



Seminar Paper

Lecture:

European Judicial Protection

Topic:

Comparison of requirements for individuals to access the CJEU and the ECtHR

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¹ AEUV (DE) = TFEU (EN).

² „Rn“ = Randnummer (DE) = recital, marginal number, or paragraph (EN).

³ EMRK (DE)= ECHR (EN).

A. Introduction

In the following, the requirements for access of individuals to the Court of Justice of the European Union (CJEU) are compared with the requirements for access of individuals to the European Court of Human Rights (ECtHR). For this comparison, both courts are analysed individually. For this purpose, first an overview of the two courts is given, then the jurisdiction of the court is analysed, followed by the possible access of individuals to the court. The reason for this is that the court's area of jurisdiction affects the requirements for access to the court. The term "individual" does not necessarily mean the individual as a party to the proceedings. Rather, an individual may also have access to a court to the extent that his or her concern is the subject matter of the court proceedings. Furthermore, "individual" means a natural person and a legal person.

B. Analysis of requirements for individuals to access the CJEU

In order to analyse the requirements for access by individuals to the Court of Justice of the European Union, it is first important to understand the scope of the Court's jurisdiction. Next, the conditions for access by individuals to the Court of Justice of the European Union are presented.

I. The CJEU

According to Art. 13 (1) of the Treaty on European Union (TEU), the Court of Justice of the European Union is one of the institutions of the European Union. More precisely, it is the judicial authority of the European Union,⁴ besides the national courts of the Member States of the European Union, with reference to Art. 19(1) TEU. This justice authority is located in Luxemburg and established in 1952.⁵ According to Art. 19 (1) TEU, the Court of Justice of the European Union “include[s] the Court of Justice, the General Court and specialised courts.”

II. The area of responsibility of the CJEU

In fact, until 2016, there was an additional specialised court called the “Civil Service Tribunal” as a competitive authority for the judiciary. Since 2016, the Court of Justice of the European Union has consisted of the General Court and the Court of Justice, Art. 19 (1) TEU.⁶

In this context, the Court's area of responsibility is, on the one hand, to act as the constitutional court of the European Union, which means, in particular, to guard the treaty law of the European Union. This includes the delimitation of competences between the European Union and the Member States, reviewing the legality of the European Union's secondary legislation, and protecting fundamental rights. On the other hand, the Court of Justice of the European Union acts as a supreme court. This is because it is also responsible for the binding interpretation of Union law at the request of a national court within the framework of a preliminary ruling procedure. This ensures a uniform application of the law.⁷

⁴ Lenaerts Koen, Maselis Ignace and Gutman Kathleen, *EU Procedural Law* (Oxford European Union Law Library 2015) marginal number 2.21; Michael Kloepfer and Holger Greve, *Staatsrecht kompakt* (3rd edn, Nomos 2018) marginal number 857, 917.

⁵ European Union, ‘*Court of Justice of the European Union (CJEU)*’, ‘*Overview*’, <https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/court-justice-european-union-cjeu_en>(accessed 8th, 2022).

⁶ European Parliament and Council Regulation (EU, Euratom) 2016/1192 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants [6. July 2016], OJ 200/138, July 26th, 2016.

⁷ Lenaerts Koen, Maselis Ignace and Gutman Kathleen, *EU Procedural Law* (Oxford European Union Law Library 2015) marginal number 2.21.

The General Court's responsibility, in contrast, is acting as a "Court of First Instance" in certain areas to preserve and improve the legal protection in the European Union.⁸

The Court of Justice of the European Union institutional provisions are defined in the Art. 251 to 281 of the Treaty on the Functioning of the European Union (TFEU). In addition to the provisions on its organisation in Articles 251 to 255 and the provisions on jurisdiction between the General Court and the Court of Justice in Art. 256 TFEU, the various jurisdictions in legal proceedings are laid down in Articles 258 to 260 and 340, 263, 265, 267, 268, 270, 271, 272, 273 TFEU.⁹

III. Requirements for individuals to access to the CJEU

The TFEU contains, among other things, the requirements for access to the Court of Justice of the European Union (CJEU). But not every legal procedure of the TFEU offers individuals the possibility of access to the Court of Justice of the European Union. And even if a legal procedure provides for the possibility of access for individuals, they are not necessarily identical. The possible legal procedure for access by individuals to the Court of Justice of the European Union with its requirements is presented below. However, the first general requirement in paragraph 3 of Art. 19 of the Protocol (No 3) on the Statute of the Court of Justice of the European Union is that the individual applicant "must be represented by a lawyer".¹⁰

1. Action for Annulment, Art. 263 TFEU

According to Art. 263 TFEU, "[t]he Court of Justice of the European Union shall review the legality of legislative acts [...]". This action, also known as an "action for annulment",¹¹ gives access to the Court of Justice of the European Union not only to the European institutions but also to individuals, Art. 263 (4) TFEU.

The general requirements for this action are one of the enumerated European institutions and a proper subject matter, such as an act of a European institution, Art. 263 (1) TFEU. In addition, according to Art. 263 (2) TFEU, there must be a valid reason for the action for annulment, such as a "[...] lack of competence, [an] infringement of an essential procedural requirement, [an] infringement of the Treaties or of any rule of law relating to their application, or [a] misuse of powers by the Commission."¹²

However, Art. 263 (4) TFEU declares the individual to be a "non-privileged applicant".¹³ This means that in order to apply for the annulment of a European legal act, an individual as plaintiff must demonstrate an interest in legal protection. The contested legal act must therefore be addressed to the plaintiff or affect him or her directly and individually.¹⁴

⁸ *ibid.* marginal number 2.35.

⁹ *ibid.* marginal number 2.53.

¹⁰ Art. 19 of Protocol (No 3) on the statute of the Court of Justice of the European Union, < <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A12008E%2FPRO%2F03> > (accessed 8th, 2022).

¹¹ EUR-Lex, *The action for annulment* (29.10.2010) <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:ai0038>> (accessed 8th, 2022).

¹² Gernot Sydow and Fabian Wittreck, *Deutsches und Europäisches Verfassungsrecht I* (C.H. BECK 2019) § 17 marginal number 54 et seq.

¹³ Lenaerts Koen, Maselis Ignace and Gutman Kathleen, *EU Procedural Law* (Oxford European Union Law Library 2015) marginal number 7.21.

¹⁴ Gernot Sydow and Fabian Wittreck, *Deutsches und Europäisches Verfassungsrecht I* (C.H. BECK 2019) § 17 marginal number 60 et seq.; Niels Petersen, *Deutsches und Europäisches Verfassungsrecht II* (2nd edn, C.H. BECK 2022) § 9 marginal number 51; EUR-Lex, *The action for annulment* (29.10.2010) <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:ai0038>> (accessed 8th, 2022).

In the case of legal acts of a regulatory nature, the individual plaintiff must at least be directly concerned according to the "Plaumann-Formel", because the legal acts are not directly addressed to a person.¹⁵

The time limit is two months within which the "action for annulment" is possible, Art. 263 (6) TFEU.

2. Action for Failure to Act, Art. 265 TFEU

Art. 265 TFEU allows the Court of Justice of the European Union to declare an unlawful omission by one of the defendants listed in Art. 265 TFEU. The most common scope of this action is EU competition law, state aid or the EU decision-making process, but this does not make it any less relevant for individuals.¹⁶ This judicial procedure can be initiated by Member States and European institutions as well as by individuals under Art. 265 (3) TFEU. The precondition is that "[...] an institution, body, office or agency of the Union has failed to act in relation to the person concerned other than by issuing a recommendation or an opinion." This means that an individual's action can only relate to the failure to act in a way that directly affects that person's legal position. In the case of actions by individuals, the Court of Justice of the European Union has held that direct and individual concern is sufficient, which is also considered sufficient in Art. 263 (4) TFEU. This refers to constellations in which legal acts which the European institution has not adopted and which should have been formally addressed to someone else, e.g. a member state.¹⁷

The time limit is two to a maximum of four months, within which an "action for failure to act" is possible, cf. Art. 265 (3) and (2) TFEU.

3. Preliminary Ruling Procedure, Art 267 TFEU

In the context of the preliminary ruling procedure under Art. 267 TFEU, the Court of Justice of the European Union has jurisdiction to give preliminary rulings on the interpretation of primary and secondary European Union law or on the validity of acts of the European Union (paragraph 1 (a) and (b)).¹⁸

But Art. 267 TFEU does not provide direct access for the individual. Rather, the preliminary ruling procedure requires the national court to request the Court of Justice of the European Union to rule on the question under paragraph 1 (a) and (b). Pursuant to Art. 267 (2) TFEU, any national court or tribunal has the possibility of referring the matter to the Court of Justice of the European Union if it deems a decision on the merits necessary in order to give judgment. However, this possibility does not depend on the interest or view of the individual as a party to the dispute. Therefore, the individual has no guaranteed access to the Court of Justice of the European Union, but it is exclusively the decision of the national court.¹⁹

In contrast, Art. 267 (3) TFEU provides individuals with the possibility of bringing an action before the Court of Justice of the European Union, on the central condition that the "question is raised in proceedings pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law". In this situation, if the court or tribunal considers that a decision of the Court of Justice of the European Union is necessary in

¹⁵ Gernot Sydow and Fabian Wittreck, *Deutsches und Europäisches Verfassungsrecht I* (C.H. BECK 2019) § 17 marginal number 61; Niels Petersen, *Deutsches und Europäisches Verfassungsrecht II* (2nd edn, C.H. BECK 2022) § 9 marginal number 51.

¹⁶ Lenaerts Koen, Maselis Ignace and Gutman Kathleen, *EU Procedural Law* (Oxford European Union Law Library 2015) marginal number 8.01 et seq.

¹⁷ *ibid.* marginal number 8.13.

¹⁸ Niels Petersen, *Deutsches und Europäisches Verfassungsrecht II* (2nd edn, C.H. BECK 2022) § 9 marginal number 50.

¹⁹ See Art. 267 Paragraph 2 and 3 TFEU; Niels Petersen, *Deutsches und Europäisches Verfassungsrecht II* (2nd edn, C.H. BECK 2022) § 9 marginal number 50.

order to give judgment, it must therefore refer the matter to the Court of Justice of the European Union. In this way, the individual gains access to the Court of Justice of the European Union, as he or she is affected by its decision. However, here the decision initially remains dependent on the national court, i.e. whether the court is of the opinion that a decision by the Court of Justice of the European Union is necessary. However, this is intended to give individuals access to the Court of Justice of the European Union by way of preliminary ruling proceedings under Art. 267 TFEU.²⁰

4. Action for Compensation, Art. 268, 340 TFEU

Last but not least, an individual has the possibility of bringing an action for compensation before the Court of Justice of the European Union, as provided for in Articles 268, 340 (2) and (3) TFEU. This action is an independent claim against the European Union and has the objective of compensation, for which the Court of Justice of the European Union has exclusive jurisdiction.²¹

The requirement is an unlawful act of a European institution that has led to damage that is causally linked.²²

C. Analysis of requirements for individuals to access the ECtHR

In order to analyse the conditions for the access of an individual to the European Court of Human Rights (ECtHR), it is first important to understand the scope of the Court's jurisdiction. Then, the conditions for individuals to access the European Court of Human Rights are examined through the lens of its jurisdiction.

I. The ECtHR

The European Court of Human Rights was established in 1959 in Strasbourg, France.²³ Its basis is the European Convention on Human Rights (ECHR) of November 4th, 1950,²⁴ which entered into force in 1953.²⁵ Currently, 46 states have signed it.²⁶ According to Art. 19 of the ECHR, the European Court of Human Rights has “[t]o ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols [...]”.

II. The area of responsibility of the ECtHR

As the judicial body of the Council of Europe, the European Court of Human Rights is responsible for the examination of complaints from individuals as well as complaints from a state against another state party to the Convention.²⁷

²⁰ See also Niels Petersen, *Deutsches und Europäisches Verfassungsrecht II* (2nd edn, C.H. BECK 2022) § 9 marginal number 50.

²¹ Lenaerts Koen, Maselis Ignace and Gutman Kathleen, *EU Procedural Law* (Oxford European Union Law Library 2015) marginal number 11.01, 11.04.

²² Streinz/*Gellermann* AEUV Art. 340 Rn. 11; see Case C-295/03 *Alessandrini and Others v Commission* [2005] EUECJ C-295/03 - ECLI:EU:C:2005:413 - para 61.

²³ The European Court of Human Rights, ‘*The Court in brief*’ p. 2, <https://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf> (accessed 8th, 2022).

²⁴ Michael Kloepfer and Holger Greve, *Staatsrecht kompakt* (3rd edn, Nomos 2018) marginal number 450; The European Court of Human Rights, ‘*European Convention on Human Rights – A living in-instrument*’ (September 2022) p. 5, <https://echr.coe.int/Documents/Convention_Instrument_ENG.pdf> (accessed 8th, 2022).

²⁵ The European Court of Human Rights, ‘*The Court in brief*’ p. 2, <https://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf> (accessed 8th, 2022).

²⁶ The European Court of Human Rights, ‘*European Convention on Human Rights – A living in-instrument*’ (September 2022) p. 5, <https://echr.coe.int/Documents/Convention_Instrument_ENG.pdf> (accessed 8th, 2022).

²⁷ The European Court of Human Rights, ‘*The Court in brief*’ p. 2, <https://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf> (accessed 8th, 2022).

Art. 32 ECHR, “Jurisdiction of the Court”, states that “[t]he jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.”

III. Requirements for individuals to access to the ECtHR

As already shown, the ECHR recognises both complaints by States, Art. 33 ECHR, and by individuals, Articles 34 and 35 ECHR. In the following, reference is made to the requirement of the individual complaint.²⁸

1. The individual application, Art. 34, 35 ECHR

Since 1998, individuals have had direct access to the European Court of Human Rights. Access is possible through an individual application. In order to do so, the individual must fulfil the requirements of the ECHR, in particular in Art. 34 and 35 ECHR. The individual does not have to be represented by a lawyer.²⁹

2. The requirements of individual application, Art. 34, 35 ECHR

The current requirements for an individual application to the European Court of Human Rights are partly found directly in Art. 34 ECHR. Taking into account the national courts and the idea of jurisdiction and the European Court of Human Rights as an institution, there are additional requirements that must be met in order to bring an individual application to the European Court of Human Rights.³⁰

First, under Articles 34 and 35 ECHR, the individual complaint must be directed against a State Party to the Convention that holds that status at the time of the alleged violation.³¹

Second, only a natural or legal person can be the complainant. However, if the complainant is a legal person, it must be able to be the bearer of the ECHR rights.³² In addition, the complainant must state that he or she is directly affected.³³

Third, the complainant must make a sufficiently substantiated allegation of a violation of ECHR rights by the act of a State Party.³⁴

Furthermore, according to Art. 35 (1) ECHR, the complainant must first seek domestic legal recourse until there is no other possibility. An exception to these conditions is provided for when the legal process for the matter is manifestly ineffective or when the domestic legal situation is futile to try.

In addition, the applicant has to consider Art. 35 (2) (a) and (b) ECHR:

According to paragraph 2 (b), the European Court of Human Rights, for one, does not deal with an individual application under Art. 34 ECHR that is “is substantially the same as a matter that has already been examined by the Court”. In other words, the matter in question must not yet have been decided by one of the competent bodies - *res judicata*. Furthermore, Art. 35 (2) (b) ECHR states that the European Court of Human Rights shall not deal with such applications that “[...] ha[ve] already been submitted to another procedure of international investigation or settlement and contains no relevant new information” – *lis pendens*. In sum-

²⁸ Markus Krajewski, *Völkerrecht* (2nd edn, Nomos 2020) § 12 marginal number 148.

²⁹ Niels Petersen, *Deutsches und Europäisches Verfassungsrecht II* (2nd edn, C.H. BECK 2022) § 9 marginal number 36.

³⁰ Markus Krajewski, *Völkerrecht* (2nd edn, Nomos 2020) § 12 marginal number 150.

³¹ *ibid.* marginal number 152; Michael Kloepfer and Holger Greve, *Staatsrecht kompakt* (3rd edn, Nomos 2018) marginal number 450.

³² Niels Petersen, *Deutsches und Europäisches Verfassungsrecht II* (2nd edn, C.H. BECK 2022) § 9 marginal number 37; Markus Krajewski, *Völkerrecht* (2nd edn, Nomos 2020) § 12 marginal number 152.

³³ Niels Petersen, *Deutsches und Europäisches Verfassungsrecht II* (2nd edn, C.H. BECK 2022) § 9 marginal number 39; Markus Krajewski, *Völkerrecht* (2nd edn, Nomos 2020) § 12 marginal number 152.

³⁴ Niels Petersen, *Deutsches und Europäisches Verfassungsrecht II* (2nd edn, C.H. BECK 2022) § 9 marginal number 34; Markus Krajewski, *Völkerrecht* (2nd edn, Nomos 2020) § 12 marginal number 152.

mary, a complaint is not possible if the matter has already been dealt with in a similar international human rights protection procedure.³⁵

In addition, the application must be made in writing and, according to Art. 34 (2) (a) ECHR, must not be anonymous.³⁶

Last but not least, the complainant must file the complaint within four months of the final decision of the national court, Art. 35 (1) ECHR.³⁷

D. Comparison of the CJEU and ECtHR requirements

In outlining the possible procedures of the Court of Justice of the European Union and the European Court of Human Rights, there are both clear differences and some similarities in terms of the requirements for individual access.

On the one hand, the basis of the Courts to rule judgments and thus their jurisdiction and the objectives of the proceedings are not the same. The Court of Justice of the European Union watches over compliance with the Treaty on European Union. The European Court of Human Rights deals with the human rights of the ECHR. Therefore, both courts have independent jurisdiction. Although there could theoretically be overlaps in the jurisprudence of both courts,³⁸ the individual must always comply with the specific conditions of the respective procedure. As shown, the European Court of Human Rights looks at the basis of a violation of ECHR human rights and thus only determines the existence of a violation of human rights - or not. This includes that the plaintiff must prove the violation of an ECHR human right.

In contrast, the actions of the Court of Justice of the European Union are based on a number of defined objectives of the respective action, which are regulated in the TFEU. As mentioned above, the actions are directed at an act or failure to act by a European institution or a Member State or at a question of interpretation of Union law or of compensation and therefore pursue a specific objective. The individual has only limited possibilities of access here, as in addition to being directly affected, a corresponding objective must also be pursued. Additionally, the individual is required to be represented by a lawyer only before the Court of Justice.

On the other hand, there are also similarities. One aspect to be mentioned is the necessary requirement to demonstrate and prove possible affectedness in order to bring proceedings before the court, even if in different forms. Both the European Court of Human Rights and the Court of Justice of the European Union have the requirement that the individual must prove that he or she is individually and directly affected. Even though the Court of Justice of the European Union has exceptions in the "action for annulment", Art. 263 TFEU or in the "action for failure to act", Art. 265 TFEU, an individual still needs at least to be directly and individually concerned in order to have access. The requirement of the "preliminary ruling procedure", Art. 267 TFEU, appears somewhat different, since no right is violated here, but rather the question raised about the interpretation of Union law. Nevertheless, here too the individual becomes a party before the Court of Justice of the European Union only because he is directly and individually affected by the decision.

Furthermore, there is no restriction on individual applicants as natural persons to apply to the European Court of Human Rights or the Court of Justice of the European Union. Neither

³⁵ Niels Petersen, *Deutsches und Europäisches Verfassungsrecht II* (2nd edn, C.H. BECK 2022) § 9 marginal number 40, 46; Markus Krajewski, *Völkerrecht* (2nd edn, Nomos 2020) § 12 marginal number 152.

³⁶ Niels Petersen, *Deutsches und Europäisches Verfassungsrecht II* (2nd edn, C.H. BECK 2022) § 9 marginal number 35, 45; Markus Krajewski, *Völkerrecht* (2nd edn, Nomos 2020) § 12 marginal number 152.

³⁷ See Art. 4 of CETS 213 – Convention for the Protection of Human Rights (Protocol No. 15), 24.VI.2013, <https://www.echr.coe.int/Documents/Protocol_15_ENG.pdf> (accessed 8th, 2022); HK-EMRK/*Jens Meyer-Ladewig/Birgit Peters* EMRK Art. 35 Rn. 24; Niels Petersen, *Deutsches und Europäisches Verfassungsrecht II* (2nd edn, C.H. BECK 2022) § 9 marginal number 35.

³⁸ See Alexandros-Ioannis Kargopoulos, 'ECHR and the CJEU - Competing, overlapping, or Supplementary Competences?' (2015) 3 eucrim p. 97.

Art. 34 ECHR nor Art. 263, 265, 268 TFEU require the individual as a natural person to be a citizen of the Union or to be domiciled in the European Union or in other specified states.³⁹ Furthermore, legal protection before the European Court of Human Rights and the Court of Justice of the European Union is subject to a time limit of up to four months, with the exception of actions under Art. 267 and Art. 268, 340 TFEU.⁴⁰ Finally, both court procedures know the rule of exhaustion of all remedies, as in Art. 35 ECHR or in Art. 267 TFEU.

E. Conclusion

In summary, the Court of Justice of the European Union and the European Court of Human Rights are different institutions - starting with the establishment and ending with the legal basis of their jurisdiction. The Court of Justice of the European Union has jurisdiction over disputes concerning European Union law, but not over specific individual complaints about fundamental rights.⁴¹ In contrast, the European Court of Human Rights offers a direct complaints procedure for individuals. Thus, the requirements for bringing a case before the Court of Justice of the European Union and the European Court of Human Rights are also different. Nevertheless, both courts allow access to individuals, regardless of his or her nationality or residence, and both courts require that the individual be individually and directly concerned, even if in slightly different ways.

³⁹ Regrading to Art. 34 ECHR: HK-EMRK/*Jens Meyer-Ladewig/Andreas Kulick* EMRK Art. 34 Rn. 6. Regrading to Art. 263 TFEU: *Streinz/Ehricke* AEUV Art. 263 Rn. 41. Regrading to Art. 265 TFEU: *Streinz/Ehricke* AEUV Art. 265 Rn. 4. Regrading to Art. *Streinz/Ehricke* AEUV Art. 268 Rn. 6.

⁴⁰ Art. 46 of Protocol (No 3) on the statute of the Court of Justice of the European Union < <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A12008E%2FPRO%2F03>> (accessed 8th, 2022); *Streinz/Gellermann* AEUV Art. 340 Rn. 33.

⁴¹ Niels Petersen, *Deutsches und Europäisches Verfassungsrecht II* (2nd edn, C.H. BECK 2022) § 9 marginal number 49.