the Charter and on how its reach can be extended through a powerful use of legal methods.

I am very thankful to everyone who has supported me on my journey so far. This is especially true in regards to my parents and my sister, my family in general and my closest friends. I will remain forever grateful!

Zeno Kaiser
May 26th, 2016 – Berlin, Germany / Lund, Sweden / Europe

Abbreviations

Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EU	European Union as it is considered by the Treaty and not as the continent nor the wider European Council
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Background

The European Union (EU) began as the European Coal and Steel Community but has since evolved and taken into account more and more fields of law and policy. One of the important fields that has gained more traction over recent decades is environmental issues. The EU has transformed itself from a steel and coal union to an environmental conscious union. Environmental law has emerged as a dynamic and developing, some even say "hot"[1] law. The environmental policy of the EU and its Member States have created obligations that are constantly being enacted into Union law. Recently this has been demonstrated in the negotiations of the Paris Agreement.

As most of EU law environmental law has seen a development of positive and negative harmonization. Next to a variety of articles like Article 3(3) Treaty of the European Union ('TEU') and Article 11, 114(3) and 191 to 193 Treaty on the Functioning of the European Union ('TFEU') more recently Article 37 Charter of Fundamental Rights of the European Union ('Charter') has been introduced. The wide formulation of Article 37 Charter and the various possibilities of its interpretation have opened up a debate about its legal consequences.

This difficult assignment is left mainly to the Court of Justice of the European Union ('CJEU). The negative harmonization through case law by the CJEU has in regards to the Charter article only seen a slow development. Article 37 Charter seems to call for an important role when considering environmental issues but has barely been used by the courts so far.

Through the various stages of the development of the Charter the extend of Article 37 Charter is not fully determined yet and continues to be under a dynamic development. Since the Lisbon Treaty the Charter has gained legally binding character through Article 6(1) TEU which has profoundly changed the legal influence of the Charter. This represents the change from soft to hard law but the exact kind of hard law is not always clear.[2]

[1] Elizabeth Fisher, 'Environmental Law as 'Hot' Law' (2013) 25 Journal of Environmental Law 347 p. 348

[2] Xavier Groussot and Laurent Pech, 'Fundamental Rights Protection in the European Union post Lisbon Treaty' (2010) Fondation Robert Schuman Policy Paper, European Issue p. 7

The biggest dispute concerning Article 37 Charter is if it is a mere principle of law or if it can be interpreted as a right therefore maybe even extending to a fundamental right. The general tendency is leaning towards interpreting it as a principle but there are various arguments that call for a rather open approach towards considering it also as a right. The formulation of the article but also of the interpretation articles at the end of the Charter can support both of these interpretations. Considering it as one or the other can have a different legal consequence and this is why legal rhetoric matters in this case.

Recently the Advocate Generals have started to take Article 37 Charter under more consideration but the court has so far only mentioned Article 37 Charter in one judgment. This might be the beginning of a new stage of development of environmental law in the EU. In the *Romonta*-case in 2014 the General Court has made a proportionality assessment like in the *Schmidberger*- and *Sky Österreich*-decisions between individual freedoms like the freedom to conduct business as enshrined in Article 16 Charter and also considered Article 37 Charter. The proportionality assessment seems to level up Article 37 Charter in regards with other fundamental rights of the Charter which could also be interesting for other discussed articles of the Charter like the other ones in Chapter IV: Solidarity.

The aim of environmental protection seems quiet undisputed on an ethical level within the Union. The actions necessary remain disputed though. Pursuing this goal can result in policies that can also have the effect of limiting individual freedoms as in the *Romonta*-case. This sparks criticism and leaves a challenging task to the EU and its courts when it tries to empower environmental protection and individual freedoms at the same time.

Turning policy into law will result in conflict situations and will continue to make it difficult for the courts when considering Article 37 Charter as a principle or even more. The question remains how Article 37 Charter will be interpreted in proportionality-assessments in the future. The possible outcomes circle around a variety of legal discussions which will be considered in this thesis.

1.2 Research Questions

Environmental law in the EU is under constant development and the decisions of the CJEU have a dynamic effect on the law of the EU. The binding effect of the Charter could bring new developments to environmental law within the EU. The purpose of this thesis is to analyze the effect of Article 37 Charter in

regards to its general legal interpretation, in regards to current case law and when considering the article in relation with other individual freedoms.

Therefore, this thesis will ask the following questions:

Can Article 37 Charter be considered to be a fundamental right when it is used in a proportionality-assessment or is it a mere principle?

This question will center around the legal foundation of Article 37 Charter and the possible effects it has when considered as a fundamental right or as a principle. It will also be considered if this differentiation becomes less or more important when the courts apply Article 37 Charter in a proportionality-assessment. The possibility will be discussed if a proportionality-assessment might automatically turn Article 37 Charter into a fundamental right.

How far do the various interpretations of Article 37 Charter comply with Articles 51 and 52 Charter and other recognized principles of interpretation of the Charter?

Another aspect of the thesis will be the implications that come with the different ways of interpreting Article 37 Charter. It will be considered how these interpretations comply especially with Article 52(5) Charter and other interpretative norms of the Charter while also considering the background behind the creation of Article 37 Charter.

How does Article 37 Charter affect other fundamental rights and pose a challenge to individual freedoms?

Then the focus will shift towards the consequences and how the different interpretation can affect other fundamental rights and individual freedoms. This will be done when looking at the rights themselves, the principle of proportionality in general and through case law.

1.3 Method and Outline

The thesis will consist various legal dogmatic approaches like legal reasoning and research based on European legal texts, laws and case law. It will make use of the basic methods of legal interpretation.

The thesis will start with an overview of the legal framework of environmental law of the EU with a focus on Article 37 Charter. This will include the discussion if Article 37 Charter can be considered to be a fundamental right

or a principle of law which will also consider how this interpretation is affected by Article 52(5) Charter and other interpretative norms of the Charter. Next to this it will be considered how the CJEU treats fundamental rights when assessing proportionality. This will be done together with considering other limitations to Article 37 Charter like a brief look at other Charter rights and the principle of legal certainty.

Then the focus will be turned to a selection of current court decisions and Advocate General opinions. These will be considered under the focus of the established information in the legal framework and limitations chapters.

In the conclusion the thesis will respond to the research questions while considering the facts established in the chapters about the legal framework, limitations and the various court decisions.

1.4 Limitations

The policy and law of the EU covers many more aspects. To give a full assessment of the environmental policy the scope of the thesis would have to be wider. The thesis will therefore sometimes give brief introductions to show the aspects at the border of the discussions around Article 37 Charter.

The focus will be on the enforcement through the CJEU and will not consider the the enforcement in the various Member States and through national law. Through the supremacy of EU law and the status of the CJEU as the court interpreting EU law the discussed decisions have a decisive effect on the Member State level and national law. This will also be briefly discussed when considering the principle of legal precedence. The full extent of the obligations on Member States through the Charter beyond when implementing EU acts will not be discussed since it is a controversial issue itself that would also require a wider scope then this thesis.

The case law will be focused on the discussion of Article 37 Charter. Other more general cases regarding environmental law will be mentioned but not fully discussed. The general approach of the court should though be clear since the CJEU takes into consideration and continues to develop and evolve its own case law. The more detailed discussions of a selected amount of cases will be focused more on Article 37 Charter then on the specific secondary legislation like the details of the directives challenged. This has to be done to keep the focus on the part of the decision that is necessary to find answers to the questions raised in the thesis.

The reader is expected to understand the EU Treaties and general aspects of the Charter. Some of the general principles will be discussed but it is presupposed that the reader knows the basics of the history, policy and law of the European Union.

2 Legal Framework

To establish the legal framework surrounding the research questions this chapter will give a brief introduction to the environmental law of the EU and its development. Then the drafting and legal aspects of Article 37 Charter will be considered in detail.

2.1 Environmental Law in the EU

2.1.1 The Concept of Environment and Treaty Law

The first questions asked should be how environment is defined when used in the context of EU environmental law. The environment must be considered as an "open concept" according to *Sadeleer* and contains two approaches.[3] There is an objective dimension which includes scientific criteria and a more subjective dimension that considers where mankind stands in relationship with its surroundings.[4] One is more geared towards finding scientific evidence and the other considers more the quality-of-life.[5] This shows the wide range of aspects that the term environment contains and already shows how difficult this can make the interpretation in a legal context. If the scope is considered to be a catch-all concept, then it naturally can result in conflicts when it is used to a broad extent.[6] This also foreshadows the difficulties that courts will face when applying environmental law. None the less this open concept is the foundation of environmental law in the EU.[7]

Other approaches in defining environmental law are discussed by *Fisher, Lange and Scotford* under three different terms: a descriptive, a purposive and a jurisprudential definition. The descriptive definition is the listing of environmental instruments available in legislation, policies and case law "concerned with regulating pollution, environmental quality, and biodiversity conservation"[8]. This allows for a simple overview on environmental law at any

[3] Nicolas de Sadeleer, *EU environmental law and the internal market* (Oxford University Press 2014) p. 5
[4] Ibid
[5] Ibid
[6] Ibid p. 7
[7] Ibid
[8] Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environmental law: text, cases, and materials* (Oxford University Press 2013) p. 6-7

time but it does not make clear where the limits of environment and law in terms of the kind of instruments are.[9]

Another way is defining environmental law in regards of the purpose it has which is between environmental policy and the achievements of certain environmental protection goals. This makes environmental law primarily "a social program implemented through law"[10]. This puts the focus on how environmental law "is a product of ethics, policy, and/or politics"[11]. The difficulties with this definition is that there is no common agreement on environmental goals and environmental law is not limited for example to only improving environmental law but can include laws that have positive and negative effects on the environment.[12]

The third definition discussed by these authors is the jurisprudential one that concludes that environmental law is a "body of legal principle". The focus should be on how law in general is transforming and being applied to environmental problems and also connects it to the legal decisions made for example by courts.[13] There exists though the same difficulty with the purposive definition regarding who defines which legal principles should be covered.

The authors conclude that defining environmental law remains difficult but that the different approaches help at least to narrow the field of environmental law in terms of scope of application and in how environmental law can be evaluated[14] – just as it will be in a limited way – in this thesis.

The definitions can only help to get a wider picture on environmental law in general. Regarding the law that will be discussed in this thesis there is common consensus that it is environmental law. This law will be introduced after taking a look at the history of environmental law in the legal forum of the EU.

The integration of environmental issues in the EU begins after the Treaty of Rome since at that time questions on the matter were not considered to be very relevant yet. This changed in 1973 with the Declaration of the Council of the European Communities and of the representatives of the Governments

[9] Ibid p. 7
[10] Ibid p. 9
[11] Ibid and also discussed in general about social rights in Daniel Denman, 'The EU Charter of Fundamental Rights: How Sharp are its Teeth?' (2014) 19 Judicial Review 160 p. 166
[12] Fisher, Lange and Scotford, *Environmental law: text, cases, and materials p. 11*
[13] Ibid p. 12
[14] Ibid p. 13-15

of the Member States[15] which made the protection of the environment something to be considered while achieving economic development. The EU started to enact secondary legislation and really gained a proper and wider competence with the Single European Act of 1987.[16] The development continued through the Maastricht Treaty in which the objective was made clearer but at the same time introduced the subsidiarity principle which decreases the involvement of the EU.[17] The Lisbon Treaty then introduced adjustments that underline the growing importance of environmental law.[18]

The general legal framework on environmental law in the EU today is based on Article 3(3) and 21(2)(d)-(f) TEU and Article 11, 114(3)-(5), 191-193 and 194(1) TFEU. These articles contain some of the central aspects which the EU considers when enacting law. They contain the ideas of achieving a sustainable development, the integration of environmental policy into EU law, also known as the integration clause, and, not fully codified in these articles, the general aim to achieve a high protection of the environment.[19] Since 1992 the EU also started to enact more and more secondary legislation which also fails to define a clear concept of the environment but also underlines the growing importance of the field.[20]

To consider environmental issues when legislating the EU has created the integration clause in Article 11 TFEU that requires that: "environmental protection must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development". This wording is also similar[21] to the one of Article 37 Charter which will be considered in detail later. The integration clause does not create an exclusive priority because the Treaty also considers cross-sectorial approaches for example in the fields of culture, regional policy, health and consumer protection.[22] This creates the problem that various goals have to be considered when legislating. Since the Treaties are not explicit on prioritizing

[15] Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment, Official Journal of the European Communities, C 112, 20 December 1973

[16] Sadeleer, *EU environmental law and the internal market p. 10*

[17] Ibid p. 12

[18] Hans Vedder, 'The Treaty of Lisbon and European Environmental Law and Policy' (2010) 22 Journal of Environmental Law (Oxford) 285 p. 299

[19] Sadeleer, *EU environmental law and the internal market p. 1*

[20] Ibid p. 20

[21] Anja Wiesbrock, 'An Obligation for Sustainable Procurement? Gauging the Potential Impact of Article 11 TFEU on Public Contracting in the EU' (2013) 40 Legal Issues of Economic Integration 105 p. 105

[22] Sadeleer, *EU environmental law and the internal market p. 12*

any of the goals and therefore it is the legislation that has to do the balancing.[23]

The extent of the integration clause in Article 11 TFEU is considered to be indeterminate.[24] The discussion is in some form similar to the one of Article 37 Charter and will therefore not be considered by itself in this thesis but some of the conclusions drawn on Article 37 Charter can probably be transferred to a discussion about Article 11 TFEU.

2.1.2 Objectives and Principles of EU Environmental Law

The integration clause makes it necessary to explain the objectives of the environmental policy of the EU in order to know what there is to consider. It has already been shown that the concept of environment is not enough to have a clear and precise answer to this question. The objectives are defined in Article 191(1) TFEU:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilization of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

The general formulation creates a discretionary power for the legislation.[25] At the same time, it allows a dynamic interpretation of these goals and the efficiency of the policy will depend on how and to what extent the legislator pursues them.[26] They also provide guidance to the courts when reviewing a directive or a regulation.[27]

There are also principles of the environmental policy of the EU some of which are defined in Article 191(2) TFEU[28]:

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[23] Ibid p. 23-25
[24] Ibid p. 27
[25] Ibid p. 34
[26] Ibid Joanne Scott, 'The Precautionary Principle before the European Courts' in Richard Macrory (ed), *Principles of European Environmental Law* (Principles of European Environmental Law, Groningen: Europa Law Publishing 2004) p. 60
[27] Sadeleer, *EU environmental law and the internal market p. 92*
[28] This list is a based on Article 191(2) TFEU but the precise names of the principles are taken from ibid p. 4 and 40 following

- principle of a high level of environmental protection,
- precautionary principle,
- principle of prevention,
- principle that environmental damage should, as a matter of priority, be remedied at source,
- polluter-pays principle.

These five principles are considered to be binding in EU law.[29] The extent of these principles is again part of an extensive process of legislation and review by the courts.[30] Therefore they also have a guiding role as well.[31]

The objectives and principles of EU environmental law might be used to justify restrictions to such basic rights as property and economic activities if they are in the general interest and that they "do not constitute an intolerable interference impairing the very substance of the rights guaranteed"[32]. This requires a case-by-case assessment and a careful use of the proportionality principle when the law is applied.

This brief introduction shows that the Treaties provide several tools to support environmental legislation and action. At the same time this creates challenges when considering what the scope of application is. The legislator has a wide discretion but the impeded rights have to be considered as well. This will also be the case when different Charter rights will be in conflict with each other which will be discussed in the legal limitations chapter later. Beforehand one of the environmental tools of the EU and the main focus of this thesis – Article 37 Charter – will be discussed in detail.

2.2 Environmental Law in the Charter of Fundamental Rights: Article 37

This chapter will begin with a look on the drafting history of the Charter with a special focus on Article 37 Charter. Then the focus will shift towards the legal effect of Article 37 Charter and whether it is only a principle, what the discussion around principle and fundamental right means and if there is room to interpret Article 37 Charter more extensively.

[29] See footnote 180, ibid p. 41
[30] For more details see ibid p. 45-89
[31] Ibid p. 92-93
[32] Ibid p. 93

2.2.1 Fundamental Rights situation leading up to the Charter

The EU did not contain human rights protections like fundamental rights prior to the discussions that surrounded the *Solange*-decisions by the German Constitutional Court.[33] The economic freedoms of the Treaty dominated[34] which the courts noticed and which made them recognize fundamental rights as general principles[35] of EU law before the conflict with the Member States would escalate. This process started the fundamental rights discussion in the EU which in the end resulted in legislation like the Charter.

Today human rights derive from three sources in EU law. They are listed in Article 6(1)-(3) TEU and are the Charter, the European Convention of Human Rights ('ECHR') and fundamental rights as they have been developed as general principles.

The EU has since the 1970s discussed an accession of the EU to the ECHR.[36] This process has resulted in Article 6(2) TEU of the Lisbon which contains a legal obligation to accede. To achieve this the EU negotiated a Draft Agreement on Accession which sparked a discussion that raised various critical points about the agreement. They mainly concerned the future relationship of the CJEU and the European Court of Human Rights ('ECtHR') after an accession.[37] The CJEU in its Opinion 2/13 declared the Draft Agreement on Accession incompatible with Article 6(2) TEU.[38]

This has made it difficult to say what the current state of the ECHR is in the EU. All of the Member States remain in their national function signatories to the ECHR which means that they are obligated to follow the ECHR. The CJEU has relied on the ECHR over decades but might now be tempted to reduce its usage. Opinion 2/13 has been received with a lot of criticism since it makes accession very difficult and could have a negative effect on the human rights situation in the EU.[39]

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[33] Paul Craig and Gráinne De Búrca, *EU law: text, cases and materials* (6. edn, Oxford University Press 2015) p. 280-282
[34] Ibid p. 382 and also Sadeleer, *EU environmental law and the internal market p. 95*
[35] Groussot and Pech, 'Fundamental Rights Protection in the European Union post Lisbon Treaty' p. 3
[36] Craig and De Búrca, *EU law: text, cases and materials p. 419*
[37] Ibid p. 421
[38] Opinion 2/13 on Accession of the EU to the ECHR, ECLI:EU:C:2014:2454
[39] Craig and De Búrca, *EU law: text, cases and materials p. 422*

The ECHR has had few environmental cases. Most notably the *Hatton*-cases[40] which will be discussed in the case law chapter. The ECtHR has read environmental aspects into articles of the ECHR and has created some environmental case law. Considering though the difficult relationship between the EU and the ECHR after Opinion 2/13 and the limited space of this thesis the source of the ECHR will not be analyzed much further.

Also in the 1970s independent from the ECHR accession debate the first cases concerning human rights issues appeared in front of the CJEU. During this time the Treaties were lacking sufficient human rights sources. In *Stadler*[41] the CJEU developed the concept of general principles of law of the EU that are sourced from the legal conceptions of the Member States to include fundamental human rights. It should be briefly mentioned that so far the court has not read environmental protection as a general principle.[42]

Next to this Article 6(3) TEU adds the constitutional traditions of the Member States to the sources of human rights in the EU. Some of the Member States mention environmental protection as constitutional right while others have mentioned them as principles.[43] This will be discussed in detail later. At this point it can be said that the situation is not clear enough to consider environmental protection a fundamental right through Article 6(3) TEU.

This takes the focus of the discussion to the Charter and whether it contains a right to environmental protection and of which normative quality it is. First the creation of the Charter shall be discussed before considering its environmental content.

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[40] *Hatton and others v the United Kingdom* ECLI:CE:ECHR:2001:1002JUD003602297 and *Hatton and others v. the United Kingdom* ECLI:CE:ECHR:2003:0708JUD003602297 (Grand Chamber)

[41] 29/69 *Stauder v City of Ulm (1969)* ECLI:EU:C:1969:57, [1969] ECR 419 and also discussed in Craig and De Búrca, *EU law: text, cases and materials p. 383*

[42] Sadeleer, *EU environmental law and the internal market p. 95-96* and see the non-exhaustive list at Juha Raitio, 'The Principle of Legal Certainty as a General Principle of EU Law' in Ulf Bernitz and others (eds), *General principles of EC law in a process of development : reports from a conference in Stockholm, 23-24 March 2007, organised by the Swedish Network for European Legal Studies* (General principles of EC law in a process of development : reports from a conference in Stockholm, 23-24 March 2007, organised by the Swedish Network for European Legal Studies, Alphen aan den Rijn : Kluwer, cop. 2008 2008) p. 49-50

[43] Sadeleer, *EU environmental law and the internal market p. 95*

2.2.2 Drafting of the Charter

The Charter of Fundamental Rights was drafted between 1999 and 2000. The legal status was left open when it was accepted by the Commission, Parliament, Council and Member States in December 2000.[44] After the failure of the Constitutional process the Charter text was slightly changed and amended in 2003-2004[45] and is since the Lisbon Treaty legally binding through Article 6(1) TEU.

The goal of the Charter was to collect and make more "evident" the fundamental rights of the EU that so far had been established by courts and various treaties.[46] The Charter makes fundamental right obligations by the EU more visible and underlines the importance they have today. It is also an important development in the discussion about EU constitutionalism since Article 6(1) TEU gives it the same importance of primary law. From a constitutional perspective fundamental rights are of immense importance.

The Charter has an "Environmental protection"-norm in Article 37 Charter:

> ***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 ensured in accordance with the principle of sustainable development.*

Constitutional principles and fundamental rights can only create importance if they have legal significance. They can for example have a powerful effect in the legislation or in the judicial decisions of the EU. Article 6(1) TEU makes the Charter primary EU law but according to Article 52 Charter the Charter contains rights and principles and creates a differentiation that can result in different legal effects.

Even though that many read and consider Article 37 Charter to be a principle the wording is not clear by itself. It is only the Explanations to the Charter that state that it should be considered to be a principle of the Charter. The distinction of rights and principles has caused some discussion in general law

[44] Kristof Hectors, 'The Chartering of Environmental Protection: Exploring the Boundaries of Environmental Protection as Human Right' (2008) 17 European Energy and Environmental Law Review 165 p. 167Craig and De Búrca, *EU law: text, cases and materials p. 394*

[45] Craig and De Búrca, *EU law: text, cases and materials p. 394*

[46] Conclusions of the Cologne European Council, 3-4 June 1999

and especially in regards to the Charter. This makes Article 37 Charter an interesting example to evaluate in the field of environmental law and fundamental rights.

2.2.3 Article 37 Charter: Between Principle and Fundamental Right of the Charter

In order to see the legal impact of Article 37 Charter it is necessary to consider the difference between rights and principles first. This will be done after taking a look on Article 37 Charter through the classic canon of interpretation meaning textual, systematic, historical and teleological interpretation.

The wording of Article 37 Charter asks for a "high level of environmental protection" and that the "improvement of the quality of the environment must be integrated into the policies of the Union". It also asks for this to be "in accordance with the principle of sustainable development". The article does not state clearly that it is a right like other articles do in the Charter. The wording at the end of the article asks for the consideration of a principle but next to this neither the text nor the headline declares the article to be a principle.

The Explanations written by the drafters of the Charter state for Article 37 Charter that 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."[47] The Explanations to Article 52 Charter that contains the differentiation between rights and principles state: "For illustration, examples for principles, recognised in the Charter include e.g. Articles 25, 26 and 37. In some cases, an Article of the Charter may contain both elements of a right and of a principle, e.g. Articles 23, 33 and 34." The Explanations are supposed to provide guidance in the interpretation according to Article 52(7) Charter.

Following the Explanations, the article should be considered to be a principle. This would mean that the article should be applied as described by Article 52(5) Charter:

> *"The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies,*

[47] Explanations relating to the Charter of Fundamental Rights (2007/C 303/02)

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. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality."

When strictly read this would would limit the legal effect to the implementation of legislative and executive actions by the EU and Member States when implementation EU law and that they should be limited to the interpretation of these acts. It could therefore not be considered to be as strong as a fundamental right.

The reference to the national constitutions might call for a different direction when interpreting the article though. There is a variety of perspectives that the Member States have in regards of environmental protection.[48] They can be divided mainly into considering environmental protection as an individual right[49] and the others as a political and / or policy goal[50]. The later was one of the reasons why the wording as a right was avoided in the Charter. Taking into account that in several Member States it is considered a right it means that the article can be read also in light of this constitutional tradition. This would open up a potentially different reading of the article beyond just being a principle. This would also be in line with Article 52(4) Charter that states: "In so far as this Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions."

When comparing the article to the rest of the articles in the Charter it has to be considered that most of the articles in Chapter I (Dignity) and II (Freedoms) of the Charter use the wording "everyone has the right" therefore making their reading as a right clear. Article 25 Charter carries the headline "The rights of the elderly" but is considered to be a principle.[51] Article 37 Charter does not use the right wording nor does it have a right to in its headline.

It is also in a different kind of chapter in the Charter. Chapter IV (Solidarity) contains human rights of the third kind of generation. The third generation of

[48] Marco Lombardo, 'The Charter of Fundamental Rights and the Environmental Policy Integration Principle' in Giacomo Di Federico (ed), *The EU Charter of Fundamental Rights* (The EU Charter of Fundamental Rights, Springer 2011) p. 222

[49] Countries in which environmental protection is considered to be a right: Belgium, Czech, Estonia, France, Hungary, Latvia, Poland, Portugal, Slovakia, Slovenia, Spain. Compiled from the list in ibid p. 220

[50] Countries in which environmental protection is considered to be a principle: Austria, Finland, Germany, Greece, Netherlands, Sweden. Compiled from the list in ibid p. 221

[51] Denman, 'The EU Charter of Fundamental Rights: How Sharp are its Teeth?' p. 167

human rights is considered to be one of rights that go beyond mere civil and social rights and which have been very often so far only been soft law.[52] The Chapter does contain clearly worded rights as well, for example Article 29, 30, 31, 35 Charter but from a systematical analysis of the Charter it cannot be simply said whether it is or is not a right or a principle.[53]

When considering the Charter as a whole and the other rights that are enshrined in the Charter there is also the possibility to use Article 37 Charter in combination with Article 3 and 7 Charter to consider it in a rights-situation.[54]

The environmental protection aim has a longer history in the main treaties of the EU as discussed earlier. Article 11 TFEU which was previously Article 6 EC has been strengthened throughout the various EU treaties.[55] The effect of Article 11 TFEU in case law has remained limited which makes *Nowag* conclude that the real strengthening has yet to take place.[56]

Article 11 TFEU makes environmental protection an important objective for the EU but it does not provide clear guidance on what this means in detail and where the limits of this aim are. The language of Article 11 TFEU sounds similar to the one of Article 37 Charter. Its legal status has also been considered to be some form of principle[57] which makes its situation somewhat comparable to the one of Article 37 Charter. It will also have to be shown by the use of the courts whether they will empower the potential of this article.[58] *Sadeleer* suggests that when Article 11 TFEU is applied "preference should

[52] Lombardo, 'The Charter of Fundamental Rights and the Environmental Policy Integration Principle' p. 221

[53] Since the Explanations are not consistent either as stated by 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 European Constitutional Law Review 321 p. 330

[54] Hans D. Jarass, 'Der neue Grundsatz des Umweltschutzes im primären EU-Recht' (2011) 11 Zeitschrift für Umweltrecht 563 p. 563

[55] Julian Nowag, 'The sky is the limit: On the drafting of article 11 TFEU's integration obligation and its intended reach' in Beate Sjåfjell and Anja Wiesbrock (eds), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously, Taylor and Francis Inc. 2014) p. 15

[56] Ibid p. 30

[57] Sadeleer, *EU environmental law and the internal market p. 25*

[58] Ibid p. 28 and Nicolas de Sadeleer, 'Sustainable development in EU law: still a long way to go' (2015) 6 Jindal Global Law Review 39 and Emily Reid, *Balancing human rights, environmental protection and international trade : lessons from the EU experience* (Oxford, Hart 2015) p. 40

be given to the interpretation that is deemed to be the most favourable to environmental requirements"[59]. This shows that in order to give effect to environmental protection it has to be made use of by courts. This is interesting in relation to the requirement of Article 52(5) Charter to make a principle of the Charter "judicially cognizable". It has to be said though that even that Article 37 Charter is based in parts on Article 11 TFEU[60] it can only provide little help on its interpretation.

There is a strong indication that the article should be considered to be a principle but there are also signs that the norm could be interpreted also as something like a fundamental right since it is part of the fundamental rights charter. Therefore, it is necessary to considered more in detail the difference between principles and rights and what implications it has on a Charter article.

2.2.4 Principles and Rights: Practical and Theoretical Effects

There are several aspects in the principle and rights debate that are interesting when considering Article 37 Charter. There is a theoretical side to the difference and a practical side. The theoretical debate focuses around the legal understanding of principles and rights and whether the differentiation is necessary, and if it is, if it has a legal meaning. This debate is separate from the practical effect since the theoretical debate might or might not have an effect on the actual interpretation by the courts. It might also be of a purely academic nature.[61]

The starting point of the difference between rights and principles in the context of the Charter seems to be the difference in justiciability. Principles by definition of Article 52(5) Charter should only be taken into account by courts when reviewing EU or Member States legislative or executive acts. They do not create a subjective right which means that they cannot by themselves give admissibility in a procedure.[62]

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[59] Sadeleer, *EU environmental law and the internal market p. 29*

[60] Hectors, 'The Chartering of Environmental Protection: Exploring the Boundaries of Environmental Protection as Human Right' p. 172

[61] This is the idea of the article by Chris Hilson, 'Rights and Principles in EU Law: A Distinction without Foundation?' (2008) 15 Maastricht Journal of European and Comparative Law

[62] Hans D. Jarass, *Charta der Grundrechte der Europäischen Union: unter Einbeziehung der vom EuGH entwickelten Grundrechte, der Grundrechtsregelungen der Verträge und der EMRK - Kommentar* (2. Aufl. edn, Beck 2013) p. Art. 52 Charter, para. 80

This is one of the central issues when considering rights and principles. If principles do not allow direct access to the courts, then their fundamental nature is at question. If access to courts is limited then individuals are left without an effective judicial remedy.[63] This runs contrary to the idea of protecting individuals which is by its nature one of the goals of sustainable development as enshrined in Article 37 Charter.

This limitation regarding admissibility does not apply to fundamental rights of the Charter and therefore they can be considered to be more autonomous[64] than principles. The autonomous nature means for example that a principle cannot be used to force the EU or a Member State to take action.[65] The failure-to-act procedure under Article 265 TFEU is limited to rights.[66]

The full extent of the autonomy is difficult to define. *Hilson* argues that a right might be used to review any legislation while it might be required that the legislation cites a principle in order for it to be reviewed under this principle.[67] This would mean a requirement to explicitly name the principle in order for it to be used in a review procedure before courts. This requirement in contrast does not exist for fundamental rights of the Charter. A principle can then only be used "only as a shield and not as a sword"[68]. The citation requirement lessens the effect of a principle. *Hilson* then focuses on arguments by *Scott* in regards to the precautionary principle.

Scott argues in regard to the precautionary principle that it can be considered to be a general principle[69] of EU law: an important part of EU environmental law and something that could also be within the scope of Article 37 Charter. The requirement to consider environmental issues before the damage occurs makes it necessary for the precautionary principle to have some legal effect before an act of legislation or executive action.[70] If Article 37 Charter contains the precautionary principle then this could create one of the situations in which it would not be enough to read it just as a principle in order for it to have the necessary legal effect.[71] There has also been a discussion how far the interpretation of the word "act" in Article 52(5) Charter should be and if it

[63] 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' p. 322
[64] Hilson, 'Rights and Principles in EU Law: A Distinction without Foundation?' p. 199
[65] Ibid p. 200
[66] Ibid
[67] Ibid
[68] Ibid p. 203
[69] Scott, 'The Precautionary Principle before the European Courts' p. 53
[70] Ibid p. 54
[71] Also argued by 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' p. 335-336

allows an interpretation beyond the act of legislating.[72] If the precautionary principle is considered to be part of Article 37 Charter, then this would call for an extensive interpretation of a principle of the Charter. This would mean a reading more like a general principle of EU law but might be considered too far when read in connection with Article 52(5) Charter.

Article 37 Charter has not in general been considered as a general principle of EU law. *Hilson* mentions that for example the right not to be discriminated against on grounds of sex has not been fully recognized in an autonomous nature even though it has been considered to be a fundamental right.[73] The *Mangold*-decision[74] did not clarify this since it also took into account a Directive and mentions a general principle of the EU as well. The case-law in the EU has not been consistent and therefore gives no clear answer if the autonomous nature is the decisive distinction between rights and principles.[75]

Hilson then considers the legal impact and accountability of rights and principles. The legal effect of principles should be a guiding force in terms of policy while rights have a binding nature.[76] The accountability is political for principles and legal for rights.[77] He concludes though that this distinction has not been followed in the EU. Principles have an effect beyond being a guiding force in policy decisions since courts and not only scholars have argued in favor of their binding nature.[78]

From an even more theoretical point of view there has been a debate amongst scholars about rights and principles which *Hilson* also discusses. *Alexy* for example differentiates between rules that are either fulfilled or not and principles which can be satisfied to different degrees. Competing principles will have to be determined through a proportionality-assessment.[79] *Alexy* also sees

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[72] Jarass, *Charta der Grundrechte der Europäischen Union: unter Einbeziehung der vom EuGH entwickelten Grundrechte, der Grundrechtsregelungen der Verträge und der EMRK - Kommentar p. Art. 52 Charter, para. 82* and Sybe A. de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' (2013) 9 Utrecht Law Review 169 p. 186

[73] In this case the right not to be discriminated against on the grounds of sex. See Hilson, 'Rights and Principles in EU Law: A Distinction without Foundation?' p. 205

[74] C-144/04 *Mangold v Helm* ECLI:EU:C:2005:709, [2005] ECR I-9981

[75] Hilson, 'Rights and Principles in EU Law: A Distinction without Foundation?' p. 206

[76] Ibid p. 208

[77] Ibid

[78] In case of the precautionary principle in the T-74/00 *Artegodan and Others v Commission* ECLI:EU:T:2002:283, [2002] ECR II-4945 para. 182

[79] Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) p. 47-48, 57

rights acting as principles often therefore not making a distinction of both always possible and necessary.[80]

Hilson concludes that because of the discussed difficulties the distinction between rights and principles is a "distinction without foundation". Since an exact distinction cannot be made it has to be argued on Charter article by article and case by case basis.[81]

Principles remain open to weighing and value-judgment.[82] Their political nature can be used to use them as a political tool. Some consider that principles are inspired by liberal values.[83] As will be discussed later this cannot be concluded when even a liberal origin of principles can be turned into using principles to limits individual freedoms and therefore reducing the freedoms usually demanded by liberal theories.

When putting this into the context of the Charter it can mean that even when considering Article 52(5) Charter the courts will be the ones to decide whether they will consider the principles beyond the scope of the Explanations of the drafters of the Charter.

2.2.5 Conclusion

This discussion shows that the distinction between rights and principles is not always clear. It is reasonable that environmental policy should be among the important points that are considered when legislating and executing actions by the EU. If the EU would stop at this point though, then it is using a form of distinction that is at least unclear and therefore questionable. The arguments presented create a space for the courts to interpret a norm like Article 37 Charter beyond just a policy guiding function.

On the other hand, the formulation as a principle in accordance with Article 52 (5) Charter means that the article should see its interpretation as such and nothing further. The limited help of the Explanations does not always make a strong enough case for a limited interpretation though.

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[80] Hilson, 'Rights and Principles in EU Law: A Distinction without Foundation?' p. 212

[81] Ibid p. 215

[82] Xavier Groussot, Gunnar Thor Pétursson and Justin Pierce, 'Weak Right, Strong Court - The Freedom to Conduct Business and the EU Charter of Fundamental Rights', *Draft Chapter for Sionaidh Douglas-Scott and Nicholas Hatzis (eds), Research Handbook on EU Human Rights Law (Edward Elgar, forthcoming)* (Draft Chapter for Sionaidh Douglas-Scott and Nicholas Hatzis (eds), Research Handbook on EU Human Rights Law (Edward Elgar, forthcoming), 2014) p. 16

[83] As considered by Bengoetxea in footnote 101 in ibid

The Preamble of the Charter says that "it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter". It seems to be necessary not only to make them visible but enforceable to maybe even go as far as considering it a right. To ensure the effect of the article it has to have some legal significance that goes beyond the pure formulation of a policy goal. Otherwise its place in the fundamental rights charter would have to be considered a misplacement.

This will also be underlined later on when the usage of the article by the court will be analyzed. This would mean a departure from the original intention that Article 37 Charter does not formulate an individual right. This leaves a wide room of interpretation to the courts. Since the drafters of the Charter were so unprecise with the rights and principle distinction the decision is essentially left open to the courts.[84] They might feel obligated to empower Article 37 Charter in order for the article not to be just a "paper tiger"[85].

[84] 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' p. 334

[85] Lombardo, 'The Charter of Fundamental Rights and the Environmental Policy Integration Principle' p. 240

3 Limitations

After assessing the legal framework of Article 37 Charter and before taking into consideration the decisions by the Court of Justice of the European Union it is first necessary to consider the limitations. The question is where the limits of the justification of Article 37 Charter and environmental policy in general are. Whether they are easily fulfilled or if they have expanded and continue to expand as justification.

When several rights and / or principles are competing with each other the principle of proportionality is of great importance. Another aspect is legal certainty which can be challenging to assess for individuals and companies when facing the difficult definition of environment and the policy surrounding it.

All the aspects covered in this chapter influence the scope of Article 37 Charter. Naturally the principle of proportionality will not give any prejudice to any norm but will rather carefully consider and balance them. This balancing might help to view Article 37 Charter as something beyond a principle because it creates a balance no matter what kind of norm the court is considering. This might change the perspective on the differentiation between rights and principles.

At the same time Article 37 Charter will come into conflict with the internal market freedoms that are also primary law. The principle of proportionality also plays a role here but in a separate chapter the potential influence of the internal market freedoms will be considered. The same might happen with other Charter articles. Again the relationship between internal market freedoms and other Charter articles and Article 37 Charter might be a relationship of equals. This also challenges the rights and principles distinction.

Before finally moving on to judicial opinions and decisions the binding nature of CJEU judgments and the concept of precedence by the EU courts will be discussed.

3.1 Principle of Proportionality

The balancing of rights as part of the principle of proportionality is a well-established principle in the legal doctrine of the EU. It is considered to be a

general principle of EU law[86] and is enshrined in Article 5(4) TEU which states "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties".

When the courts apply this test in EU law they will usually identify the relevant interest and then assess whether the measure was suitable to achieve the desired goal, whether it was necessary to achieve this goal and whether the burden on the individual was excessive in relation to the objective being pursued.[87] The last step is also known as proportionality *stricto sensu*. Not all of these levels will always be considered by the court especially not if the test fails on an earlier stage.[88]

The most decisive and difficult level is the proportionality *stricto sensu*. On this level the court does the actual balancing of rights. Most of the time this involves the question whether the policy choice by the EU administration went beyond what is necessary to achieve an objective.[89] This question will often be claimed by the appellant when environmental issues are being challenged since they very often involve a policy choice.

The standard of the proportionality-test in this case has been called the "manifest review". This is because of the extent that the courts will scrutinize the decision of the administration. Since the the courts do not have the same democratic legitimization and are not the executive branch they have to respect the decision by the administration as long as it does not "clearly exceed the bounds of its discretion"[90]. The courts do not always use the manifest test and there have been decisions that have called for a stricter kind of review.[91]

The question is which kind of proportionality-assessment the courts would make in regards to Article 37 Charter. The Charter prescribes through Article 52(1) Charter that limitations are subject to a proportionality-test as well: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be

[86] Craig and De Búrca, *EU law: text, cases and materials p. 551*
[87] Ibid and de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' p. 172
[88] Craig and De Búrca, *EU law: text, cases and materials p. 551*
[89] Ibid p. 552
[90] Ibid and Groussot, Pétursson and Pierce, 'Weak Right, Strong Court - The Freedom to Conduct Business and the EU Charter of Fundamental Rights' p. 11
[91] For example in the case Digital Rights Ireland which as cited by Groussot, Pétursson and Pierce, 'Weak Right, Strong Court - The Freedom to Conduct Business and the EU Charter of Fundamental Rights' p. 11

made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others." The wording is not the same as Article 5(4) TEU but goes in the same direction. The question has been raised whether the standard of review is different or clearer.[92]

The biggest textual difference is that Article 52(1) Charter states that any limitation must be provided for by law. This underlines the importance of the rule of law and can be considered to be the first level of a proportionality test. Then an objective of general interest is necessary and it has to be seen whether the limitation is proportionate to the legitimate aim pursued and does not go beyond what is necessary to achieve this aim.[93] The last level will then also be a proportionality-assessment *stricto sensu* to reconcile and balance competing rights.[94] Therefore the test is more precise in its stages but it cannot be concluded that the court follows it more strictly or always cites the relevant article.[95] It also carries out some leisure like in cases that though did not involving the Charter.[96]

The proportionality-test is therefore a little bit clearer when Charter rights are involved but depending on how the courts use the language of Article 52(1) Charter they might employ different proportionality tests. This shows that the proportionality assessment will continue to vary on a case-by-case basis.

The influence on Article 37 Charter might come through the variety of interpretations. The proportionality-assessment in general though should though be applied in the same way for rights and principles as there is no distinction in the Charter for a different application.

This means that when the court considers Article 37 Charter with other rights – as will be shown later in the case law chapter – the distinction between rights and principles diminishes. When the courts weigh Article 37 Charter they consider it among other legal tools and will not prejudge one or the other. This means that the principle of proportionality can naturally support a reading of Article 37 Charter beyond being a principle.

[92] Ibid p. 12
[93] Ibid p. 13
[94] The authors also discuss if because of the word "essence" there needs to be a different kind of test here but conclude that this is not the case, see ibid
[95] Ibid
[96] Ibid

3.2 Principle of Legal Certainty

The principle of proportionality leads to situations of legal uncertainty.[97] This leads to another interesting general principle of EU law the principle of legal certainty. As has already been discussed earlier one of the problems of environmental law will be the definition and the changes that will occur when new environmental legislation is enacted. This can result in changes for individuals and new limitations of individual freedoms that did not exist beforehand.

The principle of legal certainty and legitimate expectations exists in the Member States and also in the EU.[98] In the EU it has been mainly developed through case law. The principle covers a lot of different aspects and they can only be mentioned briefly here. Difficulties arise when administrative decisions are revoked therefore the principle can cause favorable decisions to remain binding.[99] This protects individual freedoms but potentially hurts change regarding new environmental laws.

Regarding changes in law there is no absolute protection as long as the institutions remain in their discretionary powers.[100] This reduces effect of the principle of legal certainty when changes in law happen because of the environment. The wider effect on individuals in regards to change in environmental law in their situation would go beyond the scope of this thesis. The principle of legal certainty should though be kept in mind as it can be an argument raised by a party that faces a change in their legal situation and this change is argued by Article 37 Charter considerations. This calls for a narrow reading of Article 37 Charter so that expectations remain intact.

If the only reason for a narrow reading is to uphold expectations, then this interpretation goes against the nature of law which includes changes in law as mentioned above. Even a wide interpretation of Article 37 Charter can be done without going beyond the limits of legal certainty.

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[97] As concluded by Junko Ueda, 'Is the Principle of Proportionality the European Approach: A Review and Analysis of Trade and Environment Cases before the European Court of Justice' (2003) 14 European Business Law Review 557 p. 591

[98] Craig and De Búrca, *EU law: text, cases and materials p. 558*

[99] Ibid p. 561

[100] Ibid

3.3 Through the Internal Market Freedoms

As the EU strives to achieve a single market through the internal market freedoms, measures that support environmental protection like Article 37 Charter can become obstacles. Reconciling those interests has not been achieved in a coherent way[101] and is also one of the reasons why this thesis discusses the competing interests.

The freedom of movement as enshrined in Article 28 ff. TFEU takes into consideration environmental issues in the justification clause of Article 36 TFEU: "the protection of health and life of humans, animals or plants". This does also cover environmental measures.[102] The courts have ruled though that it is no absolute justification and that restrictive measures will face a proportionality-test.[103]

Less difficult because of lacking constellations that challenge environmental issues are the free movement of workers, the freedom of establishment and the freedom to provide service. If issues should arise it the environmental issues will have to be taken into account by Treaty law and it can also be relied on decisions regarding the free movement of goods. These justifications should be covered under Article 49 and 56 TFEU and the Service directive.[104]

The requirement to regard environmental issues in the Treaties as has been discussed earlier in the thesis has paved the way for a transition. *Sadeleer* concludes that a change in case law from favoring commercial interests is underway.[105] Problematic are the various standards in the Member States. Decisions like *PreussenElektra* have shown that the CJEU is willing to accept the different degrees to which Member States pursue environmental protection.[106] To achieve a higher standard a proportionality-assessment should on the level of *stricto sensu* take into account the circumstances of every case and the situation of the Member States.[107]

The case in *PreussenElektra* concerned the introduction of the renewable energy law (Erneuerbare-Energien-Gesetz) in Germany. This law forced power

[101] Sadeleer, *EU environmental law and the internal market p. 383*
[102] Ibid p. 292
[103] Ibid p. 293
[104] Ibid p. 385
[105] Ibid p. 383
[106] Han Somsen, 'Discretion in European Community Environmental Law: An Analysis of ECJ Case Law' (2003) 40 Common Market Law Review 1413 p. 1453
[107] Sadeleer, *EU environmental law and the internal market p. 384-385*

companies to buy energy above market price from renewable energy sources. Enforcing this kind of buying-requirement allowed the renewable energy providers to have a save flow of income and therefore support their environmental friendly energy source. The challenge at hand was that the free movement of goods was limited and that the individual company was limited in its decisions.

The court considered the various arguments and decided that the environmental policy that is also enshrined in Article 11 TFEU enshrines a legal principle of the EU and can also be used by a Member State to create a system that supports the environmental goals of the EU.

Part of the judgement can be considered as giving in to the Member State Germany since its own energy system is from a national perspective very essential. It is always a power game between the EU and the Member States if a mayor legal project is challenged. On the other hand, there is the individual freedom in the form of the free movement of goods which is one of the main goals of the single market of the EU.

This poses a challenge to the internal market and individual and companies facing regulation will try to see their internal market freedoms upheld rather than environmental protection raised.

An interesting case covering the crossing of the internal market freedoms and fundamental rights is the case *Schmidberger*[108]. In this case the Court underlined that Human Rights and the freedom of expression and freedom of assembly as enshrined in the ECHR – and now also in the Charter – can justify a restriction on the free movement of goods when reviewed in a proportionality-assessment.[109] Fundamental rights are not absolute rights and as shown in this case will face a *stricto sensu* balancing.[110] The derogation from EU rules is in this case was justified on the grounds of protecting a fundamental right. This decision is relevant regarding the Charter because Article 52 Charter states that the standard of protection through the Charter should not be below the standard of the ECHR.

[108] *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* ECLI:EU:C:2003:333, [2003] ECR I-5659

[109] Craig and De Búrca, *EU law: text, cases and materials p. 386-387*

[110] Groussot, Pétursson and Pierce, 'Weak Right, Strong Court - The Freedom to Conduct Business and the EU Charter of Fundamental Rights' p. 14 and de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' p. 178-179

The courts have also heard cases like *Omega*[111] in which they allowed a similar strong reasoning to protect a constitutional right of a Member State.[112] On the other hand the CJEU has also decided cases like *Laval*[113] and *Viking*[114] which have been criticized widely.[115]

This shows that limitations to the internal market can be justified but that different outcomes have been ruled by the courts.[116] Cases like *PreussenElektra* show that the court is willing to take into account environmental issues. These cases have created no clear line of jurisdiction. Taking into account the difficulty in defining and establishing the various standards of environmental issues and protecting these interests it remains to be seen on a case-by-case basis what is considered to be justifiable.

What can be concluded though is that the court is very open to this reasoning and in connection with the more established legal framework of environmental law it has the necessary tools to do so. One of the new tools is Article 37 Charter and it is very likely to end up in *Schmidberger*-like assessments. This will be evident in the case law chapter.

3.4 Through other Charter rights

The most difficult challenge is probably how the court weighs within the Charter. It has already been discussed that the proportionality-assessment in the Charter follows a clearer manifest-test approach that the courts should follow.

This chapter will take a brief look on how a right is weighed. This will be done by the example of Article 16 Charter. Article 16 Charter enshrines the right to conduct business. This right is an interesting one to consider for a moment because it will probably be one of the rights that can easily be in conflict with environmental issues while it tries to protect individual free-

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[111] C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* ECLI:EU:C:2004:614, [2004] ECR I-09609

[112] Craig and De Búrca, *EU law: text, cases and materials p. 388*

[113] C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* ECLI:EU:C:2007:809, [2007] ECR I-11767

[114] C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti.* ECLI:EU:C:2007:772, 2007 ECR I-10779

[115] Craig and De Búrca, *EU law: text, cases and materials p. 388*

[116] de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' p. 191

doms. This thesis also considers as one of the research questions how environmental issues and an Article 37 Charter justification will usually result in the limitation of individual freedoms like Article 16 Charter.

Article 16 Charter also has a pretty new case law history which makes it difficult to draw conclusions on its application.[117] This is the case for all the Charter rights since the Charter especially in its binding form has not been around for too long.

Some authors consider Article 16 Charter to be of weak standing so far.[118] This means that a proportionality-assessment involving Article 16 and 37 Charter could see an interesting weighing of a fundamental right with a principle. This shows that in some constellations the right and principle question might not have an impact on the outcome of the case and rendering the distinction useless. It might even allow the courts to have a wider margin of interpretation for the principle since its function is not clear. It can also be argued that this calls for a rather restricted interpretation since its definition remains unclear.

A right like Article 16 Charter cannot be considered to be an absolute right.[119] Connecting this to the debate of rights and principles at least the distinction cannot be made whether one is absolute and one is not. Fundamental rights should be viewed "in relation to their social function"[120]. This is also interesting when considering that a norm like Article 37 Charter is part of the social rights of the Charter. If the social function of a Charter norm is important then this has to be valid for all Charter norms. This connects to the reading of the EU as a social market democracy[121] according to Article 3(3) TEU and when considering the social rights enshrined in the Charter.

Therefore, some argue that Article 16 Charter must allow for a high level of protection regarding the social rights of the Charter. If this is the case, then individual freedom might be limited more easily where social protection requires this. This also opens the way to consider the social dimension of envi-

[117] Groussot, Pétursson and Pierce, 'Weak Right, Strong Court - The Freedom to Conduct Business and the EU Charter of Fundamental Rights' p. 5
[118] Ibid
[119] Ibid p. 15
[120] As quoted in footnote 86, ibid
[121] The authors of this article ask if Article 3(3) TEU has an influence or not but do not draw a conclusion since a conclusion cannot be made but the article can be used as an argument but the Courts have not given a conclusive answer yet, see ibid

ronmental protection. The other interpretation is the manifestation of capitalist principles in the Charter[122] through principles like Article 16 Charter. This is supported by the important single internal market goal of the EU. The market access is at the center of the "freedoms" of the EU and especially individual freedoms that companies and individuals enjoy in the EU. The limits of these freedoms as has been shown remain difficult to assess.

When the individual freedom is not limited to a grave extent as has to be shown by the manifest-test then it seems likely that a right like Article 16 Charter will be limited to the extent of enforcing the environmental protection as is considered by the legislator of the EU or a Member State when citing the necessity of Article 37 Charter. This again shows that the distinction of a right and a principle can shift easily. Under this point of view, the principle enshrined in Article 37 Charter seems to be quite absolute while the right of Article 16 Charter seems to be easily limited. This is in line with the argument that Article 16 Charter is rather weak.

On the other hand the "weak textual formulation"[123] – just as in the case of Article 37 Charter – also open the opportunity for a wide interpretation. The weakness or powerfulness of the right of Article 16 Charter will be assessed through a manifest-test and yet has to be shown by more case law.

This is while it will be interesting to consider some of the court decisions. This will be done though more in relation to Article 37 Charter in order to assess the situation of the main article discussed in this thesis. Before moving on to the case law it shall be briefly considered to which extent precedence is created by CJEU decisions.

3.5 Precedence in EU Law

Limitations might also stem from previous decisions and previous decisions might create limitations for future interpretations. This is why a brief look should be taken at the nature of precedence in EU law.

Through the Declaration concerning primacy[124] the Member States and EU have established that the well settled case law of the CJEU establishes the principle of primacy of EU law over the law of Member States. This can only

[122] As quoted in Footnote 94 in ibid p. 16
[123] Ibid p. 15
[124] Declaration concerning primacy, Declaration 17 of the Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union, C 326/47

be achieved if decisions of the CJEU are being followed as precedent when the same material facts are being decided.[125] The CJEU has confirmed in the *CILFIT*-decision that it will not make a different interpretation when it was decided and no new facts are at hand.[126]

The extent of the doctrine of precedent has been discussed[127] and if the same material facts reach the CJEU the same outcome can be expected. Especially national courts will be asked to consider CJEU opinions but if the facts differ the outcome may differ as well and might even require another preliminary ruling reference.[128] In general though the CJEU will ask national courts to follow its previous decisions and they are not required to ask for another ruling under the acte claire-doctrine.[129]

When taking the precedence-doctrine into account it becomes clear that reviewing the AG opinions and the case law on Article 37 Charter could show the emergence of a precedent of an environmental right. The interesting fact is that a precedent does not require more than one ruling but of course only a continuously followed line of interpretation will make a precedent legally sound and sustainable. The following look at the view of the courts on Article 37 Charter will evaluate its potential when considered by the courts of the EU.

[125] Gundega Mikelsone, 'The Binding Force of the Case Law of the Court of Justice of the European Union' (2013) 20 Mykolas Romeris University periodical reviewed research papers "Jurisprudence" 469 p. 490

[126] C-283/81 *Srl CILFIT et Lanificio di Gavardo SpA v Ministero della sanità* ECLI:EU:C:1982:335, [1982] ECR 3415 para. 13 and 14 as quoted by Mikelsone, 'The Binding Force of the Case Law of the Court of Justice of the European Union' p. 490

[127] Jan Komarek, 'Reasoning with Previous Decisions: Beyond the Doctrine of Precedent' (2013) 61 American Journal of Comparative Law 149 and Karen McAuliffe, *Precedent at the Court of Justice of the European Union: The Linguistic Aspect* (Oxford University Press 2013)

[128] Mikelsone, 'The Binding Force of the Case Law of the Court of Justice of the European Union' p. 490

[129] Craig and De Búrca, *EU law: text, cases and materials p. 471-474*

4 Jurisdiction: View of the Courts

To examine the legal significance that the courts of the CJEU have read into Article 37 Charter it will now be necessary to examine how the court has used Article 37 Charter so far. The CJEU has mainly made mentions of Article 37 Charter in opinions by the Advocate Generals and so far only a few decisions have quoted Article 37 Charter in the judgement.

4.1 AG Opinions mentioning Article 37 Charter

When taking a look at the courts usage of Article 37 Charter there have been mainly opinions by the Advocate General. Considering that the court most of the time follows the AG opinion it is interesting to see that a number of Article 37 Charter mentions exist that were not quoted in the judgment. It cannot be explained whether the court made a conscious decision not to quote Article 37 Charter in these judgments.

The usage by the Advocate Generals seems to demonstrate a consciousness of the emerging importance of the Charter. This might be also in relation to the court's Opinion 2/13 in regards to the relationship of the EU and the ECHR. On the other hand, it might also demonstrate that the Advocate Generals are willing to use the new binding nature of the Charter and underline its growing importance.[130]

The judges of the court could have refrained from mentioning Article 37 Charter so far because of a variety of reasons. First of all, as has been shown in the earlier chapters the role of principle and right has created an uncertainty for the judges in how they should apply Article 37 Charter without upsetting the legal forum of the EU. It is also the case that a conservative reading of the Charter will require the mentioning of Article 37 Charter in the legislation in order for it to be part of a review by the court. This means a restrictive application of Article 37 Charter by the court will not apply Article 37 Charter when it is not mentioned by the legislator.

[130] Denman, 'The EU Charter of Fundamental Rights: How Sharp are its Teeth?' p. 160

Not all Advocate General opinions will be considered but the ones excluded are mainly ones that are simply referencing Article 37 Charter when mentioning a high level of protection of the environment but do not use Article 37 Charter for a deeper legal assessment.

This is the case in the opinions by Advocate General *Kokott* in a case concerning the REACH-regulation (Registration, evaluation, authorization and restriction of chemicals)[131] and in a case concerning Regulation (EC) No 1782/2003 which concerns a direct payment system that is part of the common agricultural policy of the EU.[132] Another opinion is the one by Advocate General *Bot* that concerns a financial support scheme for cogeneration plants.[133] All three of the opinions mention Article 37 Charter only to underline the importance of environmental protection. They do not consider them in a wider sense or use them in an extensive weighing of rights.

4.1.1 C-120/10 - European Air Transport (2011)

A very interesting opinion is the one by Advocate General *Villalón* in the case European Air Transport concerning airport noises. Therefore, the court had to weigh the impact of air transport against the environmental impact that it causes.

Villalón mentions at the beginning that Article 37 Charter could provide support in the case "should any be needed"[134]. He then later on in the opinion states that the protection from noise pollution is one of "constitutional nature"[135] since its deeply rooted in EU law and in "national orders through fundamental rights"[136]. This builds up a strong foundation for what follows with the statement that Article 37 Charter "expressly recognizes the right to environmental protection"[137]. He continues right away though with stating that "(t)he latter right is expressed as a principle and, moreover, does not arise

[131] C-106/14 *FCD und FMB, Opinion by Adovcate General Kokott* ECLI:EU:C:2015:93 para. 81
[132] C-298/12 *Confédération paysanne, Opinion by Advocate General Kokott* ECLI:EU:C:2013:319 para. 30
[133] C-195/12 *IBV & Cie, Opinion by Advocate General Bot* ECLI:EU:C:2013:293 para. 82 and 96
[134] C-120/10 *European Air Transport, Opinion by Advocate General Villalón* ECLI:EU:C:2011:94 para. 3
[135] Ibid p. para. 77
[136] Ibid
[137] Ibid p. para. 78

in a vacuum but instead responds to a recent process of constitutional recognition in respect of protection of the environment, in which the constitutional traditions of the Member States have played a part."[138]

It is hardly possible to take away from this opinion a clear statement that Article 37 Charter suddenly can be considered to provide the right to environmental protection but the Advocate General is to some extent attributing a right-category to Article 37 Charter even though retracting to the mentioning of it being a principle. He seems to be willing in order to give Article 37 Charter proper effect to at least empower it. It is not necessary in this opinion to give Article 37 Charter the standing of a subjective right but the wording used makes it seem possible that in a different situation this could also be possible under the same argumentation.

The Advocate General goes on to mention the constitutional traditions of the Member States and then cites Germany, Greece, Poland, Portugal, Spain and the Czech Republic.[139] This limited list of Member States does not really help since Greece, Poland, Portugal and Spain consider it as a right while Germany and the Czech Republic more as a principle.[140]

An additional rights-argument comes from the next paragraph then connects the importance of Charter rights to the ECHR. This opinion was written before Opinion 2/13 but this does not mean that the mentioning of this link is less important. As required by Article 52(3) Charter: "the meaning and scope of those rights shall be the same as those laid down by the said Convention"[141]. The explanation of that provision states that this also includes the case law of the ECHR.[142] Article 52(3) Charter also mentions that this shall not prevent the EU from "providing more extensive protection" which means that the EU cannot go below the level of protection provided by the ECHR.

The ECHR has integrated environmental protection in its interpretation of Article 8 of the Convention for example in the *Hatton*-case[143]. Article 8 of the Convention contains the right to respect the private and family life and its formulation states this as a right. Now this is again a difficult situation in how

[138] Ibid
[139] Footnote 26 in ibid
[140] See footnote 5 in Nicolas de Sadeleer, 'Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases' (2012) 81 Nordic Journal of International Law 39 p. 40
[141] Also quoted in *European Air Transport, Opinion by Advocate General Villalón*
[142] Explanations relating to the Charter of Fundamental Rights (2007/C 303/02)
[143] Hatton-case and discussed by Margaret DeMerieux, 'Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2001) 21 Oxford Journal of Legal Studies 521

to assess whether the opinion wants to make the connection with a right or just to underline the importance of the principle. Since the standing of a principle seems already guaranteed by the Charter itself it seems like the statement is supposed to underline the importance of environmental protection beyond the standing of a principle. This could also open up a future use beyond the principle situation but it does not state clearly that a subjective right exists. It does though mention the foundation that creates a subjective rights situation when referencing Article 8 of the Convention.

4.1.2 Joined Cases C-204/12 to C-208/12 - Essent Belgium NY v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt (2013/2014)

The case *Essent Belgium* concerns the conflict of environmental protection and the internal market freedoms. The question in this case was whether a scheme that requires energy suppliers to demonstrate that they use a certain amount of renewable energy in their energy mix can also be required to proof this through only nationally produced energy and therefore cannot do this with imported energy. This of course challenged the concept of the free movement of goods as protected under Article 34 TFEU and the question arose whether it could be justified or not.

In the 2014 annual report[144] on the Charter the opinion of Advocate General *Bot* was especially mentioned because he cited Article 37 Charter but came to the conclusion that in this case the justification through this article was insufficient. The court though went on to come to the different conclusion that in this case it would be justified even when in conflict with the free movement of goods. The report therefore concludes that "(t)herefore, even without mentioning Article 37 of the Charter, the Court has granted a high priority status to environmental protection"[145].

In this situation it seems to be a more critical application by the Advocate General. He expresses that: "Express elevation of environmental protection to the level of an imperative requirement relating to public interest that may be invoked in order to justify measures that restrict the freedoms of movement even where such measures are discriminatory would, in my view, contribute

[144] European Commission - Directorate-General for Justice and Consumers, *2014 report on the application of the EU Charter of Fundamental Rights*, 2015)
[145] Ibid p. 119

to ensuring its pre-eminence over other considerations."[146] This is interesting in the regard that as has been discussed earlier as long as the proportionality-assessment survives the manifest-test it does result in some pre-eminence over other considerations which will very often require the courts to stand down and respect the decision by the administration. The Advocate General seems to also have this in mind when stating that "(a)lthough that principle does not require that priority should always be given to environmental protection, it does mean that the environmental objective may be routinely balanced against the European Union's other fundamental objectives"[147]. The usage of the word "fundamental objective" can be viewed as creating a connection to the fundamental rights discussion.

4.2 The CJEU on Rights and Principles

Before considering the first decision citing Article 37 Charter directly a brief look shall be taken on the discussion of the rights and principle debate and Article 52(5) Charter by the CJEU.

This has been so far discussed to some extent only in the *Glatzel*-decision regarding Article 26 Charter. The court considers Article 26 Charter to be a principle in connection with the Explanations.[148] The court ensures that it is reviewing legislation which allows it to consider this principle of the Charter. It then goes on to state that "the principle enshrined by that article does not require the EU legislature to adopt any specific measure. In order for that article to be fully effective, it must be given more specific expression in European Union or national law. Accordingly, that article cannot by itself confer on individuals a subjective right which they may invoke as such."[149] This means that the court gives the principle in this case a very weak standing. The wording can be viewed as a form of negligence since the court states that in order to be fully effective it must be given more specific expression but then fails to give it more expression. This could have been a situation where the court could have legislated. It is very likely that this would have caused some discussion but it could have also demonstrated the power of the fundamental rights Charter.

[146] Joined Cases C-204/12 to C-208/12 *Essent Belgium NY v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt, Opinion by Advocate General Bot* ECLI:EU:C:2013:294 para. 96
[147] Ibid p. para. 97
[148] C-356/12 *Glatzel* ECLI:EU:C:2014:350 para. 74
[149] Ibid para. 78

This ineffectiveness is criticized by Advocate *Villalón* in the opinion to the case *Association de médiation sociale ('AMS')*[150] considering Article 27 Charter which contains the worker's "right" to information and consultation within the undertaking which is not clearly a right or principle through the Explanations. The limited view of principles can result in a "vicious circle"[151] and that in this case it would mean that "(o)therwise, both Article 27 and its judicial guarantee in the second sentence of Article 52(5) of the Charter would be rendered ineffective."[152]

The Advocate General starts out with a much wider discussion[153] on rights and principles then in the *Glatzel*-case mentioning Article 37 Charter in reference to the Explanations that mention some examples of articles that should be considered principles.[154] This is followed by the bold statement: "First, it is necessary only to point out that, within the structure of the Charter, the general category chosen for the title of the Charter itself, 'fundamental rights', must relate to all its contents. In other words, none of the content of the Charter, in terms of its substantive provisions, should be excluded from the category of 'fundamental rights'. That having been established, it is necessary, and this may seem less obvious, to point out that the fact that specific substantive content of the Charter is described as a 'right' elsewhere in the Charter does not in itself prevent it from potentially belonging to the category of 'principles' within the meaning of Article 52(5)."[155] This means rights can contain principles but it can potentially be read the other way round as well meaning that a principle can contain a right.

The Explanations to Article 52 Charter also consider this: "In some cases, an Article of the Charter may contain both elements of a right and of a principle, e.g. Articles 23, 33 and 34."[156] Since this does not mention Article 37 it could be read as an exclusion. As it is a listing of examples it cannot be read as an exclusionary listing.

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[150] C-176/12 *Association de médiation sociale, Opinion by Advocate General Villalón* ECLI:EU:C:2013:491

[151] Ibid para. 69

[152] Ibid para. 70 also concluded by Denman, 'The EU Charter of Fundamental Rights: How Sharp are its Teeth?' p. 169

[153] *Association de médiation sociale, Opinion by Advocate General Villalón beginning at para. 43 ff.*

[154] Footnote 13 as quoted in ibid para. 43

[155] Ibid para. 44 and also discussed by Jarass, *Charta der Grundrechte der Europäischen Union: unter Einbeziehung der vom EuGH entwickelten Grundrechte, der Grundrechtsregelungen der Verträge und der EMRK - Kommentar p. Art. 52 Charter, para. 73*

[156] Explanations relating to the Charter of Fundamental Rights (2007/C 303/02)

The opinion goes on to mention that usually social rights are not rights that can be enforced by individuals.[157] This statement does not expressively exclude that this situation can arise in a social right situation and then maybe create a right to an individual claim. The opinion goes on to consider the wording of Article 51(1) Charter that mentions that "observe the principles and promote the application thereof in accordance with their respective powers." This can of course be also used for a strong interpretation. A direction that the Advocate General points to in some form when saying "the public authorities, and in particular the legislature, are called upon to promote and transform the 'principle' into a judicially cognisable reality"[158] but also saying "while at all times respecting the objective framework (the subject-matter) and its purposive nature (the results) as determined by the wording of the Charter establishing the 'principle'"[159].

This is another opinion setting up another possible foundation to making principles more fundamental then what they maybe were drafted as but in order to fulfill the requirements as set out by Articles 51 and 52 Charter.

It should also be mentioned that the Advocate General knows very well about the difficulty of the interpretation of the Charter and states: "One last important detail: the solution proposed here should not result in a situation of legal uncertainty."[160] The issue of legal certainty has been briefly discussed earlier as well and should always be kept in mind when arguing for an extensive interpretation of Article 37 Charter.

The discussion of the *Glatzel*-judgement and the *AMS*-opinion show that the CJEU has not found a conclusive and clear answer to the rights and principle discussion and a narrow and wide interpretation both seem possible in the future.

4.3 T-614/13 - Romonta GmbH v European Commission (2014)

The only main case that includes the mentioning of Article 37 Charter in a judgment is the *Romonta*-decision in 2014. It was followed by four decisions that also mention Article 37 Charter.

[157] *Association de médiation sociale, Opinion by Advocate General Villalón para. 45*
[158] Ibid para. 50
[159] Ibid para. 50
[160] Ibid para. 78

The *Romonta*-judgment comes after Opinion 2/13 which might explain the usage of the Charter. It also follows after the previously mentioned Advocate General opinions that did not transform into any real mentioning in judgments so far.

The case concerns the greenhouse gas emission allowance trading scheme established by Directive 2003/87/EC and subsequent amendments. The applicant *Romonta* applied for free allowances which were allocated to it by the Member State Germany but had to also be approved by the Commission.[161] The Commission refused the approval since it considered the allocation list by the Member State not substantiated enough. Regarding the applicants installation, it stated: "Assigning more free allowances to some installations distorted or threatened to distort competition and had cross-border effects given Union-wide trade in all sectors covered by Directive 2003/87."[162] This was required by the "principle of equal treatment of installations under the scheme for greenhouse gas emission allowance trading"[163].

The applicant went to court to claim that "the Commission infringed the principle of proportionality and its fundamental rights, namely its freedom to choose an occupation, its freedom to conduct a business and its right to property, as provided for in Articles 15 to 17 of the Charter of Fundamental Rights of the European Union."[164] The applicant claims that this violation is caused by the absence of a hardship-clause[165] for special situations like the one that the applicant claims to be in.

The court cites the binding nature of the Charter and its legal status at the same level of the Treaties as prescribed now in Article 6(1) TEU.[166] Then the court goes on to mention the Charter rights Articles 15 to 17 Charter and states that they are not absolute rights and that they must be considered in relation to their social function[167]. This requires that any restrictions of these rights cannot be disproportionate and do not impair "the very substance of those rights"[168] which is in accordance with Article 52(1) Charter and settled case law. The court in this case does not see a violation of this principle of proportionality since "the Commission must be allowed a wide discretion in an area such as that involved in the present case, which entails political, economic

[161] T-614/13 *Romonta GmbH v European Commission* ECLI:EU:T:2014:835 para. 8-11
[162] Ibid para. 12
[163] Ibid para. 12
[164] Ibid para. 41
[165] Ibid para. 54
[166] Ibid para. 55
[167] Ibid para. 59
[168] Ibid para. 59

and social choices on its part (…)"[169]. Only if the measure is manifestly inappropriate and therefore fail the manifest-test it would be considered to be unlawful by the court.[170]

This could be the case because of the absence of a hardship-clause[171] which could result in the measure being "manifestly disproportionate in the strict sense"[172]. The court seems to show that it is applying the strong and clear proportionality-test as required by Article 52(1) Charter that was discussed earlier in this thesis. The court does not cite Article 52(1) Charter though.

Since there is an act of legislation present with Directive 2003/87/EC the question if Article 37 Charter is applicable is not at question. The court then states that "the Commission had to balance the fundamental rights of operators of installations that are subject to the emission allowance trading scheme and environmental protection as provided for in Article 37 of the Charter of Fundamental Rights, the first subparagraph of Article 3(3) TEU and Articles 11 and 191 TFEU"[173]. There is no mention of Article 37 Charter as a principle but rather the beginning mentions the balancing of fundamental rights. This also continues in the following paragraph with another rights and then fundamental freedom reference and no mentioning of the principle nature of Article 37 Charter.[174] The only Charter-principle reference is quoted by the court in paragraph 83 in reference to recital 50 of Directive 2009/29[175], which is an amendment to the original directive, which states that the principles of the Charter should be respected. The court proceeds to mention the *Schmidberger*-decision to make a reference to the established weighing of different rights and freedoms.[176]

The appellant brings up a very strong reason when it claims that "the Commission wrongly held that climate protection took precedence over safeguarding a large number of jobs"[177]. The court though agrees with the Commission-

[169] Ibid para. 63
[170] Ibid para. 63
[171] Ibid para. 74
[172] Ibid para. 75
[173] Ibid para. 76
[174] Ibid para. 77
[175] Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community (Text with EEA relevance), Official Journal of the European Union L 140/63
[176] *Romonta GmbH v European Commission para. 77*
[177] Ibid para. 78

argument and in line with previous case-law that a hardship-clause would result in a reduced incentive for firms to comply with the reduction of emissions.[178]

The court seems to be aware of the issue of legal certainty: "Given the multiplicity and complexity of economic circumstances, such an evaluation would not only be impossible to achieve, but would also create perpetual uncertainty in the law"[179]. In what seems to be an evaluation of the rights guaranteed by Articles 15 to 17 Charter then continues that "it has been ruled that the goal of European Union restrictive measures of improving market conditions does not require the Commission to guarantee each individual undertaking a minimum level of production determined in accordance with the undertaking's own criteria of profitability and development"[180]. This falls in line with the weak standing of Article 16 Charter as has been discussed earlier. Therefore, the court concludes that the argument of the appellant must be rejected.

Even though that the court in assessing the arguments scrutinizes the proportionality-assessment by the Commission quite a lot while stating that only a manifest-breach should result in such scrutiny. The court accepts the arguments of the Commission though and respects its wide discretion. The discussion surrounding the environmental goals does involve a lot of policy argumentation but Article 37 Charter is never brought up to underline that this policy comes from a principle enshrined in Article 37 Charter.

In the courts proportionality-assessment the balancing of fundamental rights and freedoms – to use the courts own language – seems to be one of equal rights. To fully conclude that the court was considering Article 37 Charter in this case as a right might be too far. On the other hand, as has been discussed in the *AMS*-case earlier, maybe rights can contain principles and maybe principles can contain rights. Then the *Romonta*-case can also be read towards making Article 37 Charter more judicially cognizable.

4.4 Outlook and Conclusion

Since the *Romonta*-case is a T-decision it has been brought to the next instance by the appellant. This has also happened in four cases that followed after the *Romonta*-case. The cases T-629/13 - *Molda v Commission*[181], T-

[178] C-203/12 *Billerud Karlsborg and Billerud Skärblacka* ECLI:EU:C:2013:664 as quoted in *Romonta GmbH v European Commission para. 92*
[179] *Romonta GmbH v European Commission para. 93*
[180] Ibid para. 93
[181] See para. 74 of T-629/13 *Molda v Commission* ECLI:EU:T:2014:834

630/13 - *DK Recycling und Roheisen v Commission*[182], T-631/13 - *Raffinerie Heide v Commission*[183] and T-634/13 - *Arctic Paper Mochenwangen v Commission*[184] all mention Article 37 Charter briefly and include a balancing within a proportionality-assessment that follows the argumentation of the *Romonta*-case.

Some of those cases have been combined now into the appeal of the *Romonta*-case[185]. The Opinion of AG *Mengozzi* on the appeal that has just been published on March 8th, 2016 mentions the Charter but the way the appellant brings up the Charter again is considered to not fall within the scope of the appeal-procedure since the claims are new ones and therefore cannot be raised in an appeal-procedure.[186] The AG is not questioning the balancing done by the previous instance and is recommending a dismissal of the claims in the case.[187]

The next instance might still come up with a different outcome but the precise analysis including Article 37 Charter in the first *Romonta*-case just discussed seems to lay the groundwork for a stronger application of Article 37 Charter. Whether this will continue will have to be seen. The support for a stronger application seems to be there in other recent judicial decisions and opinions.

[182] See para. 73 of T-630/13 *DK Recycling und Roheisen v Commission* ECLI:EU:T:2014:833

[183] See para. 76 of T-631/13 *Raffinerie Heide v Commission* ECLI:EU:T:2014:830

[184] See para. 72 of T-634/13 *Arctic Paper Mochenwangen v Commission* ECLI:EU:T:2014:828

[185] C‑540/14 P, C‑551/14 P, C‑564/14 P and C‑565/14 P *DK Recycling und Roheisen GmbH, Arctic Paper Mochenwangen GmbH, Raffinerie Heide GmbH, Romonta GmbH v European Commission, Opinion by Advocate General Mengozzi* ECLI:EU:C:2016:147

[186] See para. 72, 94 and 95 of ibid

[187] See para. 123 of ibid

5 Concluding Remarks

In general, it can be concluded that the Charter and Charter articles like Article 37 Charter are gaining more importance. First of all, the Charter is now a legally binding instrument of primary law in the EU through Article 6(1) TEU. Additionally, as long as the relationship between the EU and the ECHR remains clouded by Opinion 2/13 other fundamental rights instruments will become more important. Second of all, the importance of environmental issues automatically puts a growing focus on a norm like Article 37 Charter.

Having considered the legal framework, the limitations and the case law on environmental law in general and Article 37 Charter especially the research questions can now be evaluated.

The first question asked: *Can Article 37 Charter be considered to be a fundamental right when it is used in a proportionality assessment or is it a mere principle?*

The second question asked: *How far do the various interpretations of Article 37 Charter comply with Articles 51 and 52 Charter and other recognized principles of interpretation of the Charter?*

After considering environmental law and the difficulties surrounding its definition and legal standing there is no straight-forward answer possible. The rights and principle discussion remains inconclusive. The theoretical discussion can only provide guidance and arguments towards the standing of rights and principles in the general forum of norms. Some even conclude that the differentiation is useless.[188]

The more practical evaluation of the both forms regarding Article 52(5) Charter showed that even when the Charter seems to stipulate a limitation to legislative acts there are arguments like the language of "judicially cognizable" that might empower principles. Also following the question of whether a principle can contain a right this could be a potential future development for Article 37 Charter.

The growing importance of environmental issues might require a wide interpretation of Article 37 Charter. Even though that the Explanations to the Charter call Article 37 Charter a principle the courts could use the other tools of interpretation to also read an environmental right into Article 37 Charter.

[188] Hilson, 'Rights and Principles in EU Law: A Distinction without Foundation?'

This is aided by Article 52(3) Charter which states that the protection of the Charter should not be below the one of the ECHR which includes an environmental right through its case law.

The CJEU has shown through its case law that it also struggles with the rights and principles differentiation of the Charter and also underlines the importance of making principles "judicially cognizable" as asked by Article 52(5) Charter. As long as a principle will not be considered to give a subjective right it might fail to be fully judicially cognizable.

Setting aside the right and principle discussion surrounding Article 52(5) Charter and considering the application and possible application of Article 37 Charter a wider application is very much possible. This might even be necessary after Opinion 2/13 but also because of the binding nature of the Charter.

The power when considering it a principle is demonstrated whenever the legislator makes sure that a possible proportionality-assessment is sustainable under a *stricto sensu* and manifest-test. This means that as long as the legislator has provided objective evidence that an act is necessary in order to achieve a high level of protection of the environment then Article 37 Charter will not be used by the courts to strike down a piece of legislation. This demonstrates that in a proportionality-assessment Article 37 Charter will be reviewed just like another fundamental right of the Charter. This means that when the courts evaluate Article 37 Charter in a proportionality-assessment then it seems to be just as much as a fundamental right as another fundamental right with whom its balanced with.

The limits of the justification through Article 37 Charter remain unclear. This can be seen when defining environmental law which creates difficulties but also the uncertainty about where the discretion of the EU institutions ends. The manifest-test will at some point have to consider scientific evidence next to the evaluation of other norms which will continue to create difficult situations to assess. This opens up further research questions regarding if the courts are even possible to make such assessment. If they are unable and will just subject themselves to the discretion of the EU institutions, then an Article 37 Charter justification could become something like a super-justification that can hardly be challenged.

The courts have shown a very cautious relationship when applying Article 37 Charter. The Advocate Generals are more willing to give it a meaningful place then the judgements by the court. The reasons for why the court does not take up the recommendations by the Advocate Generals could be many. They range from a possible unwillingness to use Charter rights, the unwillingness

to empower a principle of the Charter at a time when the standing of a principle is not fully clear, the unwillingness to deal with the Charter at all and the new unknown relationship with the ECHR. It is also easier to use another legal norm to base a decision on that does not require mentioning Article 37 Charter and therefore passing any more meaningful decision on to another court's decision.

What is the take-away from this? Potential and reality of Article 37 Charter are still in an early development stage. The potential is high and the discussion surrounding rights and principles allow for an argumentation of a powerful legal effect but also a weak one. The reality shows a weak standing of Article 37 Charter but this falls in line with a general weak standing of other Charter rights at the moment.[189] The road ahead remains unclear but the opportunity is there for Article 37 Charter to have the potential of a fundamental rights upgrade.

Only if the courts will continue to develop the requirements of an efficient and legally powerful high protection of the environment then this means Article 37 Charter must be read as a strong fundamental right and not only as a policy principle that can be brought up only when used while legislating. The discussion of rights and principles shows that a lot of times principles are read as strong general interest goals that have to be considered and cannot stand down. This also falls in line with the fundamental demands of general interest-aims. Potentially this means that this has to go as far as establishing a principle also as a right or at least not to be as strict as the Charter and only allow a review when it is mentioned by an act of legislation. Otherwise it remains more difficult to gain standing in cases where an environmental issue is being brought to court by an individual.

If the court takes threats to the environment seriously then it might be necessary to see beyond the vague formulation of Article 52(5) Charter and demonstrate a powerful application of Article 37 Charter when needed. As has been shown in this thesis the various ways of legal interpretation could be used to allow for this wide interpretation of Article 52(5) Charter and Article 37 Charter.

This would require an empowerment of environmental protection which can result in challenges for other established rights. This is why the thesis also considered issues in regards with individual freedoms and asked the third

[189] Concluding this for Article 16 Charter: Groussot, Pétursson and Pierce, 'Weak Right, Strong Court - The Freedom to Conduct Business and the EU Charter of Fundamental Rights'

question: *How does Article 37 Charter affect other fundamental rights and pose a challenge to individual freedoms?*

It has already been said that when fundamental rights face off with Article 37 Charter the assessment by the court will review them under the manifest-test. This means that as long as the environmental aim pursued through Article 37 Charter does not go beyond what is necessary the court will respect the discretion of the Commission. This becomes clear in a variety of Advocate General opinions and finally in the *Romonta*-judgement.

This means that through the limited power of the principle of proportionality and the democratic linkage through elections of the Commission the level of environmental protection that can be achieved through Article 37 Charter seems to be very high. This challenges the concept of the single market and as has been shown in regards to Article 16 Charter also limits other individual fundamental rights in the Charter.

The criticism in this regard should be strong. Why does the Charter create the distinction of rights and principles? The drafters wanted to include social rights but some Member States were afraid of empowering those rights to much and wanted to create a distinction from rights. But can this reason be enough for courts to stand down in a situation where the empowerment of a principle might be necessary and therefore come to the conclusion that a principle can contain a right? This can be argued but the question has to be left open to the courts.

The legal uncertainty of this situation should not be welcomed. In a time where the EU is under constant pressure through negative public opinion the use of a wide interpretation could very well be considered to go beyond what Member States agreed upon. It cannot be assumed that every empowerment by the EU is good simply because it empowers the EU. The democratic legitimation has to be intact and the legal argumentation has to be sound.

On the other hand, the EU needs progressive development and if the Member States were willing to go half the way with the concept of principles then it might be the courts that have to go the other half. Even if this challenges other individual rights those rights always face challenges when they collide with other rights. This is where the court has to proof that it applies the principle of proportionality wisely. This will ensure the protection of individual rights as well as the protection of the environment in a time where the EU has become very conscious of the need for this.

One of the aspects I wanted to show in this thesis is the very basic form of fundamental rights development: When courts take a legal text and give it a powerful meaning. This development is possible for Article 37 Charter.

This will have to face the scrutiny of proportionally and legal certainty. As well as the challenges it will bring to other individual rights. At the end of the day a critical approach should be followed. A powerful environmental tool is good for the courts but when they have to respect the discretion of the EU institutions they should also consider individual freedoms. The environment cannot be seen as a super-justification but the closer it is to guaranteeing sustainable development for humans in the EU then it should be used as a powerful tool. The legislator should though ensure that it establishes this through carefully crafted law. In this way the interpretation of Article 37 Charter as a principle does seem to be at this point of time a very reasonable one. But when a situation arises that asks for protection of the environment then only a rights situation will make it fully judicially cognizable. This is why the arguments considered in this thesis could set the stage for a fundamental right upgrade of Article 37 Charter.

Bibliography

Books

Alexy, Robert, *A Theory of Constitutional Rights* (Oxford University Press 2002)

Craig, Paul and De Búrca, Gráinne, *EU law: text, cases and materials* (6. edn, Oxford University Press 2015)

Fisher, Elizabeth, Lange, Bettina and Scotford, Eloise, *Environmental law: text, cases, and materials* (Oxford University Press 2013)

Groussot, Xavier, Pétursson, Gunnar Thor and Pierce, Justin, 'Weak Right, Strong Court - The Freedom to Conduct Business and the EU Charter of Fundamental Rights' *Draft Chapter for Sionaidh Douglas-Scott and Nicholas Hatzis (eds), Research Handbook on EU Human Rights Law (Edward Elgar, forthcoming)* (Draft Chapter for Sionaidh Douglas-Scott and Nicholas Hatzis (eds), Research Handbook on EU Human Rights Law (Edward Elgar, forthcoming), 2014)

Jarass, Hans D., *Charta der Grundrechte der Europäischen Union: unter Einbeziehung der vom EuGH entwickelten Grundrechte, der Grundrechtsregelungen der Verträge und der EMRK - Kommentar* (2. Aufl. edn, Beck 2013)

Lombardo, Marco, 'The Charter of Fundamental Rights and the Environmental Policy Integration Principle' in Federico, Giacomo Di (ed) *The EU Charter of Fundamental Rights* (The EU Charter of Fundamental Rights, Springer 2011)

McAuliffe, Karen, *Precedent at the Court of Justice of the European Union: The Linguistic Aspect* (Oxford University Press 2013)

Nowag, Julian, 'The sky is the limit: On the drafting of article 11 TFEU's integration obligation and its intended reach' in Sjåfjell, Beate and Wiesbrock, Anja (eds), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously, Taylor and Francis Inc. 2014)

Raitio, Juha, 'The Principle of Legal Certainty as a General Principle of EU Law' in Bernitz, Ulf and others (eds), *General principles of EC law in a process of development : reports from a conference in Stockholm, 23-24 March 2007, organised by the Swedish Network for European Legal Studies* (General principles of EC law in a process of development : reports from a

conference in Stockholm, 23-24 March 2007, organised by the Swedish Network for European Legal Studies, Alphen aan den Rijn : Kluwer, cop. 2008 2008)

Reid, Emily, *Balancing human rights, environmental protection and international trade : lessons from the EU experience* (Oxford, Hart 2015)

Sadeleer, Nicolas de, *EU environmental law and the internal market* (Oxford University Press 2014)

Scott, Joanne, 'The Precautionary Principle before the European Courts' in Macrory, Richard (ed) *Principles of European Environmental Law* (Principles of European Environmental Law, Groningen: Europa Law Publishing 2004)

Journal Articles

de Vries, Sybe A., 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' (2013) 9 Utrecht Law Review 169

DeMerieux, Margaret, 'Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2001) 21 Oxford Journal of Legal Studies 521

Denman, Daniel, 'The EU Charter of Fundamental Rights: How Sharp are its Teeth?' (2014) 19 Judicial Review 160

Fisher, Elizabeth, 'Environmental Law as 'Hot' Law' (2013) 25 Journal of Environmental Law 347

Groussot, Xavier and Pech, Laurent, 'Fundamental Rights Protection in the European Union post Lisbon Treaty' (2010) Fondation Robert Schuman Policy Paper, European Issue

Hectors, Kristof, 'The Chartering of Environmental Protection: Exploring the Boundaries of Environmental Protection as Human Right' (2008) 17 European Energy and Environmental Law Review 165

Hilson, Chris, 'Rights and Principles in EU Law: A Distinction without Foundation?' (2008) 15 Maastricht Journal of European and Comparative Law

Jarass, Hans D., 'Der neue Grundsatz des Umweltschutzes im primären EU-Recht' (2011) 11 Zeitschrift für Umweltrecht 563

Komarek, Jan, 'Reasoning with Previous Decisions: Beyond the Doctrine of Precedent' (2013) 61 American Journal of Comparative Law 149

Krommendijk, Jasper, '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

Mikelsone, Gundega, 'The Binding Force of the Case Law of the Court of Justice of the European Union' (2013) 20 Mykolas Romeris University periodical reviewed research papers "Jurisprudence" 469

Sadeleer, Nicolas de, 'Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases' (2012) 81 Nordic Journal of International Law 39

Sadeleer, Nicolas de, 'Sustainable development in EU law: still a long way to go' (2015) 6 Jindal Global Law Review 39

Somsen, Han, 'Discretion in European Community Environmental Law: An Analysis of ECJ Case Law' (2003) 40 Common Market Law Review 1413

Ueda, Junko, 'Is the Principle of Proportionality the European Approach: A Review and Analysis of Trade and Environment Cases before the European Court of Justice' (2003) 14 European Business Law Review 557

Vedder, Hans, 'The Treaty of Lisbon and European Environmental Law and Policy' (2010) 22 Journal of Environmental Law (Oxford) 285

Wiesbrock, Anja, 'An Obligation for Sustainable Procurement? Gauging the Potential Impact of Article 11 TFEU on Public Contracting in the EU' (2013) 40 Legal Issues of Economic Integration 105

EU law and documents

Declaration concerning primacy, Declaration 17 of the Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union, C 326/47

Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment, Official Journal of the European Communities, C 112, 20 December 1973

Conclusions of the Cologne European Council, 3-4 June 1999

Explanations relating to the Charter of Fundamental Rights (2007/C 303/02)

Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community (Text with EEA relevance), Official Journal of the European Union L 140/63

CJEU Case Law

Stauder v City of Ulm (1969) 29/69 ECLI:EU:C:1969:57, [1969] ECR 419

Srl CILFIT et Lanificio di Gavardo SpA v Ministero della sanità C-283/81 ECLI:EU:C:1982:335, [1982] ECR 3415

Artegodan and Others v Commission T-74/00 ECLI:EU:T:2002:283, [2002] ECR II-4945

Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich ECLI:EU:C:2003:333, [2003] ECR I-5659

Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn C-36/02 ECLI:EU:C:2004:614, [2004] ECR I-09609

Mangold v Helm C-144/04 ECLI:EU:C:2005:709, [2005] ECR I-9981

International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti. C-438/05 ECLI:EU:C:2007:772, 2007 ECR I-10779

Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet C-341/05 ECLI:EU:C:2007:809, [2007] ECR I-11767

Billerud Karlsborg and Billerud Skärblacka C-203/12 ECLI:EU:C:2013:664

Arctic Paper Mochenwangen v Commission T-634/13 ECLI:EU:T:2014:828

DK Recycling und Roheisen v Commission T-630/13 ECLI:EU:T:2014:833

Glatzel C-356/12 ECLI:EU:C:2014:350

Molda v Commission T-629/13 ECLI:EU:T:2014:834

Raffinerie Heide v Commission T-631/13 ECLI:EU:T:2014:830

Romonta GmbH v European Commission T-614/13 ECLI:EU:T:2014:835

CJEU Opinions

Opinion 2/13 on Accession of the EU to the ECHR, ECLI:EU:C:2014:2454

CJEU Advocate General Opinions

European Air Transport, Opinion by Advocate General Villalón C-120/10 ECLI:EU:C:2011:94

Association de médiation sociale, Opinion by Advocate General Villalón C-176/12 ECLI:EU:C:2013:491

Confédération paysanne, Opinion by Advocate General Kokott C-298/12 ECLI:EU:C:2013:319

Essent Belgium NY v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt, Opinion by Advocate General Bot Joined Cases C-204/12 to C-208/12 ECLI:EU:C:2013:294

IBV & Cie, Opinion by Advocate General Bot C-195/12 ECLI:EU:C:2013:293

FCD und FMB, Opinion by Adovcate General Kokott C-106/14 ECLI:EU:C:2015:93

DK Recycling und Roheisen GmbH, Arctic Paper Mochenwangen GmbH, Raffinerie Heide GmbH, Romonta GmbH v European Commission, Opinion by Advocate General Mengozzi C‑540/14 P, C‑551/14 P, C‑564/14 P and C‑565/14 P ECLI:EU:C:2016:147

ECtHR Case Law

Hatton and others v the United Kingdom ECLI:CE:ECHR:2001:1002JUD003602297

Hatton and others v. the United Kingdom ECLI:CE:ECHR:2003:0708JUD003602297 (Grand Chamber)

Reports

Consumers, European Commission - Directorate-General for Justice and, *2014 report on the application of the EU Charter of Fundamental Rights*, 2015)