

University of Coimbra, 30 September – 1 October 2021

Introduction to the FRICoRe Trans-national Training Workshop on

# FUNDAMENTAL RIGHTS AND EFFECTIVE JUDICIAL PROTECTION ACROSS SECTORS. UNIFORMITY OR DIVERSITY?

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**“Fundamental Rights In Courts and Regulation” – FRICoRe**

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# Project Partners

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University of Trento (UNITN) (Italy) – *Leading Institution*

Institute of Law Studies of the Polish Academy of Sciences (INP-PAN) (Poland)

Université de Versailles Saint Quentin-en-Yvelines (UVSQ) (France)

Rijksuniversiteit Groningen (UG) (Netherlands)

Universidad Pompeu Fabra (UPF) (Spain)

Universidade De Coimbra (UC) (Portugal)

Fondazione Bruno Kessler (FBK) (Italy)

Italian National School of Magistracy (SSM) (Italy)

## **Advisory Board –**

Representatives of Supreme Courts in EU MSs, national schools of magistracy and European networks of judges and lawyers

# Outline

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*A. The FRICoRe project: objectives and main issues*

❖ *Why a cross-sector workshop?*

*B. The methodology and the Project training instruments*

❖ *The Horizontal Workshop Materials*

*C. The workshop structure*

**A. The Project objectives:**  
a focus on the horizontal  
dimension of this workshop

# The FRICoRe project

## The core objectives

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Contribute to the effective and coherent application of EU law and part. the Charter of Fundamental Rights in project's sectors

*Consumer protection*  
*Non-discrimination*  
*Data protection*  
*Asylum&Immigration*  
*Health law*

Focusing on  
The impact of **art. 47 CFR** and of the **principle of effectiveness** on the protection of fundamental rights at EU and national level

The impact of **digital technologies** on vulnerability and enforcement of fundamental rights

providing  
Tools for the effective enforcement by courts and other enforcers

# The core objectives (Cnt.)

Increase judges' awareness about the **role of the Charter** (part. art. 47 CFR) and its **impact** on EU and national caselaw

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## *Article 47 - Right to an effective remedy and to a fair trial.*

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

[fair and public hearing, independent and impartial tribunal, legal aid, defense]

Support the use of **conforming interpretation, disapplication and preliminary reference** in solving the possible conflicts between EU and national law

## Our journey so far: 'vertical' itineraries

- ❖ Fundamental Rights and Effective **Consumer Protection**: the Role of Judges Between Old and New Scenarios (Barcelona, 3-4 February 2020)
- ❖ EU Fundamental Rights and **Non-Discrimination**: Effective Protection in the light of Article 21 of the Charter (2-3 November 2020, online)
- ❖ **Data Protection** and Fundamental Rights: the New Paradigms for Judicial Practice (4-5 February 2021, online)
- ❖ Effective Justice, International Protection and Fundamental Rights in **Asylum and Migration** (4-5 March 2021, online)
- ❖ Judicial Protection of **Health** as a Fundamental Right (27-28 May 2021, online)

# The 'horizontal itineraries' and the main objectives of this workshop

- ❖ What is the role of the CFR and more particularly the one of article 47 CFR, read in the light of EU general principles (part. effectiveness and proportionality), in the different fields of EU law?
- ❖ Does it diverge across sectors or can we observe converging applications?
- ❖ Can national judges extend, to different fields, applications of art. 47 or of the principle of effective judicial protection developed in a specific area?

## *Three itineraries:*

1. The **power of national courts and the relationship between the judge and the parties**
2. Effectiveness, proportionality and dissuasiveness of **remedies and sanctions**
3. **Collective redress**, its content and the relationship with individual redress.

# On the horizontal dimension of art. 47 CFR... as driven by art. 19(1) TEU

[CJEU, C-896/19, Repubblica, 20 April 2021]

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## 1. Art. 47 applies when rights and freedoms guaranteed by EU law are infringed

- “As regards (...) Article 47 of the Charter, it must be recalled that that provision, which constitutes a reaffirmation of the principle of effective judicial protection, enshrines the right to an effective remedy before a tribunal for every person whose rights and freedoms guaranteed by EU law are infringed” (para 40)

## 2. Art. 19(1) TEU applies in all fields covered by EU law irrespective of whether MS are implementing EU law

- “As regards (...) the material scope of the second subparagraph of Article 19(1) TEU, it should be recalled that that provision refers to the ‘fields covered by Union law’, irrespective of whether the Member States are implementing EU law within the meaning of Article 51(1) of the Charter” (para 36)

## 3. Art. 19(1) TEU requires that MS provide remedies sufficient to ensure effective judicial protection

## 4. Art. 47 CFR shall be taken into account when art. 19(1) TEU applies.

- “However, since the second subparagraph of Article 19(1) TEU requires all Member States to provide remedies sufficient to ensure effective judicial protection in the fields covered by EU law, within the meaning in particular of Article 47 of the Charter, that latter provision must be duly taken into consideration for the purposes of interpreting the second subparagraph of Article 19(1) TEU” (para 45)

# The multiple dimensions of art. 47 CFR

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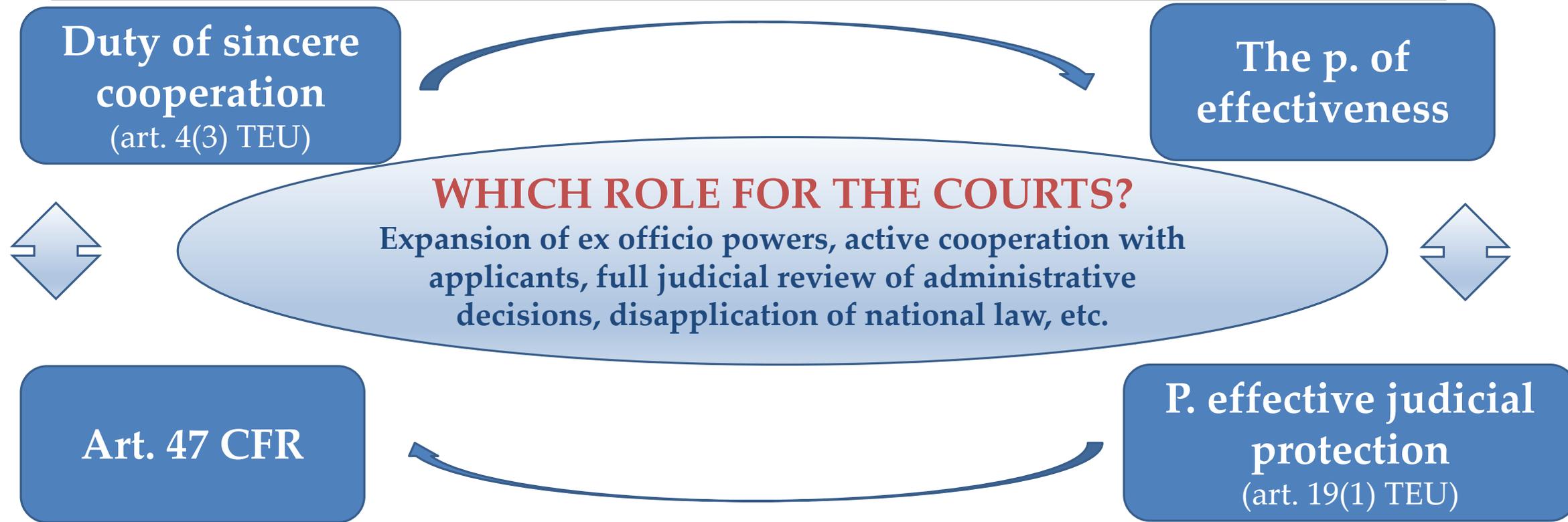
- The right to an effective remedy before a tribunal
- The right to a fair and public hearing in a reasonable time
- The right to an independent and an impartial judge
- The right of defence
- The right to legal aid as necessary to have effective access to justice
- ❖ Which of these dimensions can homogeneously extend across sectors and which ones can more likely present distinct features depending on sectors?
- ❖ Are remedies more than structural and procedural guarantees subject to some sort of 'sector-dependence'?

# The impact of art. 47 CFR and of the general principles of EU law across sectors: three itineraries

1. the impact of art. 47 and the principle of effectiveness on the **power of national courts and the relationship between the judge and the parties**;
2. the application to remedies and the correlation with the principles of effectiveness, proportionality, and dissuasiveness as applied to **remedies and sanctions**;
3. the impact on the development of **collective redress**, its content and the relationship with individual redress.

# 1. The role of the courts in the light of EU general principles

«The principle of effectiveness is deduced from the principle of sincere cooperation as enshrined in art. 4(3), TEU»  
(AG Tachev, C-177/20, *Grossmania*)



«Article 47 of the Charter (...) constitutes a reaffirmation of the principle of effective judicial protection»  
(CJEU, C-896/19, *Repubblica*, para 40)

# 1.1 *Ex officio* powers and the role of courts in consumer protection

- “In order to guarantee the protection intended by Directive 93/13, the Court has also stated on a number of occasions that the **imbalance** which exists between the consumer and the seller or supplier **may be corrected only by positive action unconnected with the actual parties to the contract** (Océano Grupo Editorial and Salvat Editores, paragraph 27, and Mostaza Claro, paragraph 26). It is in the light of those principles that the Court has therefore held that the national court is required to **assess of its own motion whether a contractual term is unfair** (Mostaza Claro, paragraph 38). (CJEU, *Asturcom*, C-40/08, paras 31-32)
- “Article 6(1) of Directive 93/13, read in conjunction with Article 47 of the Charter of must be interpreted as meaning that **it is for the national court**, finding that a term in a contract concluded between a seller or supplier and a consumer is unfair, **to inform the consumer**, in the context of the national procedural rules, after both parties have been heard, **of the legal consequences which annulment of the contract may entail, irrespective of whether the consumer is represented by a professional representative.**” (C-19/20, 19 April 2021, *Bank BPH*)

## 1.1 Ex officio powers and the role of courts in consumer protection

### Hints for discussion

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- *Can this approach be extended to other fields of EU law?*
- *Should courts rely on the unbalanced relationship between the litigants as a basis for an extended application of ex powers beyond the scope of consumer protection and in other fields of EU law such as, e.g., data protection or non-discrimination?*

## 1.2. Courts' powers and the duty of sincere cooperation; its application in the field of asylum

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- **Art. 3, TEU.** 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.
- “Under Article 4(1) of Directive 2004/83, although it is generally for the applicant to submit all elements needed to substantiate the application, the fact remains that it is the **duty of the Member State to cooperate with the applicant** at the stage of determining the relevant elements of that application.
- This requirement that the Member State cooperate therefore means, in practical terms, that if, for any reason whatsoever, the elements provided by an applicant for international protection are not complete, up to date or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant, at that stage of the procedure, **so that all the elements needed to substantiate the application may be assembled. A Member State may also be better placed than an applicant to gain access to certain types of documents.**” (CJEU, C-277/11, M.M., para 165-166)

## 1.3. *Ex officio* powers and duty of cooperation: a cross-sectoral perspectives

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- Should art. 47 CFR be interpreted in the light of the principle of sincere cooperation?
- Shall *ex officio* powers, identified by the CJEU in the field of consumer protection, be interpreted in the framework of art. 4(3), TEU, and therefore extended to cases in which the duty of sincere cooperation requires a more active role for the court in order to ensure the effective application of EU law and the effective protection of rights and freedoms protected by EU law?
- Or, alternatively, shall the principle-bases for *ex officio* powers in consumer protection and the duty of cooperation in asylum remain distinct with no or limited extensions to other fields?

## 2. The right to an effective remedy across sectors

### a. Examples from consumer protection

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- *Interim measures as effective remedy against infringements of consumers' fundamental rights to family home*
- “With regard in particular to the consequences of the eviction of the consumer and his family from the accommodation forming their principal family home, the Court has already emphasised the importance, for the national court, to provide for interim measures by which unlawful mortgage enforcement proceedings may be suspended or terminated where the grant of such measures proves necessary in order to ensure the effectiveness of the protection intended by Directive 93/13 (...). In the present case, the fact that it is possible for the competent national court to adopt any interim measure, such as that described in paragraph 60 of the present judgment, would suggest that adequate and effective means exist to prevent the continued use of unfair terms, which is a matter for the referring court to determine ((CJEU, C-34/13, Kusionova, paras 66-67)”

## 2. The right to an effective remedy across sectors

### ***b. Examples from non-discrimination***

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#### *Effective judicial review of private decisions*

- “Article 4(2) of Directive 2000/78, read in conjunction with Articles 9 and 10 of the directive and Article 47 of the Charter, must be interpreted as meaning that, where a church or other organization whose ethos is based on religion or belief asserts, in support of an act or decision such as the rejection of an application for employment with it, that by reason of the nature of the activities concerned or the context in which the activities are to be carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organization, it must be possible for such an assertion to be the subject, if need be, of **effective judicial review** by which it can be ensured that the criteria set out in Article 4(2) of that directive are satisfied in the particular case’ (*Egenberger* (C-414/2016) para 59).”

## 2. The right to an effective remedy across sectors

### c. *Examples from international protection*

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#### *Effective judicial review of administrative decisions*

- “Article 46(3) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, in conjunction with the first paragraph of **Article 47** of the Charter of Fundamental Rights of the European Union, is to be interpreted as meaning that a model of judicial review in matters of international protection in which the courts are endowed with a mere cassational power but in which the judicial guidance they issue in their annulment decisions is effectively being disregarded by the administrative bodies when deciding on the same case again, such as demonstrated in the case in the main proceedings, **fails to meet the requirements of effective judicial review** set out in Article 46(3) of Directive 2013/32 and interpreted in the light of the first paragraph of Article 47 of the Charter.”

(AG Bobek, *Torubarov*, C-556/17”

## 2. The right to an effective remedy across sectors

### **Hints for discussion**

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- *Does the right to an effective remedy present different features depending on the sector?*
- *E.g. should the effectiveness of interim relief be acknowledged whenever fundamental rights are at stake, regardless of the sector?*
- *E.g. should invalidity of private decisions always be available when general principles of EU law (such as non-discrimination) are infringed?*
- *E.g., should MS always ensure that, regardless of the sector, annulment of administrative decisions contrary to EU law is followed up by an effective compliance by administrative authorities whose decisions have been set aside?*

## 2.1. General principles of EU law applied to remedies and sanctions: effectiveness, proportionality and dissuasiveness

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- “according to the Court’s settled caselaw relating to the **principle of sincere cooperation**, now enshrined in Article 4(3) TEU, while the choice of **penalties** applicable to infringements of EU law remains within their discretion, Member States must ensure in particular that they are effective, proportionate and dissuasive (CJEU, C-34/13, *Kusionova*, para 59)

**Art. 11a(1), Dir. 2005/29/EC (modified by Dir. EU/2019/2161):**

- “Consumers harmed by unfair commercial practices, shall have access to **proportionate and effective remedies**, including compensation for damage suffered by the consumer and, where relevant, a price reduction or the termination of the contract. Member States may determine the conditions for the application and effects of those remedies. Member States may take into account, where appropriate, the gravity and nature of the unfair commercial practice, the damage suffered by the consumer and other relevant circumstances.

## 2.1. General principles of EU law applied to remedies and sanctions: effectiveness, proportionality and dissuasiveness

### Hints for discussion

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- Are effectiveness, proportionality and dissuasiveness (all) based on general principles of EU law (such as 'sincere cooperation'), due to be applied in all fields of EU law or at least when rights and freedoms protected by EU law are infringed (whatever the sector)?
- Or, should they be applied only if secondary legislation, and national legislation implementing it, provide so?  
For the negative, see AG, Bobek, Case C-205/20, NE
- Should these principles apply differently across sectors?
- Should they apply differently to sanctions and to remedies?
- E.g., should infringer's profits be taken into account for both (sanctions and remedies) and regardless of the sector?

### 3. Art. 47 and the role for collective redress

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- Should art. 47 equally apply to both individual and collective redress and to the coordination between the two?
- Does the right to an effective remedy include the right to choose for individual or collective effective remedies?
- When could access to individual redress be limited (e.g. through suspension of individual proceedings) pending a collective redress procedure concerning the same infringement?
- Should the role of collective redress (and its relationship with individual redress) be different across sectors?

### 3. Art. 47 and the role for collective redress

## Guidelines based on the principle of effectiveness (consumer protection)

- «Article 7 of Directive 93/13 must be interpreted as precluding a provision of national law (...) which requires a court, before which an individual action has been brought by a consumer seeking a declaration that a contractual term binding him to a seller or supplier is unfair, automatically to suspend such an action pending a final judgment concerning an ongoing collective action brought by a consumer association on the basis of Article 7(2) of Directive 93/13 seeking to prevent the continued use, in contracts of the same type, of terms similar to those at issue in that individual action, without the relevance of such a suspension from the point of view of the protection of the consumer who brought the individual action before the court being able to be taken into consideration and without that consumer being able to decide to dissociate himself from the collective action. (CJEU, *Salès Sinuès*, C-381/14, para 43)
- Such a national rule therefore appears incomplete and insufficient and does not constitute either an **adequate or effective means of bringing to an end the continued use of unfair clauses**, contrary to the requirements of Article 7(1) of Directive 93/13.  
(*Id.*, para 39)

# **B.** **The project methodology**

# A methodology based upon cooperation between judges and scholars

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- ✓ **Mutual learning process**
  - The role of the European Network of national judges and legal experts
- ✓ **Building instruments apt for future use**
- ✓ **The “judicial dialogue” approach and the application of the CFR**
- ✓ **Use of comparative law**

# A core dimension: the Judicial dialogue (EU – national courts)

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Vertical dimension

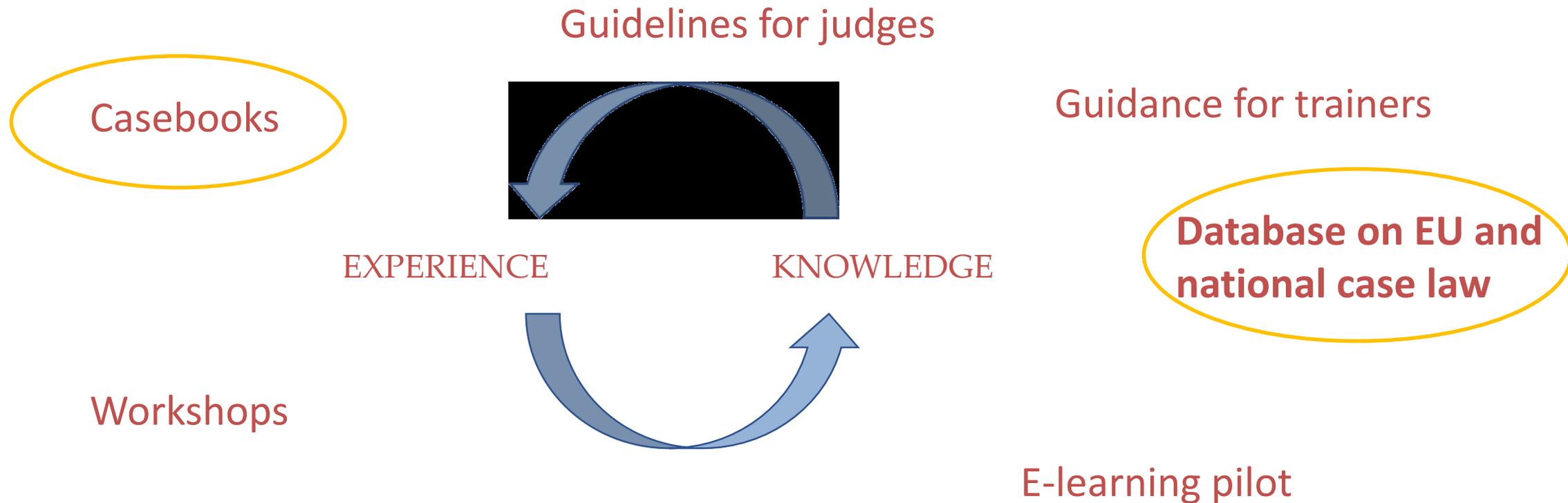
Horizontal dimension

- Major role of article 47, CFR, and other general principles of EU law

Impact upon national caselaw

# A map of Project instruments

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«Training the trainer» programme

# Project instruments

## The Horizontal Workshop Materials

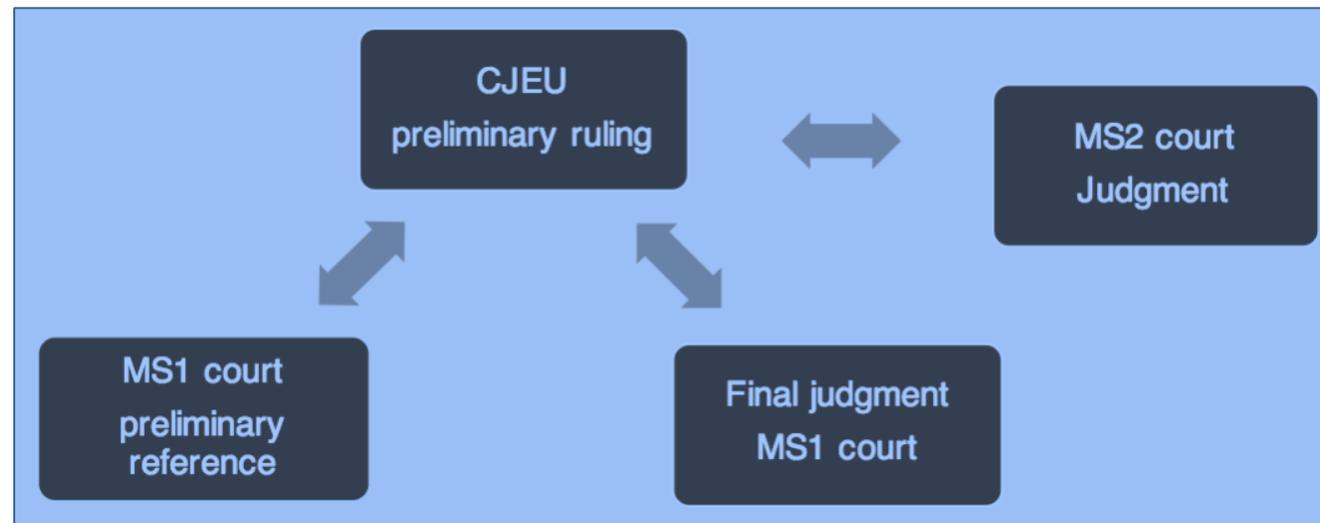
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- **Sec. 1** – The role of courts, art. 47 CFR and the general principles of EU law
- **Sec. 2** – Sanctions and remedies
- **Sec. 3** – Collective redress
  - *Question-based*
  - *Case-based*
  - *Work-in-progress*
- *Contributions about national caselaw will be appreciated and included in more advanced versions*

## Project instruments

# Database on EU and national cases

**Main objective:** impact on MSs case law of art. 47 CFR and of effectiveness, proportionality and dissuasiveness principles



<https://www.fricore.eu/content/database-index>

[Go to the search index](#)

# France, Court of Cassation, 10 October 2018 15-26.093

## Case summary

### Deciding Body

Court of Cassation  
*Cour de Cassation*  
France

### National case details

Date of decision: 10.10.18  
Registration ID: 15-26.093  
Instance: Cassation (review)  
Case status: Final

### Area of law

Health law

### In judicial dialogue

Judgement of the CJEU (First Chamber), 16 February 2017, Case C-219/15 Elisabeth Schmitt vTÜV Rheinland LGA Products GmbH

## Identification of the case

### National law sources

- Articles R. 665-1 to R. 665-47 of the Public Health Code and Article R. 5211-40 of the same Code

### EU law sources

- Council Directive 93/42/EEC of 14 June 1993 concerning medical devices

# C. The workshop structure

# C. The workshop structure

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**Key note speeches** (plenary session)

**Roundtables** (plenary sessions)

**Practical sessions** (in smaller groups) for the discussion on hypothetical cases

*Topics:*

- Access to Justice and the Role of Courts Between the Duty of Cooperation and Ex Officio Powers
- Effective, Proportionate, Dissuasive Sanctions and Remedies Across Different Areas of EU Law
- Access to Justice and Collective Redress

**Thank you for your kind attention**

***Enjoy the FRICoRe Workshop on  
“Fundamental Rights and Effective  
Judicial Protection across Sectors.  
Uniformity or Diversity?”***