

University of Trento, 27-28 May 2021

Introduction to the FRICoRe Trans-national Training Workshop on

THE JUDICIAL PROTECTION OF HEALTH AS A FUNDAMENTAL RIGHT

P. Iamiceli – University of Trento



“Fundamental Rights In Courts and Regulation” – FRICoRe

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Project Partners

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

- A. The FRICoRe project: objectives and main issues*
 - ❖ The main issues addressed in the field of Health

- B. The methodology and the Project training instruments*
 - ❖ The Casebook on Judicial Protection of Health as a Fundamental Right

- C. The workshop structure*

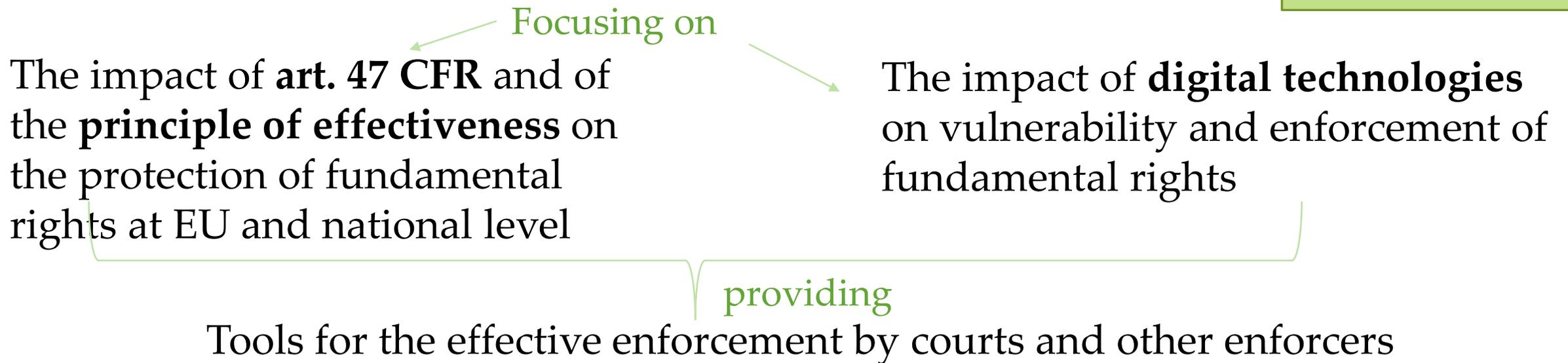
A. The Project objectives:
a focus on training judges in
the field of Health

The FRICoRe project

The core objectives

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



The main objective of this workshop

What is the role of the Charter FR, and the one of general principles of EU law, in the field of Health?

1. The right to health as a fundamental right
2. The role of EU general principles in striking the balance between health and other FRs and freedoms
3. The role of art. 47 CFR and the principle of effective judicial protection in the field of health

1. The right to health as a fundamental right

HEALTH AS A FUNDAMENTAL RIGHT

Right to life
(2 ECHR, CFR)

NATIONAL AND SUPRANATIONAL LAW

Right to physical and mental integrity
(3 CFR)

Respect for private life
(8 ECHR, 7 CFR)

Prohib. inhuman and degrading treat.
(3 ECHR, 4 CFR)

RIGHT TO HEALTHCARE AS A SOCIAL RIGHT

NATIONAL LAW

Art. 35, CFR - Healthcare

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. (...)

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(...) A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities

1.1. The role of European Courts: (i) the CJEU

Preliminary remark

- The scope of application of the EU Charter within the field of action of EU law
- *Art. 6, TFEU*: The Union shall have competence to carry out actions to **support, coordinate or supplement the actions of the MSs**. The areas of such action shall, at EU level, be: (a) protection and improvement of human health (...)
- *Art. 168, TFEU*: **A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities**. Union action, which shall complement national policies, shall be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources and danger to physical and mental health. Such action shall cover the fight against major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education, and monitoring, early warning of and combating serious cross-border threats to health.

(i) the CJEU and MSs' duty to exercise discretion in line with art. 168 TFEU

- *Main areas interested by the application of art. 168 TFEU:*
 - Environment, food safety, consumer protection, immigration and asylum, free movement of people, goods and services, etc
- *E.g., Commission v. Italy (C-644/18, 10 November 2020): “the need to ensure clean air serves the fundamental interest of protecting human health and the discretion of the competent authorities should be consistent with that imperative” (para 124)*

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(i) the CJEU and the EU's duty to take legislative action

- *E.g., Pillbox 38UK (C-477/14, par. 116)*: “The fact that tobacco products have been able to benefit for many years from advertising campaigns cannot under any circumstances constitute a reason requiring the EU legislature to allow such campaigns also for electronic cigarettes. On the contrary, as soon as it became aware of serious scientific information alleging the existence of potential risks to human health to which a relatively new product on the market might give rise, **the EU legislature was required to act in accordance with the precautionary principle** in the second sentence of Article 35 of the Charter, Article 9 TFEU and Articles 114(3) TFEU and 168(1) TFEU which require it to ensure a high level of protection of human health in the definition and implementation of all Union policies and activities.”

(i) the CJEU and the EU's duty to apply the precautionary principle correctly: the role of science

- *E.g., C 616/17, Blaise, 1 October 2019*: “where there is **uncertainty as to the existence or extent of risks to human health**, protective measures may be taken without having to wait until the reality and seriousness of those risks become fully apparent. Where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because the results of studies conducted are inconclusive, but the **likelihood of real harm to public health persists should the risk materialise**, the precautionary principle justifies the adoption of restrictive measures”
- “A **correct application of that principle** in the area covered by Regulation No 1107/2009 presupposes, first, identification of the potentially negative consequences for health of the use of the active substances and plant protection products falling within its scope, and, second, a comprehensive assessment of the risk to health based on the most reliable scientific data available and the most recent results of international research”.

2. The role of health in the limitation of other FRs and freedoms

- **Art. 52(1), CFR:**
 - «Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the **principle of proportionality**, limitations may be made only if they are necessary and genuinely meet **objectives of general interest** recognised by the Union or the need to **protect the rights and freedoms of others**»
 - The right to health as a fundamental right and a subject of general interest

2.1. E.g., health v. freedom to conduct a business

- *E.g.*, CJEU, C-230/18, para 74: the restriction on freedom of establishment that national legislation, such as that at issue in the main proceedings, which confers on an administrative authority the power to decide to close with immediate effect a commercial establishment on the ground that it suspects the exercise, within that establishment, of a prostitution business without the authorisation required by that regulation, must be regarded as being **justified by overriding reasons in the public interest**, and suitable for securing the attainment of the objectives pursued by the legislation, namely the prevention of the commission of criminal offences against persons who engage in prostitution and **the protection of public health**.

2.2. Public health v. blood donors' rights: the proportionality principle

- *C-528/13, Léger, 29 April 2015*: "It must be determined whether the permanent contraindication to blood donation provided for in the Decree of 12 January 2009 for a man who has had sexual relations with another man none the less satisfies the conditions laid down by Article 52(1) of the Charter in order to be justified. (...) the measures laid down by national legislation must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation; when there is a choice between several appropriate measures, recourse must be had to the least onerous among them, and the disadvantages caused must not be disproportionate to the aims pursued.
- (...) In a case such as that in the main proceedings, that principle is respected only where a high level of health protection for the recipients cannot be ensured by effective techniques for detecting HIV which are less onerous than the permanent deferral from blood donation for the entire group of men who have had sexual relations with other men (...), the tests requiring to be performed according to the most recent scientific and technical procedures.

2.3. The pandemic challenge and the collective dimension of health

- *ECtHR, Vavříčka and Others v. the Czech Republic, Appl no. 47621/13, 8 April 2021* [out of the Covid-19 context]
- (...) The Court considers that it cannot be regarded as disproportionate for a State to require those for whom vaccination represents a remote risk to health to accept this universally practised protective measure, as a matter of **legal duty and in the name of social solidarity**, for the sake of the small number of vulnerable children who are unable to benefit from vaccination. In the view of the Court, it was validly and legitimately open to the Czech legislature to make this choice, which is fully consistent with the rationale of protecting the health of the population. The notional availability of less intrusive means to achieve this purpose, as suggested by the applicants, does not detract from this finding.
- 310. The Court would clarify that, ultimately, the issue to be determined is **not** whether a different, less prescriptive policy might have been adopted, as has been done in some other European States. **Rather**, it is whether, in striking the particular balance that they did, the Czech authorities remained within their **wide margin of appreciation** in this area. It is the Court's conclusion that they did not exceed their margin of appreciation and so the impugned **measures can be regarded as being "necessary in a democratic society"**.

3. Health and effective judicial protection

- Art. 47, CFR and the principle of effective judicial protection in the field of health, e.g. (immigration and asylum):
 - *C-562/13, Moussa Abdida*: “In the very exceptional cases in which the removal of a third country national suffering a serious illness to a country where appropriate treatment is not available would infringe the principle of non-refoulement, Member States cannot therefore, as provided for in Article 5 of Directive 2008/115, taken in conjunction with Article 19(2) of the Charter, proceed with such removal. (...) That interpretation is supported by the explanations relating to **Article 47 of the Charter**, to the effect that the first paragraph of that article is based on **Article 13 ECHR** (...). Indeed, the ECtHR has held that, when a State decides to return a foreign national to a country where, there are substantial grounds for believing, he will be exposed to a real risk of ill-treatment contrary to Article 3 ECHR, **the right to an effective remedy provided for in Article 13 ECHR** requires that a remedy enabling **suspension of enforcement of the measure authorising removal should, ipso jure, be available to the persons concerned** (...).

The main issues addressed in this workshop

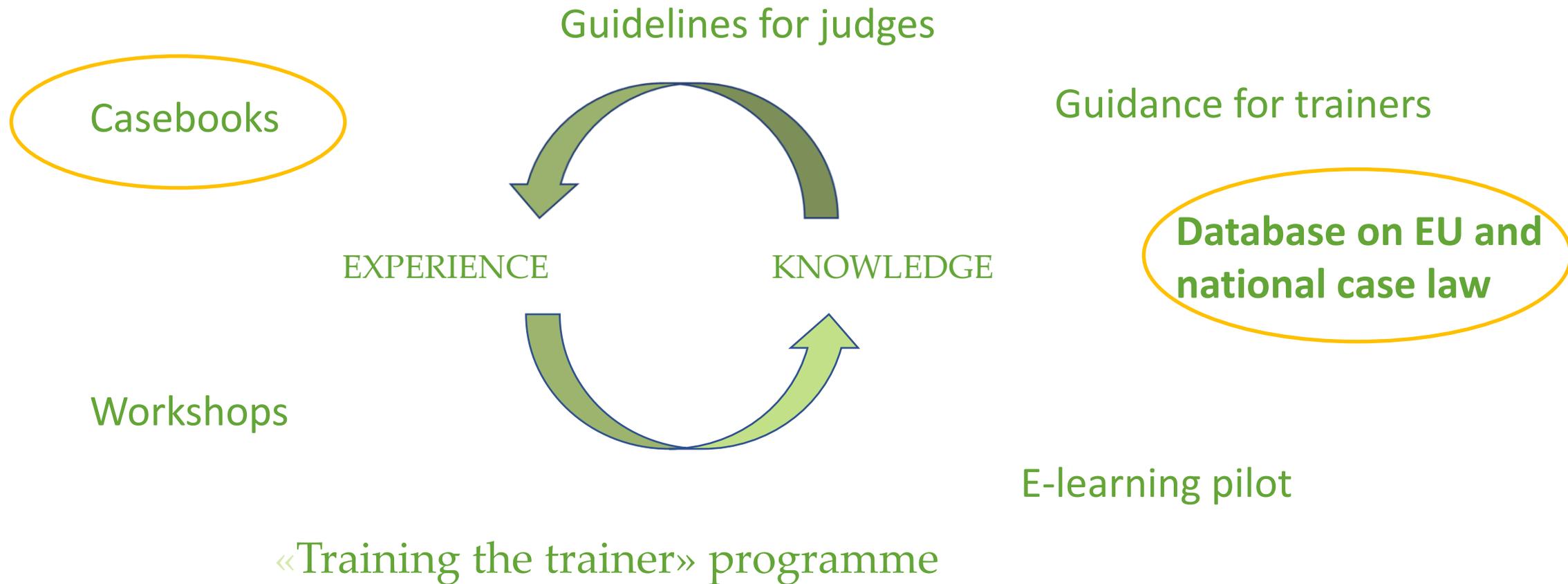
- i) Whether the need to ensure an **effective protection of health** has an impact on the definition of duties imposed on states, individuals and organisations and on the choice and the functioning of remedies available for the right holder, with special regard to cases in which the right to health is violated together with other rights (e.g., consumers' rights, asylum seekers' rights, etc.);
- ii) Whether the need to **balance the right to health with other rights and freedoms** calls for a peculiar application of the principle of proportionality, being the interests at stake potentially linked with the right to life and, in many instances, human dignity;
- iii) Whether the state of emergency stemmed from the **current pandemic** and the global crisis caused by it are determining a change in the way in which courts ensure effective protection of the right to health and strike a balance between the latter and other fundamental rights and freedoms.

B. The project methodology

A methodology based upon cooperation between judges and scholars

- ✓ **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 map of Project instruments



Project instruments

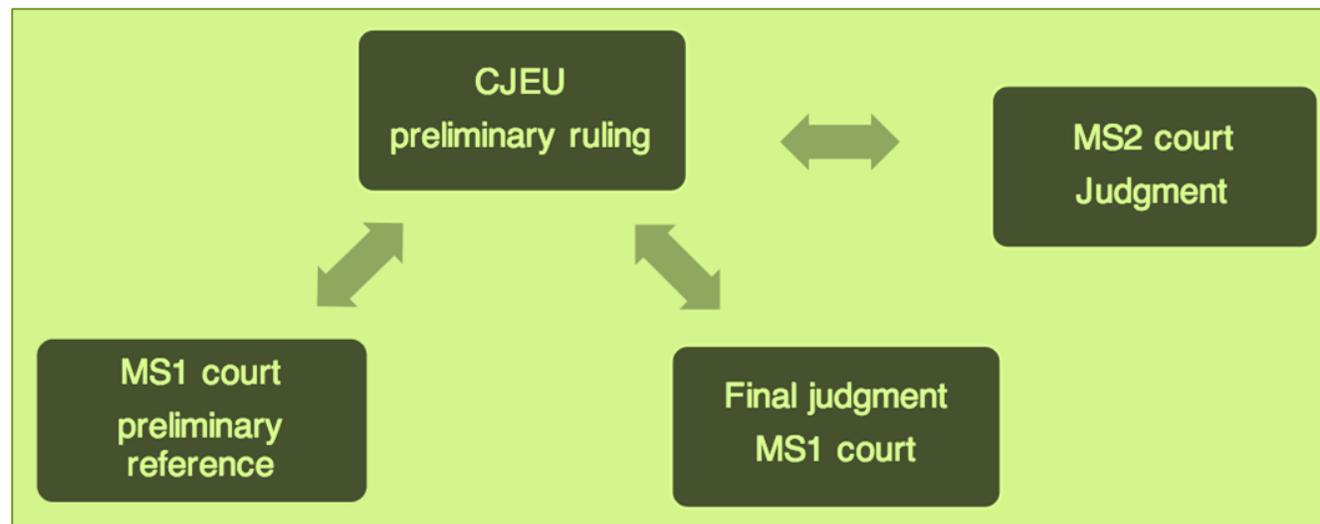
The FRICoRe Casebook on Health

- **Ch. 1** – Effective protection of health and cross-border healthcare
- **Ch. 2** – Health and consumer protection
- **Ch. 3** – Food safety and effective protection of health
- **Ch. 4** – Health and data protection
- **Ch. 5** – Health and non-discrimination
- **Ch. 6** – Migration, Asylum and Health
- **Ch. 7** – Health and the Covid-19 pandemic

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

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Key note speeches (plenary session)

Roundtables (plenary sessions)

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

Topics:

- The horizontal dimensions of health protections: the right to health in consumer protection, data protection, asylum, non-discrimination
- Balancing the right to health with other Fundamental Rights: the role of general principles of EU law
- The fight against the Covid-19: how effective has judicial protection been

Thank you for your kind attention

***Enjoy the FRICoRe Workshop on
Health as a Fundamental Right!***