

## GENERAL PRINCIPLES OF EU LAW: SYSTEMIC IMPLICATIONS OF 'TWIN' TFEU ARTICLE 11 AND EUCFR ARTICLE 37

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**ABSTRACT:** Under the basic tenet of sustainable development, TFEU Article 11 compels the integration of environmental protection into the regulatory action of the European Union (EU). Such a provision is paralleled in the human rights framework by 'twin' EUCFR Article 37. What are the implications of this dual system? The analysis assesses the systemic implications of the inclusion of TFEU Article 11 and EUCFR Article 37 as core twin provisions in different sources of EU law, particularly in light of the foreseeable accession of the EU to the ECHR envisaged in TEU Article 6(2). Arguably, TFEU Article 11 and EUCFR Article 37 create an imbalance between the EU and ECHR legal systems and might foster the full establishment of environmental protection as a fundamental right in both EU law and the ECHR.

**RESUM:** Seguint el principi bàsic del desenvolupament sostenible, l'article 11 del TFUE obliga a la integració de la protecció ambiental en l'acció regulatòria de la Unió Europea (UE). Aquesta disposició és paral·lela en el marc dels drets humans a l'article 37 "bessó" de l'EUCFR. Quines són les implicacions d'aquest sistema dual? L'anàlisi avalua les implicacions sistèmiques de la inclusió de l'article 11 del TFUE i l'article 37 del TFUE com a disposicions bessones

fonamentals en diferents fonts del dret de la UE, en particular a la llum de l'adhesió de la UE al CEDH prevista a l'article 6, apartat 2, del TUE. Es podria dir que l'article 11 del TFUE i l'article 37 de l'EUCFR creen un desequilibri entre els sistemes jurídics de la UE i del CEDH i podrien fomentar el ple establiment de la protecció ambiental com un dret fonamental tant a la legislació de la UE com al CEDH.

**RESUMEN:** Siguiendo el principio básico del desarrollo sostenible, el artículo 11 del TFUE obliga a la integración de la protección ambiental en la acción regulatoria de la Unión Europea (UE). Tal disposición es paralela en el marco de los derechos humanos al artículo 37 "gemelo" del EUCFR. ¿Cuáles son las implicaciones de este sistema dual? El análisis evalúa las implicaciones sistémicas de la inclusión del artículo 11 del TFUE y el artículo 37 del TFUE como disposiciones gemelas fundamentales en diferentes fuentes del derecho de la UE, en particular a la luz de la previsible adhesión de la UE al CEDH prevista en el artículo 6, apartado 2, del TUE. Podría decirse que el artículo 11 del TFUE y el artículo 37 del EUCFR crean un desequilibrio entre los sistemas jurídicos de la UE y del CEDH y podrían fomentar el pleno establecimiento de la protección ambiental como un derecho fundamental tanto en la legislación de la UE como en el CEDH.

**KEYWORDS:** Environmental integration rule — primary EU law —human right to a sustainable environment — ‘high level’ of environmental protection —accession of the EU to the European Convention on Human Rights.

**PARAULES CLAU:** Norma d'integració ambiental —dret primari de la UE — dret humà a un medi ambient sostenible — ‘alt nivell’ de protecció ambiental — adhesió de la UE al Conveni Europeu de Drets Humans.

**PALABRAS CLAVE:** Norma de integración ambiental — derecho primario de la UE — derecho humano a un medio ambiente sostenible — ‘alto nivel’ de protección ambiental — adhesión de la UE al Convenio Europeo de Derechos Humanos.

**SUMARIO:** I. INTRODUCTION. II. THE SOURCES OF EU LAW: A FLEXIBLE PARADIGM. III. TFEU ARTICLE 11 AND EUCFR ARTICLE 37: TWIN PROVISIONS. IV. THE EFFECTIVENESS OF TFEU ARTICLE 11 AND EUCFR ARTICLE 37. V. SYSTEMIC IMPLICATIONS, PARTICULARLY IN LIGHT OF THE (FORESEEABLE) ACCESSION OF THE EU TO THE ECHR. VI. CONCLUSION.

## I. INTRODUCTION

Environmental protection is a basic concept within the framework of EU law in the international context. Historically, environmental protection emerged as a priority internationally in the 1970s.<sup>1</sup> Although it was not initially embodied in the EU regulatory system, since the 1970s environmental protection has progressively gained a central place and normative recognition, particularly via the case law of the European Court of Justice (ECJ) and the definition of the EU environmental action plans.<sup>2</sup> This was followed by the inclusion of environmental protection in the 1987 Single European Act, which modified the EEC Treaty so as to embed environmental protection in Article 100A, on the Internal Market,<sup>3</sup> and Article 130R-T.<sup>4</sup> Subsequently, environmental protection has further developed via the adoption of the Treaty on European Union (TEU) in 1992 and the Charter of Fundamental Rights of the EU (EUCFR) in 2000, as well as via the progressive amendment of the Treaty on the European Economic Community (TEEC). Currently, TEU Articles 3 and 21, Articles 11 and 191-4 of the Treaty on the Functioning of the European Union (TFEU), and EUCFR Article 37 define the fundamental framework for environmental protection within the EU, outlining the basic principles of the environmental action of the Union, which has constantly improved.<sup>5</sup>

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<sup>1</sup> Timo Koivurova, *Introduction to International Environmental Law*, Routledge, London, 2014, p. 35; Nicolas De Sadeleer, *EU Environmental Law and the Internal Market*, OUP, Oxford, 2013, para. 1.3.1.

<sup>2</sup> Matthe Schemmel and Bas De Regt, "The European Court of Justice and the Environmental Protection Policy of the European Community", in *Boston College International and Comparative Law Review*, vol. 17, 1994, p. 53.

<sup>3</sup> Now TFEU Article 114.

<sup>4</sup> Now TFEU Articles 191-193.

<sup>5</sup> This is exemplified by EU regulation in the matter of climate change, which commenced with the adoption of Directive 2003/87 of the European Parliament and Council Establishing a Scheme for Greenhouse Gas Emission Allowance Trading, having internal application within the Community and amending Council Directive 96/61/EC, and later led, inter alia, to the adoption of Directive 2008/101 amending Directive 2003/87/EC so as to Include Aviation Activities in the Scheme for

This article develops a positivistic analysis of key EU norms in light of relevant developments in the case law and scholarly opinions.<sup>6</sup> The aim is assessing environmental regulation in the Union, particularly its normative consistency, by focusing on the inclusion of TFEU Article 11 and EUCFR Article 37 as ‘twin’ provisions in different primary sources of EU law. On the one hand, the question deserves specific attention in light of the acceleration of the green transition prompted by the Green Deal, which has tightened up EU climate change obligations.<sup>7</sup> On the other hand, the issue is particularly important because of the increasing number of climate disputes, including human rights issues, within and outside the Union, particularly in the European Court of Human Rights,<sup>8</sup> to which the EU might accede *de lege ferenda*.<sup>9</sup>

The investigation analytically proceeds in four steps, essentially within the framework of secondary rules outlined by Herbert Hart.<sup>10</sup> First, the research defines a schematic paradigm for interpreting the sources of EU law. This is a particularly complex task, because of the specific nature of the Union, which essentially merges constitutional and international law principles.<sup>11</sup> In this respect, the analysis underscores the necessity of adopting a flexible paradigm of interpretation, notably as concerns the ranking of the general principles of EU law and EU international obligations. Secondly, the research turns to considering TFEU Article 11 and EUCFR Article 37, with particular regard to their scope and effect. This part of the investigation contextualises TFEU Articles 11 and EUCFR 37 within the framework of the sources of EU law. Thirdly, the investigation assesses key normative asymmetries that arise from the inclusion of TFEU Article 11 and EUCFR Article 37 as twin provisions in different sources of EU law, with

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Greenhouse Gas Emission Allowance Trading within the Community, having extraterritorial application.

<sup>6</sup> See Hans Kelsen, *Pure Theory of Law*, The Lawbook Exchange Ltd 2005, transl. by Max Knight, p. 77.

<sup>7</sup> European Commission, A European Green Deal: Striving to Be the First Climate-Neutral Continent, [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en).

<sup>8</sup> See, for instance, *Mex Müller v. Austria*, Appl. of 25 March 2021.

<sup>9</sup> Council of Europe, EU Accession to the ECHR, <https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights>.

<sup>10</sup> See Herbert Hart, *The Concept of Law*, OUP, Oxford, 3<sup>rd</sup> edn, 2012, p. 79.

<sup>11</sup> Alessandra Gianelli, “Customary International Law in the EU”, in Enzo Canizzaro et al. (eds), *International Law as Law of the EU*, Brill, Leiden, 2011, p. 95; Robert Schutze, *EU Constitutional Law*, CUP, Cambridge, 2012).

particular regard to the status of environmental protection as a general principle of EU law and as an international obligation of the Union. Within this context, the analysis considers the incidence of the accession of the EU to the ECHR, as established in TEU Article 6(2),<sup>12</sup> on the status of environmental protection within these different but interrelated legal systems, *de lege ferenda*.

## II. THE SOURCES OF EU LAW: A FLEXIBLE PARADIGM

Understanding TFEU Article 11 and EUCFR Article 37 within the system of the sources of EU law is a particularly complex task, because such sources are far from being firmly outlined as a hierarchy.<sup>13</sup> Probably by reason of the complex nature of the EU legal system, which is a constantly evolving hybrid international and constitutional model, the sources of EU law are far from being inflexibly defined. Based on the Lisbon Treaty, the fundamental elements of the current EU regulatory system are the TEU, TFEU, EUCFR, and EU legislation, which are internal sources, as well as international agreements, *lato sensu* including customary practices, which are external sources. This system is completed by the general principles of EU law, which are inferred from domestic legal orders, international treaties, and EU law itself. The hierarchical relationship between these elements is complex, even confining the analysis to EU law, without addressing in detail the multi-faceted reality of the relationship between EU law and the law of the Member States.

Fundamentally, under the Lisbon Treaty the EU is a two-layered construction, whereby the TEU and the TFEU establish the substantive and institutional 'primary' foundation of the Union,<sup>14</sup> together with the EUCFR.<sup>15</sup> However, the Charter is also supposed to provide guidance in interpreting the founding

<sup>12</sup> 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.'

<sup>13</sup> Roland Bieber and Isabelle Salomé, "Hierarchy of Norms in European Law", *Common Market Law Review*, vol. 33, 1996, pp. 907, 909.

<sup>14</sup> According to Grainne and De Burca, the TEU and TFEU 'sit at the top of the hierarchy of norms in the EU' (Paul Craig and Gráinne De Búrca, *EU Law: Texts, Cases and Materials*, OUP, Oxford, 7<sup>th</sup> edn., 2020) p. 142.

<sup>15</sup> TEU Article 6(1): 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties'. See also Craig and De Búrca, *EU Law, cit.*, p. 142.

treaties,<sup>16</sup> but at the same time, under Articles 52(2)<sup>17</sup> and 53,<sup>18</sup> the EUCFR is supposed to be consistent with such treaties. Regulations, directives and decisions, that is, 'legislative' acts adopted by EU institutions, secondarily complement the fundamental layer. Outside this well-established, albeit not fully systematised, double-layered framework, revolve the general principles of EU law<sup>19</sup> and the international agreements of the Union.<sup>20</sup>

According to the prevailing interpretation, the general principles of EU law are inferred from EU domestic legal orders, international rules, and also the EU founding Treaties, notably, the precautionary principle in the matter of environmental protection, which was inferred by the ECJ from Article 174 of the Treaty on the European Community (TEC).<sup>21</sup> Controversially, some scholars assume that the general principles of EU law override secondary EU legislative acts, but not the founding Treaties, whose jurisprudential interpretation and review they would nevertheless shape.<sup>22</sup> By contrast, according to an opposite stance the general principles of EU law rank at least equal to primary EU rules;<sup>23</sup> this view is more consistent with the assumption that the general principles of EU law can also be inferred from the founding Treaties. The primacy of the general principles of EU law is further supported by the observation that, after the foreseeable accession of the EU to the ECHR,<sup>24</sup> the latter, which currently embeds core fundamental principles of EU law, will rank above the EUCFR

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<sup>16</sup> Craig and De Búrca, *EU Law, cit.*, p. 142.

<sup>17</sup> 'Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties'.

<sup>18</sup> 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised ... by Union law ....'

<sup>19</sup> In favour of a flexible interpretation of the general principles of EU law, see Luísa Lourenço, *A Matter of Principle: the Interaction of General Principles of EU Law with Other Legal Sources in the Case-Law of the CJEU*, EUI, Firenze, 2015).

<sup>20</sup> *Germany v. Council* (C-280/93) [1994] ECR I-4973, paras 103-105, 111. For a scholarly viewpoint, see Jan Klabbers, "The Validity of EU Norms Conflicting with International Obligations", in Enzo Canizzaro et al. (eds.), *International Law*, p. 111.

<sup>21</sup> *Artegodan GmbH and Others v Commission* (T-74/00) [2002] ECR II-4945, para. 182: 'As regards environmental matters, the precautionary principle is expressly enshrined in Article 174(2) EC, which establishes the binding nature of that principle. Furthermore, Article 174(1) includes protecting human health among the objectives of Community policy on the environment.'

<sup>22</sup> Craig and De Búrca, *EU Law, cit.*, pp. 142-43.

<sup>23</sup> Takis Tridimas, *The General Principles of EU Law*, OUP, Oxford, 2013, pp. 4-5.

<sup>24</sup> Council of Europe, Steering Committee for Human Rights (CDDH), Continuation of the Ad Hoc Terms of Reference for the CDDH to Finalise the Legal Instruments Setting out the Modalities of Accession of the European Union to the European Convention on Human Rights, 1364th meeting, 15 January 2020.

(EUCFR Article 52(3)),<sup>25</sup> which, in turn, has a status equivalent to the TEU and TFEU (TEU Article 6(1)). This view is also backed by the argument that, although the ECHR is likely to become an international agreement of the Union, which should thus rank equal to, or below, the EU founding treaties, under TEU Article 6(3) its rules are considered to embed fundamental principles of EU law, together with domestic constitutional rules,<sup>26</sup> which under EUCFR Article 53 override the Charter.<sup>27</sup> Furthermore, the primacy of the general principles of EU law is supported by the interpretation of the TFEU provided by the ECJ in *Kadi*, whereby TFEU Article 351 should allow derogations from the founding treaties by means of international agreements concluded prior to 1958, but not from the fundamental principles of EU law, particularly those inferred from the founding Treaties.<sup>28</sup>

As concerns the status of the international obligations of the Union contracted under the exercise of exclusive competence, or mixed agreements in the case of shared competence, scholars usually assume the necessary consistency of international obligations with the EU founding treaties, thus classifying international agreements as an ‘intermediate’ source between primary and secondary EU rules.<sup>29</sup> This stance is nevertheless not fully consistent with the horizontal structure of international law and raises a stark contrast with the absolute priority of obligations such as those arising under Article 103 of the UN Charter.<sup>30</sup> The well-established distinction between the monistic and dualistic interpretation of international law provides a frame to possibly reconcile the inconsistency.<sup>31</sup> In *Kadi*, the ECJ took a dualistic stance diametrically opposite to

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<sup>25</sup> ‘In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.’

<sup>26</sup> ‘Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.’

<sup>27</sup> ‘Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised ... by the Member States' constitutions.’

<sup>28</sup> *Yassin Abdullah Kadi and Al Barakat International Foundation v. Council of the EU and Commission of the EC* (C-402/05 P and C-415/05 P) [2008] I-06351, paras 283-308.

<sup>29</sup> See Klaus-Dieter Borchardt, *ABC of EU Law*, EU Publications Office, Bruxelles, 2010, p. 80.

<sup>30</sup> ‘In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’

<sup>31</sup> Kelsen, *Pure Theory*, *cit*, pp. 328-343; Georg Wilhelm Friedrich Hegel, *The Philosophy of Right*, Clarendon Press, Oxford, 1952, trans by TM Knox, para. 332.

that of the Court of First Instance (CFI)<sup>32</sup> and upheld the primacy of the EU founding Treaties over international law.<sup>33</sup> Normatively, however, EUCFR Article 53 provides that the Charter must be interpreted in accordance with the international agreements of the Union.<sup>34</sup> More generally, under TFEU Article 218(11) if an envisaged EU agreement is inconsistent with the founding Treaties, ‘the agreement envisaged may not enter into force unless it is amended or the Treaties are revised’, which essentially postulates a basic equivalence between the founding Treaties and the international agreements of the Union.<sup>35</sup>

Overall, it is necessary to posit a relatively flexible interpretive paradigm, whereby the TEU, TFEU and EUCFR rank as primary EU law (1), and are complemented by the general principles of EU law as primary or ‘intermediate’ EU law (2), EU international agreements as primary or ‘intermediate’ law (3), and secondary EU legislation (4). All these sources have direct or indirect vertical and horizontal effects, including primary EU law, subject to the principles of clarity and non-conditionality established by the ECJ in *Van Gend en Loos*.<sup>36</sup> Within this framework, TFEU Article 11 and EUCFR 37 are anomalous, because, whereas their text is literally almost identical, these provisions are embedded in different primary EU regulatory instruments, and thus asymmetrically relate to each other and to other EU norms.

### III. TFEU ARTICLE 11 AND EUCFR ARTICLE 37: TWIN PROVISIONS

TFEU Article 11 establishes that ‘*environmental protection* requirements must be *integrated into the definition and implementation of the Union’s policies and activities*, in particular with a view to promoting *sustainable development*’.<sup>37</sup>

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<sup>32</sup> *Kadi* (T-315/01) [2005] ECR II-3649, paras 213-232; *Yusuf & Al Barakaat* (T-306/01) [2005] ECR II-3533, paras 264-282.

<sup>33</sup> *Kadi*, paras 285-330.

<sup>34</sup> ‘Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised ... by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms ...’ Overall, the consistency of Articles 6(1) TEU, 52 and 53 EUCFR is quite problematic.

<sup>35</sup> See also Pierre Pescatore, *L’ordre juridique des Communautés européennes: étude des sources du droit communautaire*, Presses Universitaires, Paris, 1975, pp. 153 and 156.

<sup>36</sup> *Van Gend en Loos* (C-26/62) [1963] CMLR 105, para. 76.

<sup>37</sup> Emphasis added. For a more detailed analysis see Beate Sjaafjell, “*Quo Vadis Europe? The Significance of Sustainable Development as Objective, Principle and Rule of EU Law*”, in Cecilia Bailliet (ed.), *Non State Actors, Soft Law and Protective Regimes*, CUP, Cambridge, 2012, p. 254;



Despite its general nature, Article 11 is not embedded in the TEU, which includes the fundamental principles governing the functioning of the Union, but in the TFEU, which ranks hierarchically equal to the TEU and includes more detailed regulatory provisions.

The substance of Article 11 was not embedded in the Treaty on the European Economic Community (TEEC) initially signed in Rome in 1952. By contrast, the 1997 version of the EC Treaty included an equivalent provision under Article 6.<sup>38</sup> The 2004 Treaty Establishing a Constitution for Europe also incorporated a similar provision under Article II-97;<sup>39</sup> indeed, Part II of the Treaty embodied the EUCFR, and thus the text of Article 37 of the Charter (Environmental Protection) was simply included within Part II of the Treaty under Article II-97.

TFEU Article 11 is in line with the Preamble to the TEU, according to which the EU promotes ‘economic and social progress for [EU] peoples, *taking into account the principle of sustainable development* and within the context of the accomplishment of the internal market and of reinforced cohesion and *environmental protection*’.<sup>40</sup> TFEU Article 11 is also complemented by TEU Article 3(3), which governs the fundamental principles of the Union and provides that ‘[the internal market] shall work for the *sustainable development* of Europe ... and a *high level of protection and improvement of the quality of the environment*’.<sup>41</sup> Along the lines of TEU Article 3(5), TEU Article 21(2)(g) and (f)

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Beate Sjåfjell, “The Legal Significance of Article 11 TFEU for EU Institutions and Member States”, in Beate Sjåfjell and Ana Wiesbrock (eds.), *The Greening of European Business under EU Law. Taking Article 11 TFEU Seriously*, Routledge, Abingdon and New York, 2014, p. 51.

<sup>38</sup> ‘Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 [Activities of the Union], in particular with a view to promoting sustainable development.’

<sup>39</sup> ‘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’ (*Treaty Establishing a Constitution for Europe*, OJ C 310, 16 December 2004, 1).

<sup>40</sup> Emphasis added.

<sup>41</sup> Emphasis added. A similar provision was embedded in Article I-3 of the Treaty Establishing a Constitution for Europe and Article 2 of the EC Treaty as amended in 1997, promoting ‘a high level of protection and improvement of the quality of the environment’ in the establishment of the common market, the economic and monetary union and common policies. Article 2 of the EC Treaty 1992 was more limited in this respect, simply referring to ‘respect for the environment’: ‘the Community shall have as its task ... to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment’. EC Treaty Article 2 was complemented by Article 100(a), outlining a ‘high level’ of ‘environmental protection’ in the initiatives of the European Commission. These rules are ultimately rooted in Art 130(f) of the Single European Act, providing that ‘environmental protection requirements shall be a component of the Union’s other policies’.

applies these principles to the sphere of the EU external action, providing that EU policies and actions ‘foster the *sustainable economic, social and environmental development of developing countries*’ and, following ‘the primary aim of eradicating poverty’, they ‘help develop international measures to *preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development*’.<sup>42</sup>

TFEU Article 11 therefore summarises the principles enshrined in the environmental norms of the TEU.<sup>43</sup> Internally, TFEU Article 11 parallels TEU Article 3(3); in fact, TEU Article 3(3) outlines an obligation to respect the environment in the establishment of the internal market and thus basically integrates environmental protection and sustainable development into the main internal policies of the EU, that is, the pre-Lisbon EC pillar.<sup>44</sup> Externally, TFEU Article 11 mirrors TEU Articles 3(5) and 21, which embody environmental protection in the external policy of the Union. As it is embedded in the general provisions of the TFEU, Article 11 serves the key purpose of explicitly linking general environmental provisions and the regulation of the different sectors of the EU policy.<sup>45</sup>

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<sup>42</sup> Emphasis added. A similar provision was included in Article III-292(2)(f) of the Treaty Establishing a Constitution for Europe, concerning the general principles of the Union’s external action: ‘The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: ... (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development ...’

<sup>43</sup> Julian Nowag, “The Sky is the Limit: on the Drafting of Article 11 TFEU’s Integration Obligation and Its Intended Reach”, in *The Greening of European Business*, *cit.*, pp. 15, 22-7; Ana Wiesbrock and Beate Sjaftjell, “The Importance of Article 11 TFEU for Regulating Business in the EU: Securing the Very Basis of Our Existence”, in *Sjaftjell and Wiesbrock*, in *The Greening of European Business*, *cit.*, pp. 1, 3-4; Christina Voigt, “Article 3 TFEU in the Light of the Principle of Sustainable Development in International Law”, in *Sjaftjell and Wiesbrock* in *The Greening of European Business*, pp. 31, 49.

<sup>44</sup> *Commission v. Council* (C-176/03) [2005] ECR I-07879.

<sup>45</sup> See Sjaftjell, “*Quo Vadis Europe?*”, *cit.*, pp. 53-4, defining Article 11 TFEU as the ‘environmental integration rule’. In this regard, it is interesting to note that, with the exception of TFEU Title XX, which is by its very nature concerned with the environmental policy of the Union and ensures a ‘high level of environmental protection’, only Title XXI, which includes a single but significant provision on ‘energy’, explicitly mentions environmental protection. In fact, TFEU Article 194 provides that the EU energy policy operates ‘in the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment’. An equivalent provision was embedded in Article III-256 of the Treaty Establishing a Constitution for Europe. Such a relevant exception, coupled with the fact that the regulation of the EU energy policy immediately follows the environmental policy, means that environmental protection is of particular interest to the energy sector. Strictly speaking, however, the explicit provision of environmental protection under Article 194 is superfluous, as the integration of environmental protection in the EU energy policy should be automatically granted under TFEU Article 11.

Focusing exclusively on the EU environmental policy, TFEU Title XX (Environment), Article 191 complements and spells out in detail TFEU Article 11. Article 191 indeed provides that the EU policy on the environment contributes to 'preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change'. TFEU Article 191 also requires that the Union's environmental policy be based on the precautionary and polluter pays principles. Furthermore, it allows EU Member States to take provisional measures for non-economic environmental reasons, subject to a procedure of inspection by the Union. Cooperation between the Union, the Member States, third countries and international organisations is also envisaged. Measures under TFEU Article 191 are taken by the Council and the Parliament after consulting the Economic and Social Committee and the Committee of the Regions.<sup>46</sup> TFEU Article 191 is another general provision, which does not address exclusively the Directorate General for the Environment or Climate Action, but rather the environmental policy of the EU as such, which is trans-sectoral under Article 11. TFEU Title XX thus restates the EU commitment to regional and worldwide environmental protection and introduces a specific reference to the goal of combating climate change. Furthermore, TFEU Article 191 extends internationally the EU internal approach to environmental protection, with particular regard to climate change. It can therefore be concluded that TFEU Articles 11 and 191 jointly regulate EU external action in the same way as they cover internal action.

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<sup>46</sup> This regulation is in line with Articles I-14 and III-233-234 of the Treaty Establishing a Constitution for Europe. An equivalent environmental policy was embedded in the 1997 EC Treaty under Articles 174-176. Unlike the current procedure, under Article 175 decisions on environmental matters were taken by the Council acting at unanimity. The 1992 TEC, as amended in Maastricht, established a similar environmental policy for the Union. TEC Article 3 outlined a specific environmental policy for the European Community, without nevertheless qualifying it as an area of shared competence (Article 3 of the 1991 EC Treaty read: 'For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein... (k) a policy in the sphere of the environment'). Consequently, Articles 130(r)-(t) specified the details of the policy. This expressly included the precautionary rule and the polluter pays principle. Moreover, Article 130(r) explicitly envisaged the integration of environmental issues into the different Community policies, thus replicating the content of TFEU Article 11.

Overall, environmental protection entered the sphere of primary EC-EU regulation after Maastricht and has remained substantially consistent in the subsequent consolidated versions of the EC and EU treaties. Within this regulatory context, which was finally crystallised in the Lisbon Treaty, TFEU Article 11 emerges as a key general provision.<sup>47</sup> Such a primary framework has allowed EU institutions to pass secondary acts prioritising environmental protection over international trade obligations.<sup>48</sup> Although this is certainly a progressive stance, it is not a utopian one, in light of the current sources of international law, which include the well-established customary no-harm rule, the polluter-pays corollary, and the complementary principles of precaution and sustainable development.<sup>49</sup> More specifically, Principle 4 of the 1992 Rio Declaration on Environment and Development provides that ‘in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it’, which has been considered a general principle of international law in the *Iron Rhine* arbitration.<sup>50</sup> The EU normative stance thus spells out in detail consolidated international environmental obligations.<sup>51</sup>

TFEU Article 11 is mirrored by a ‘twin’ provision in the EUCFR. Indeed, Article 37 of the Charter (Environmental Protection) provides that ‘A high *level of environmental protection* and the *improvement of the quality of the environment* must be *integrated into the policies of the Union* and ensured in accordance with the *principle of sustainable development*’.<sup>52</sup> The text of EUCFR Article 37 is not identical to that of TFEU Article 11, to the extent that it only mentions the ‘policies’ of the EU, but not its ‘activities’. Moreover, EUCFR Article 37 explicitly establishes a ‘high level’ of environmental protection and the ‘improvement’ of environmental quality, which are also embedded in TEU Articles 3 and 21, as well as in TFEU

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<sup>47</sup> Sjaafjell, “*Quo Vadis Europe?*”, *cit.*, p. 53.

<sup>48</sup> See, for instance, the European Parliament Resolution on International Trade Policy in the Context of Climate Change Imperatives (2010) [11]: ‘... obligations and objectives under MEAs, such as the UN Framework Convention on Climate Change, and other UN institutions (FAO, ILO, and IMO) *must take precedence over the narrow interpretation of trade rules*’ (emphasis added).

<sup>49</sup> *United States v. Canada* (Trail smelter), 16 April 1938 and 11 March 1941, RIIA Vol III 1905; *Hungary v. Slovakia* (Gabčíkovo-Nagymaros Project), 25 September 1997 (1997) ICJ Rep 7.

<sup>50</sup> *Iron Rhine* (‘Ijzeren Rijn’) *Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, 24 May 2005, RIIA Vol XXVII 35, 38 and 67.

<sup>51</sup> De Sadeleer, *EU Environmental Law*, *cit.*, para. 1.7.1; Voigt, “Article 3 TFEU”, pp. 46-50.

<sup>52</sup> Emphasis added.

Article 191. Furthermore, environmental protection must be implemented under EUCFR Article 37 ‘in accordance with’ sustainable development, which is a ‘principle’, unlike TFEU Article 11, which establishes the implementation of environmental protection ‘with a view to promoting sustainable development.’<sup>53</sup>

Despite marginal differences, EUCFR Article 37 is basically grounded in TFEU Article 11.<sup>54</sup> This is confirmed by the historical evolution of the norm. In fact, EUCFR Article 37 first came into existence as a declaratory provision via the adoption of the Charter in 2000, fundamentally along the lines of 1997 TEC Article 6, that is, the predecessor of TFEU Article 11, which it subsequently repealed in the text of the 2004 Constitution for Europe.<sup>55</sup> In light of the evolution of the sources of EU law, it is thus sensible to conclude that the rejection of the planned Constitution for Europe, compelling the splitting of the text into the two founding Treaties, that is, the TEU and TEC (then re-nominated TFEU), in addition to the now binding EUCFR, under the Lisbon Treaty, ultimately led to adopting two similar provisions, that is, TFEU Article 11 and its developed version under EUCFR Article 37.

In light of these premises, not only TFEU Article 11, but also ‘twin’ EUCFR Article 37 must be understood in the context of other primary EU environmental norms. This approach seems all the more sensible by considering that after the entry into force of the Lisbon Treaty in December 2009, the EUCFR is no longer a merely declaratory instrument, as it was at the time of its adoption in 2000, when its purpose was to make human rights known to EU citizens, but has become a binding regulatory tool having the same hierarchical rank as the TEU and the TFEU. In other words, as the EUCFR, and its Article 37, are part of the primary law of the EU, based on Article 31 of the Vienna Conventions on the Law of

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<sup>53</sup> On these differences, see, in more detail, Gracia Marin-Durán and Elisa Morgera, “Commentary on Article 37 of the EU Charter of Fundamental Rights – Environmental Protection”, in Steve Peers et al. (eds.), *Commentary on the EU Charter of Fundamental Rights*, Hart, Oxford, 2013, pp. 1041, 1050-52.

<sup>54</sup> Marín-Durán and Morgera “Commentary on Article 37”, *cit.*, p. 1045.

<sup>55</sup> See above section II.

Treaties,<sup>56</sup> which requires a contextual interpretation of international treaties,<sup>57</sup> insofar as possible, EUCFR Article 37 should be read in accordance with TFEU Articles 11 and 191-4, as well as TEU Articles 3 and 21. In practice, EUCFR Article 37 has been considered in conjunction with TFEU rules to assess the obligations of the EU and its Member States in the matter of environmental integration.<sup>58</sup>

#### IV. THE EFFECTIVENESS OF TFEU ARTICLE 11 AND EUCFR ARTICLE 37

The effects of TFEU Article 11 have been approached primarily in terms of 'programmes', 'objectives', 'principles', and 'rules', but, at the same time, the implications of the verb 'must' have been highlighted in terms of binding duties.<sup>59</sup> Scholars thus argue that TFEU Article 11 generates an obligation for the Councils, Commission and Parliament to take action to protect the environment and prioritise it in institutional policies, within the framework of the EU general objectives.<sup>60</sup> This would also impose upon Member States an indirect justiciable obligation to implement environmental protection,<sup>61</sup> notably in light of the principle of sincere cooperation under TEU Article 4(3).<sup>62</sup> As a consequence, the CJEU

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<sup>56</sup> Vienna Convention on the Law of Treaties (VCLT), opened for signature 23 May 1969, 115 UNTS 332, entered into force 27 January 1980; Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (VCLTIO), opened for signature 21 March 1986, UN Doc A/ CONF.129/ 15, not yet in force.

<sup>57</sup> 'Treaties must be interpreted contextually, by taking into account relevant rules that govern the relationship between the parties'.

<sup>58</sup> *Commission v. Italy* (C-87/02) Opinion of Advocate General Ruiz-Jarabo Colomer [2004] ECR I – 5978, para. 36.

<sup>59</sup> Suzanne Kingstone, *Greening EU Competition Law and Policy*, CUP, Cambridge, 2011, p. 107; Julian Nowag, "Article 11 TFEU and Environmental Rights", in Sanja Bogojević and Rosemarie Rayfuse (eds.), *Environmental Rights in Europe and Beyond*, Hart, Oxford, 2018, pp. 155, 160-1. With reference to former Article 6 TEC, see Beate Sjafiell, *Towards a Sustainable European Company law*, Kluwer, Alphen aan den Rijn, 2009, pp. 225-6.

<sup>60</sup> Ludwig Krämer, "The Genesis of EC Environmental Principles", in Richard Macrory (ed.), *Principles of European Environmental Law*, Europa Law Publishing, 2004, p. 31; De Sadeleer, *EU Environmental Law*, cit., para. 1.5.3; Sjafiell, "Quo Vadis Europe?", cit., p. 53; Ana Wiesbrock and Beate Sjafiell, "The Jigsaw Puzzle of Sustainability", in Sjáfjell and Wiesbrock, *The Greening of European Business*, cit., pp. 181-2.

<sup>61</sup> *Commission v UK* (Case 32/79) [1980] ECR 2403; Sjafiell, "Quo Vadis Europe?", cit., p. 70.

<sup>62</sup> 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.' See also *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (C 67/96) [1980] ECR I-5863; Sjafiell (n 33) 66-7.

would be compelled to monitor implementation, upon recourse by EU institutions, Member States, and natural or legal persons under TFEU Articles 263 and 265.<sup>63</sup>

With respect to the effects of EUCFR Article 37, on the one hand, it is acknowledged that the norm permits the recognition of environmental protection as a principle, but not as an ‘individual (human) right’ to a healthy environment.<sup>64</sup> Indeed, Article 37 does not embed the expression ‘everyone has the right to’, but is concerned with EU organs (‘the policies of the Union’), unlike Article 24 of the African Charter on Human and Peoples’ Rights, which provides that ‘all peoples shall have the right to a general satisfactory environment favourable to their development’. On the other hand, scholars recognise that EUCFR Article 37 imposes on EU institutions a duty to integrate environmental protection into their policies.<sup>65</sup> As EUCFR Articles 52(2) and 53 provide that the Charter is binding not only upon EU institutions, but also on Member States implementing EU measures, also EU Member States would have an obligation to integrate environmental protection into their policies, which, according to some scholars, would be actionable in domestic courts.<sup>66</sup>

Theoretically, based on the correlation between fundamental legal concepts postulated by Hohfeld, whereby a right is the opposite of no-right and is necessarily matched by a corresponding duty,<sup>67</sup> it should be assumed that

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<sup>63</sup> See *Republik Österreich v. Martin Huber* (C-336/00) [2002] ECR I-7699, para. 33; *Commission v. Austria* (C-320/03) [2005] ECR I-9871, para. 5; *Austria v. Parliament and Council* (C-161/04) Opinion of Advocate General Geelhoed, [2006] 1-7183, para. 59. With regard to former Article 6 TEC, see *British Aggregates Association v Commission of the European Communities and United Kingdom* (C-487/06 P) [2008] ECR I-10505, para. 90. See also Sjafiell (n 33) 62.

<sup>64</sup> Christopher Hilson, “Substantive Environmental Rights in the EU: Doomed to Disappoint?”, in Bogojević and Rayfuse (eds.), *Environmental Rights in Europe*, cit., pp. 87, 91; Eloise Scottford, “Environmental Rights and Principles: Investigating Article 37 of the EU Charter of Fundamental Rights”, *ibid.*, pp. 133, 142 ff; Tobias Lock, “Article 37”, in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, OUP, Oxford, 2019, p. 2197; Marín-Durán and Morgera, “Commentary on Article 37”, *cit.*, pp. 1048 and 1053-54.

<sup>65</sup> EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union* (2006) 315; Bruno Genevois, “La Convention européenne des droits de l’homme et la Charte des droits fondamentaux de l’Union européenne: complémentarité ou concurrence?”, in *Revue française de droit administratif*, vol. 26, 2010, p. 437; David Anderson and Cian Murphy, “The Charter of Fundamental Rights”, in Andrea Biondi and Piet Eeckhout (eds.), *EU Law after Lisbon*, OUP, Oxford, 2012, pp. 155, 166; Eduardo Gill-Pedro, “EU Environmental Rights as Human Rights: Some Methodological Difficulties Facing European Courts”, in Bogojević and Rayfuse, *Environmental Rights in Europe*, cit., pp. 201 and 206.

<sup>66</sup> Gill-Pedro, “EU Environmental Rights”, *cit.*, pp. 213-15.

<sup>67</sup> Wesley Newcomb Hohfeld, “Fundamental Legal Conceptions as Applied in Judicial Reasoning”, *Yale Law Journal*, vol. 26, 1917, p. 710.

environmental protection, which ‘must’ be integrated into the policies of the EU, is necessarily matched by a ‘right’ under both TFEU Article 11 and EUCFR Article 37. Furthermore, TFEU Article 11 and EUCFR Article 37 were included in Article III-292(2)(f) of the Treaty establishing a Constitution for Europe, which established that the ‘provisions of the Charter’ would be ‘judicially cognizable’, thus implying an enforceable duty-right relation.<sup>68</sup> Fundamentally, TFEU Article 11 and EUCFR Article 37 outline the position of the duty-bearer rather than that of the right-holder, similar to Article 11 of the San Salvador Protocol to the American Convention on Human Rights, which provides that ‘[t]he States Parties shall promote the protection, preservation, and improvement of the environment’, matching the ‘right of everyone’ to ‘live in a healthy environment’. Along the same lines, ‘procedural’ environmental rights under the Aarhus Convention are outlined as duties of European (and non-European) authorities (‘each Party shall ensure’).<sup>69</sup> In any case, as Resolution 2020/2134(INI) of the European Parliament on the Effects of Climate Change on Human Rights urges the Union to ‘take action to introduce the right to a safe and healthy environment in the Charter [EUCFR] and to fully comply with Article 37 thereof’, it should be excluded that, at least for the time being, EUCFR Article 37 establishes a human right to a safe environment,<sup>70</sup> but progress is certainly underway towards such a recognition.

Within this framework, the only significant difference between TFEU Article 11 and EUCFR Article 37 lays in a general limitation of the scope of the latter under EUCFR Article 52(5), which provides that ‘general principles under the Charter’, including Article 37, are ‘judicially cognisable only in the interpretation’ and ‘the ruling on the legality’ of ‘legislative and executive *acts* taken by institutions, bodies, offices and agencies of the Union, and by *acts* of Member States when they are implementing Union law, in the exercise of their respective powers.’<sup>71</sup> Therefore, contrary to TFEU Article 11, action under EUCFR Article 37 before the

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<sup>68</sup> Article II-112(5).

<sup>69</sup> Articles 4, 6, and 9.

<sup>70</sup> Resolution 2020/2134(INI).

<sup>71</sup> This provision was not embedded in the initial text of the Charter adopted in 2000.



Court of Justice of the EU (CJEU) is confined to active conduct (TFEU Article 263), excluding inaction (TFEU Article 265).<sup>72</sup>

## **V. SYSTEMIC IMPLICATIONS, PARTICULARLY IN LIGHT OF THE (FORESEEABLE) ACCESSION OF THE EU TO THE ECHR**

The fact that TFEU Article 11 and EUCFR Article 37 are quite similar provisions embedded in different sources of EU law, whose relationship is not definitely crystallised in a clear hierarchy,<sup>73</sup> entails some systemic implications.

First, although TEU Article 6(1) confers upon the EUCFR the same legal status as the TEU and TFEU, EUCFR Articles 52(2) and 53 establish that the Charter must be consistent with the EU founding treaties. However, this asymmetry should not have relevant internal consequences for environmental protection. In fact, EUCFR Article 37 incorporates elements that are also embodied in TEU Articles 3 and 21, as well as in TFEU Article 11, and is fundamentally consistent with these provisions.

Secondly, environmental protection under TFEU Article 11 and EUCFR Article 37 is not necessarily fully aligned with environmental protection as a general principle of EU law inferred from domestic legal orders, which often recognise an individual constitutional right to an adequate environment, sometimes in conjunction with a correlative State duty, but not a high level of environmental protection.<sup>74</sup> In light of the uncertain status of the general principles of EU law, it is not clear whether TFEU Articles 11 and EUCFR Article 37 should be consistent with a general principle of EU law protecting the environment, or vice versa. This has relevant implications particularly for the interpretation of EUCFR Article 37 as a norm establishing a fundamental right rather than not.

Thirdly, the international treaties signed by the Union or international customary practices may not always be consistent with the 'high level' of environmental protection required by the EU under TFEU Article 11 and EUCFR Article 37. In this case, the question is whether international agreements should be consistent

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<sup>72</sup> De Sadeleer, *EU Environmental Law, cit.*, p. 45.

<sup>73</sup> See above section II.

<sup>74</sup> See, for instance, *Loi constitutionnelle 2005-205*, Article 2; *Spanish Constitution*, Article 45(1); *Portuguese Constitution*, Article 66; *German Basic Law*, Art 20(a).

with the standard of EU environmental protection, or rather the other way around. Notably, in *Air Transport Association of America* the CJEU justified the extraterritorial application of the EU emission trading scheme (ETS) within the aviation sector under Directive 2008/101, based, inter alia, on a 'high level of environmental protection',<sup>75</sup> but this interpretation has been criticised for being in breach of the basic consensual principle underpinning international relations.<sup>76</sup> This prompted a suspension of the extraterritorial application of Directive 2008/101, pending multilateral negotiations on greenhouse gas (GHG) emission limits within the International Civil Aviation Organisation.<sup>77</sup>

Fourthly, and most importantly, in light of TEU Article 6(2), which envisages the accession of the EU to the ECHR,<sup>78</sup> TFEU Article 11 and EUCFR Article 37 create an imbalance as, unlike the EUCFR, the ECHR does not embed a specific rule on environmental protection. Such a normative discrepancy clearly emerges in the approach to the issue taken in practice by the former ECJ, now CJEU, and the European Court of Human Rights (ECtHR). The ECJ has had an important impact on environmental law and has probably shaped it more than any other legal areas, so much so that current primary EU regulation is fundamentally a codification of its jurisprudence. In general, the jurisprudence of the ECJ and CJEU demonstrates that these Courts have always been willing to provide the Community-Union with a policy affording effective environmental protection. Notably, in *Prosecutor v. Association de Défense des brûleurs d'huiles usagées* (ADBHU) the ECJ adjudicated upon the implementation in France of European Council Directive No 75/439/EEC of 16 June 1975, providing that EU Member States should take the necessary measures to ensure the safe collection and disposal of waste oils, preferably by means of recycling. French legislation implementing Directive No. 75/439/EEC essentially prohibited the burning of waste oils and was contested by ADBHU, an association protecting the interests

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<sup>75</sup> *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change and Others* (C-366/10) [2011] ECR I-13755, para. 128.

<sup>76</sup> Gilles Dufrasne, *How Can the EU Emissions Trading System Drive the Aviation Sector's Decarbonisation?* (2021).

<sup>77</sup> EU Council, *Informal Agreement on Aviation in the European Emission Trading System*, 7371/14 (2014).

<sup>78</sup> See further, Council of Europe, *EU Accession to the ECHR*, 2022, <https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights>.

of manufacturers, dealers, and users of stoves and heating appliances designed to burn both fuel oil and waste oils, as an obstacle to the principles of the freedom of trade, free movement of goods, and free competition. Eventually, the ECJ declared the prohibition of the burning of waste oils in conditions other than those permitted under French legislation consistent with Directive No. 75/439/EEC, in light of environmental protection as an essential objective of the European Community:

The Directive must be seen in the perspective of *environmental protection*, which is one of the *Community's essential objectives*. It is evident, particularly from the third and seventh recitals in the preamble to the directive, that any legislation dealing with the disposal of waste oils *must be designed to protect the environment* from the harmful effects caused by the discharge, deposit or treatment of such products.<sup>79</sup>

The ECJ therefore seems to acknowledge a claim to environmental protection and its fundamental status, which can override market freedoms. In fact, the Court recognises the environment as an object of direct protection under EC (now EU) law, setting out an obligation to integrate environmental protection into EU policies, which underpins TFEU Article 11, EUCFR Article 37 and all EU environmental norms.<sup>80</sup>

Along these lines, in *Canadian Oil Company Sweden AB, Anders Rantén v. Riksåklagaren* the CJEU held that the 'objective' of ensuring 'a high level of protection of human health and the environment' is 'capable of justifying any hindrance to the free movement of goods'.<sup>81</sup>

<sup>79</sup> *Procureur de la République contre Association de défense des brûleurs d'huiles usagées (ADBHU)* (C-240/83) [1985] 00531, para. 13.

<sup>80</sup> See further *Saarland v. Minister for Industry, Post and Telecommunications and Tourism and Others* (C-187/87) [1988] ECR 5013; *Criminal Proceedings against Zanetti and Others* (C-359/88) [1990] ECR I-1509; *Concordia Bus Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* (C-513/99) [2002] ECR I-7213; *Commission v. Council* (C-176/03) [2005] ECR I-7879; *Commission v. Council* (C-440/05) [2007] ECR I-9097. See also Frank Jacobs, "The Role of the European Court of Justice in the Protection of the Environment", in *Journal of Environmental Law*, 2006, vol. 18(2), p. 185.

<sup>81</sup> *Canadian Oil Company Sweden AB, Anders Rantén v. Riksåklagaren*, Case C-472/14, ECLI:EU:C:2016:171, Judgment of 17 March 2016, para 46. See further Sanja Bogojevic, "EU Human Rights Law and Environmental Protection: The Beginning of A Beautiful Friendship?", in Sionaidh Douglas-Scott and Nichoplas Hatzis (eds.), *Research Handbook on EU Law and Human Rights*, Edward Elgar, Cheltenham, 2017, pp. 451, 459 ff; Delphine Misonne, "The Court of Justice of the European Union and the High Level of Environmental Protection: Transforming a Policy Objective into a Concept Amenable to Judicial Review.", in Christina Voigt (ed.), *International Judicial Practice on the Environment: Questions of Legitimacy*, CUP, Cambridge, 2019, p. 212.

Contrary to the ECJ, the ECtHR has never recognised an independent (third-generation) principle, or right, to environmental protection. By contrast, the Court has afforded environmental protection through specific first- and second-generation fundamental rights, such as the right to health and private and family life,<sup>82</sup> which has been defined as a ‘minimum level of environmental protection’.<sup>83</sup> Notably, in *López Ostra v. Spain*, based on a referral from the European Commission of Human Rights the ECtHR dealt with the case of a Spanish citizen who claimed that failure by Spain to take any measures against the smell, noise and contaminating smokes originating in a solid and liquid waste treatment plant located next to her home violated her rights to physical integrity (Article 3 ECHR) and to respect for home and private life (Article 8 ECHR). Upholding the stance of the Commission, the Court held Spain responsible for violating the right to respect for home and private life, as serious pollution can affect individual well-being and prevent an individual from fully enjoying his or her home. Furthermore, the Court held that Spain had failed to find an adequate balance between its interest to promote economic development and the claimant’s effective enjoyment of her rights, and consequently ordered compensation for damages and litigation costs. In *Tatar v. Romania*, the ECtHR followed this logic and acknowledged that the right to private and family life includes the ‘enjoyment of a healthy and protected environment’.<sup>84</sup> It is thus clear that the ECtHR can only grant environmental protection indirectly, through the prism of different non-environmental human rights.<sup>85</sup> Direct protection is basically prevented by the fact that the ECHR does not embed ‘third-generation’ human rights, and thus cannot afford adequate environmental protection when, for instance, substantive regulatory standards provide inadequate protection for the environment, if they

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<sup>82</sup> The development of fundamental rights from the first to the second and third generation outlines the evolution from civil and political rights to economic, social and cultural rights, and eventually the collective rights to sustainable development and environmental protection (see Morten Pedersen, “Three Generations of International Human Rights Governance”, in *Anthony Burke and Rita Parker, Global Insecurity: Futures of Global Chaos and Governance*, Palgrave, London, 2017, p. 293).

<sup>83</sup> De Sadeleer, *EU Environmental Law*, *cit.*, para. 2.4.1.

<sup>84</sup> *Tatar v. Romania*, Appl. No. 67021/01, 27 January 2009, paras 107 and 112.

<sup>85</sup> In particular, the Court has also afforded environmental protection via ECHR Articles 2 and 13 (see *Öneryildiz v. Turkey*, Appl. No. 48939/99, 30 November 2004). For an exhaustive overview of environmental cases before the ECtHR, see Council of Europe, *Manual on Human Rights and the Environment – Principles Emerging from the Case Law of the European Court of Human Rights*, Council of Europe Publishing, Bruxelles, 2<sup>nd</sup> edn., 2012).

do not cover conduct in breach of specific first- and second-generation human rights.<sup>86</sup>

So far, albeit the ECJ and CJEU, on the one hand, and the ECtHR, on the other, have developed a dialogue and shown deference towards one another's decisions,<sup>87</sup> discrepancies have emerged in the jurisprudence of the two Courts.<sup>88</sup> After accession of the EU to the ECHR, different mechanisms have been proposed to align the respective action of the Courts, essentially based on the principle of subsidiarity,<sup>89</sup> but coordination between the CJEU and the ECtHR seems problematic and is the main reason for the rejection of the Draft Accession Agreement by the CJEU in 2013.<sup>90</sup> With specific regard to environmental protection, the question arises as to what would happen in a case such as *Prosecutor v. ADBHU*. In fact, although environmental protection is currently not directly granted under the ECHR, and thus the ECtHR may not exercise direct competence in this regard, the CJEU can under TFEU Article 11 and ECHR Article 37. Therefore, accession would generate a paradoxical situation, whereby the CJEU affords direct protection to the fundamental principle of environmental safety under EU law, which is evolving as a fundamental right, much more progressively than the ECtHR under the ECHR, only affording indirect protection. Overall, as a result of the accession the fundamental principle-right covering the environment would be protected asymmetrically, and would thus be afforded less protection than other fundamental rights. This is inconsistent in itself and also with respect to the value of the right to environmental protection as a basis for the enjoyment of all other human rights.<sup>91</sup> In light of these premises, TFEU Article 11 and EUCFR Article 37 have the potential to facilitate the development of the ECHR and foster an extension of the scope of ECHR Articles 2, 3 and 8, so as to

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<sup>86</sup> De Sadeleer, *EU Environmental Law, cit.*, para. 2.4.3.5.

<sup>87</sup> *Dieter Krombach v. André Bamberski* (C-7/98) [2000] ECR I-1935, para. 39; *Christine Goodwin v. UK, Appl. No. 28957/95*, 11 July 2002, para. 43.

<sup>88</sup> See, for instance, *Hoechst v. Commission* (C-46/87 and 227/88) [1989] ECR 2859, para. 17; *Chappell v. UK*, Application No. 10461/83, 30 March 1989, para. 52.

<sup>89</sup> Council of Europe, Draft Accession Agreement, 47+1(2013)008Rev2, paras 66-69.

<sup>90</sup> Opinion 2/13, ECLI: EU:C:2014:2454. See also Nicolas Petit and Joëlle Pilorge-Vrancke, "Avis 2/13 de la CJUE : l'obsession du contrôle?", in *Revue des Affaires Européennes*, vol. 2, 2015, p. 815.

<sup>91</sup> Dinah Shelton, "Human Rights, Environmental Rights, and the Right to Environment", in *Stanford Journal of International Law*, vol. 28, 1991-2, pp. 103, 112-17; *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Comm. No. 155/96 (AComHPR, 27 October 2001) para. 52.

definitely embrace a fundamental right to environmental protection, along the lines of *Tatar v. Romania*. Indeed, suggestions have already been put forward in this sense. Notably, in their joint dissenting opinion in *Hatton and Others v UK*, Judges Costa, Ress, Türmen, Zupančič and Steiner considered:

[T]he close connection between human rights protection and the urgent need for a decontamination of the environment leads us to perceive health as the most basic human need and as pre-eminent ... It is true that the original text of the Convention does not yet disclose an awareness of the need for the protection of environmental human rights. In the 1950s, the universal need for environmental protection was not yet apparent. Historically, however, environmental considerations are by no means unknown to our unbroken and common legal tradition whilst, thirty-one years ago, the Declaration of the United Nations Conference on the Human Environment stated as its first principle: 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being.' *The European Union's Charter of Fundamental Rights* (even though it does not at present have binding legal force) *provides an interesting illustration of the point* ... These recommendations show clearly that *the member States of the European Union want a high level of protection and better protection, and expect the Union to develop policies aimed at those objectives*. On a broader plane the Kyoto Protocol makes it patent that the question of environmental pollution is a supra-national one, as it knows no respect for the boundaries of national sovereignty. This makes it an issue par excellence for international law – and a fortiori for international jurisdiction. In the meanwhile, many supreme and constitutional courts have invoked constitutional vindication of various aspects of environmental protection – on these precise grounds. We believe that this concern for environmental protection shares common ground with the general concern for human rights.<sup>92</sup>

Following this approach, different proposals have been put forward, going as far as to require the inclusion of a right to safe environment in the ECHR, notably via an *ad hoc* protocol additional to the Convention.<sup>93</sup> This possibility, however, has

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<sup>92</sup> *Hatton and Others v. UK*, Appl No 36022/97, 8 July 2003, Joint Dissenting Opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner, para. 1, emphasis added.

<sup>93</sup> Council of Europe, Parliamentary Assembly, Future Action to Be Taken by the Council of Europe in the Field of Environment Protection, Recommendation 1431 (1999) para. 8; Council of

thus far been rejected by the Committee of Ministers of the Council of Europe, considering that the ECtHR has already developed adequate environmental protection via first- and second-generation human rights.<sup>94</sup> In September 2021, nonetheless, the Council of Europe's Parliamentary Assembly passed a resolution asking again the Committee of Ministers to adopt a protocol additional to the ECHR to acknowledge an enforceable 'right to a safe, clean, healthy and sustainable environment',<sup>95</sup> along the lines of the evolution of general international law fostered by the UN Human Rights Council.<sup>96</sup>

If it were to be recognised under the ECHR, according to TEU Article 6(3) a human right to environmental protection would become part of the general principles of EU law, with relevant implications. Indeed, the nature of environmental protection as a fundamental right within the EU, which is currently only confined to action of the EU and its Member States, but does not extend to inaction under EUCFR Article 37, would in all likelihood be definitely clarified. In fact, the case law of the ECtHR, although limited to the 'greening' of first- and second-generation human rights, has posited no distinction between the action or inaction of State Parties to the ECHR with respect to environmental protection. This approach is likely to extend to the recognition of an independent human right to environmental protection under the ECHR, which would 'negatively' complement the limited 'positive' application of EUCFR Article 37 under EUCFR Article 52(5). At the same time, the hierarchy of the sources of EU law governing

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Europe, Parliamentary Assembly, *Environment and Human Rights*, Recommendation 1614 (2003) para. 9(ii), 10(i) and (ii); *Id.*, Challenges Posed by Climate Change, Recommendation 1883 (2009); Council of Europe, Parliamentary Assembly, Drafting an Additional Protocol to the European Convention on Human Rights Concerning the Right to a Healthy Environment, Recommendation 1885 (2009) paras 1 and 10.1. See also see Christel Cournil, "La relation 'droits de l'homme et changements climatiques' au sein de la communauté internationale et en Europe", in Christel Cournil and Anne-Sophie Tabau (eds.), *Politiques climatiques de l'Union européenne et droits de l'homme*, Bruylant, Bruxelles, 2013, pp. 27, 60; Conference of INGOs of the Council of Europe, Standing Committee, Climate Change and Human Rights, Declaration to the Warsaw Climate Change Conference (2013).

<sup>94</sup> Council of Europe, Committee of Ministers, Environment and Human Rights, Doc. 10041 (21 January 2004); Council of Europe, Committee of Ministers, Joint Reply to "The Challenges Posed by Climate Change, Parliamentary Assembly Recommendation 1883 (2009)" and "Drafting an Additional Protocol to the European Convention on Human Rights Concerning the Right to a Healthy Environment, Parliamentary Assembly Recommendation 1885 (2009)", CM/AS(2010) Rec1883–1885 final (18 June 2010).

<sup>95</sup> Anchoring the Right to a Healthy Environment: Need for Enhanced Action by the Council of Europe, Recommendation 2211 (2021).

<sup>96</sup> Human Rights Council, The Human Right to a Safe, Clean, Healthy and Sustainable Environment, UN Doc. A/HRC/48/L.23/Rev.1, 2021. See also UN General Assembly, The Human Right to a Safe, Clean, Healthy and Sustainable Environment, UN Doc. A/76/L.75, 26 July 2022.

environmental protection would be broadened, so as to include not only TFEU Articles 11 and EUCFR 37, but also a specific general principle under the ECHR, aligning EU law to environmental protection as a constitutional principle within the Member States.

## VI. CONCLUSION

In the EU regulatory system, environmental protection is granted within the broader context of sustainable development. TFEU Article 11 and EUCFR Article 37 are core to this system. TFEU Article 11 summarises TEU Articles 3 and 21, 'integrates' them into the TFEU, and is paralleled by 'twin' Article 37 in the EUCFR. In light of Parliamentary Resolution 2020/2134, both TFEU Article 11 and EUCFR Article 37 can be interpreted as progressively establishing environmental protection not only as a fundamental principle of EU law, but also, *de lege ferenda*, as a right and duty.

The status of environmental protection is asymmetric in the context of the sources of EU law. First, TFEU Article 11 and EUCFR Article 37 are not necessarily aligned with environmental protection as a general principle of EU law inferred from domestic legal orders, which posit more clearly an individual constitutional right to an adequate environment. Secondly, it is unclear whether international agreements should be consistent with the EU high level of environmental protection under TFEU Article 11 and EUCFR Article 37, or vice versa. Thirdly, whereas the EUCFR affords direct environmental protection, the ECHR does not, which has thus far compelled the ECtHR to stretch first- and second-generation human rights in order to protect the environment, unlike the ECJ and CJEU.

*De lege ferenda*, in light of the accession of the EU to the ECHR envisaged in TEU Article 6(3), and the direct and indirect justiciability of environmental protection respectively afforded by these legal systems, TFEU Article 11 and EUCFR Article 37 could prompt an amendment of the ECHR, so as to include an independent human right to a safe environment. Substantively, this would foster a clarification of the status of the right to a safe environment within the sources of EU law, establishing it as a general principle of EU law and thus helping to answer the question as to how much a declaration or protocol on human rights



and the environment should add to existing civil and political rights.<sup>97</sup> Such a step is essential in the search for the unambiguous recognition of environmental protection as a universal claim, aligning EU law with the recent evolution of international law.<sup>98</sup>

## VII. BIBLIOGRAFÍA

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<sup>97</sup> Alan Boyle, “Human Rights and the Environment: Where Next?”, in *European Journal of International Law*, vol. 23(3), 2012, pp. 613, 616.

<sup>98</sup> Human Rights Council, The Human Right to a Safe, Clean, Healthy and Sustainable Environment, *cit.*, para. 1; UN General Assembly, *id.*, *cit.*, para. 1.

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