

**Romania, Court of Justice of the European Union (Grand Chamber), C-430/21 RS (Effect of the decisions of a constitutional court), ECLI:EU:C:2022:99, in connection with Romanian Constitutional Court, Decision no. 390/8 June 2021, published in the Official Monitor of Romania no. 612 of 22.06.2021**

Member State

 Romania

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Topic

rule of law, independence of the judiciary

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Sector

role of national higher courts; disciplinary proceedings; use of the preliminary reference procedure; judicial cooperation

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Deciding Court Original Language

Court of Justice of the European Union / Curtea Constitu?ional? a României

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Deciding Court English translation

Court of Justice of the European Union / Romanian Constitutional Court

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Registration N

C-430/21 RS

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Date Decision

22.02.2022

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ECLI (if available)

ECLI:EU:C:2022:99

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National Follow Up Of (when relevant)

3.7.1. The Judgment of the Court in the Case C-430/21 RS represents the response to the request made by a national ordinary court, Curtea de Apel Craiova (Court of Appeal, Craiova, Romania) as follow-up of the Decision no. 390/8 June 2021 of the Romanian Constitutional Court. 3.7.2. The Decision no. 390/8 June 2021 of the Romanian Constitutional Court is the follow-up of the CJEU (Grand Chamber) Judgment in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociația Forumul Judecătorețelor din România (AFJR) of 18 May 2021, ECLI:EU:C:2021:393. By this Decision, and notwithstanding the criteria proposed by the Grand Chamber in the aforementioned case, the Romanian Constitutional court found the legal dispositions concerning the Secția pentru Investigarea Infracțiunilor din Justiție (Section for the investigation of offences committed within the judicial system; 'the SIJ'), established within the Parchetul de pe lângă Înalta Curte de Casație și Justiție (Public Prosecutor's Office at the High Court of Cassation and Justice, Romania) to be constitutional.

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## EU legal sources and CJEU jurisprudence

Article 2 and the second subparagraph of Article 19(1) TEU and of Article 47 of the Charter of Fundamental Rights of the European Union

e.g.: Asociația 'Forumul Judecătorețelor din România' and Others (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393); Judgments of 6 October 2020, État luxembourgeois (Right to bring an action against a request for information in tax matters), C-245/19 and C-246/19, EU:C:2020:795; Judgement of 20 April 2021, Repubblika, C-896/19, EU:C:2021:311; Judgment of 21 December 2021, Euro Box Promotion and Others, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034; Judgments of 24 June 2019, Commission v Poland (Independence of the Supreme Court), C-619/18, EU:C:2019:531

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## ECtHR Jurisprudence

N/A

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## Subject Matter

rule of law – independence of the judiciary – primacy of EU law – alleged lack of jurisdiction of a national court to examine the conformity with EU law of national legislation found to be constitutional by the constitutional court of the Member State concerned – disciplinary proceedings

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## Legal issue(s)

In the context of the conflicting Judgments mentioned at point 3.7, the case deals with the Romanian ordinary courts' dilemma whether to comply with the case-law of the national Constitutional Court, or with that of the Court of Justice, when deciding whether they have jurisdiction to examine the conformity with EU law of national ordinary legislation affecting the independence of the judiciary. It also questions the compatibility with EU law of national legislation allowing disciplinary penalties to be imposed on a judge who has examined the conformity with EU law of a national provision in breach of a decision of the national constitutional court.

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## Request for expedited/PPU procedures

The referring court asked the Court of Justice for the reference for a preliminary ruling to be determined pursuant to the urgent preliminary-ruling procedure or, in the alternative, pursuant to the expedited or accelerated procedure, arguing that the case concerned a serious undermining of the independence of the Romanian courts and given the uncertainties associated with the national

legislation at issue in the main proceedings, likely to have an impact on the functioning of the system of judicial cooperation constituted by the preliminary-ruling mechanism. The President of the Court granted the request that the reference be determined pursuant to the expedited procedure, considering that, in view of the fundamental importance for Romania and the EU legal order of the questions relating to the relationships between the ordinary courts and the constitutional court of a Member State, as well as to the principle of judicial independence and the primacy of EU law, raised by the case, an answer from the Court within a short time was likely to remove the serious uncertainties faced by the referring court.

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### Interim Relief

N/A

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### National Law Sources

Article 148(2) and (4) of the Constitu?ia României (Romanian Constitution), Article 488-1, Article Article 488-6(1) ( of the Code of Criminal Procedure Code, Article 99(?) of the Legea nr. 303/2004 privind statutul judec?torilor ?i procurorilor (Law No 303/2004 on the rules governing judges and prosecutors) of 28 June 2004 (Monitorul Oficial al României, Part I, No 826 of 13 September 2005)

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### Facts of the case

RS was the subject of criminal proceedings, at the end of which he was convicted. His wife lodged a criminal complaint alleging offences of abuse of process and abuse of office committed in the course of the abovementioned criminal proceedings by a prosecutor and two judges. Since that complaint also concerned the judiciary, its examination fell within the competence of the Sec?ia pentru Investigarea Infrac?iunilor din Justi?ie (Section for the investigation of offences committed within the judicial system; 'the SIIJ'), established within the Parchetul de pe lâng? Înalta Curte de Casa?ie ?i Justi?ie (Public Prosecutor's Office at the High Court of Cassation and Justice, Romania). A prosecutor of the SIIJ instituted criminal proceedings against the judges referred to in RS wife's complaint. Later on, RS brought an action before the referring court, seeking to challenge the excessive duration of the criminal proceedings. The referring court considered that, in order to rule on that action, it had to examine the compatibility with EU law of national legislation which established the SIIJ. Since the case-law of CJEU and of the Romanian Constitutional Court differed on that matter and the disapplication of the latter's decisions by the national judges triggered disciplinary sanctions, the ordinary court referred several questions to the CJEU.

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### Reasoning (role of the Charter or other EU, ECHR related legal basis)

According to the Grand Chamber, the second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 TEU and Article 47 of the Charter, must be interpreted as precluding national rules or a national practice under which the ordinary courts of a Member State have no jurisdiction to examine the compatibility with EU law of national legislation which the constitutional court of that Member State has found to be consistent with a national constitutional provision that requires compliance with the principle of the primacy of EU law. The same provisions of the Treaty preclude national rules or a national practice under which a national judge may incur disciplinary liability on the ground that he or she has applied EU law, as interpreted by the Court, thereby departing from case-law of the constitutional court of the Member State concerned that is incompatible with the principle of the primacy of EU law. The Grand Chamber arguments take into account the essential characteristics of the EU legal order and mainly adress the obligation of the

Member States, under Article 19 TEU, to preserve the independence of the bodies that, at the national level, interpret and enforce EU law. In particular, as regards the relationships between the ordinary courts and the constitutional court of a Member State, the Court notes that although the organisation of justice in the Member States, including the establishment, composition and functioning of a constitutional court, falls within the competence of those Member States, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law.

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#### Relation of the case to the EU Charter

Although Article 47 of the Charter was relied on by the referring court, the CJEU considered that it was not applicable to the case in the main proceedings. The Court pointed out that the recognition of the right to an effective remedy in a given case presupposed that the person invoking that right was either relying on rights or freedoms guaranteed by EU law or was the subject of proceedings constituting an implementation of EU law, within the meaning of Article 51(1) of the Charter, which was not the case in the main proceeding. Also, the choice made by the Court not to rely on the Charter but rather on the principle dispositions of TEU indicates that there cannot be a variable geometry on judicial independence in Europe, all Member States being bound by the same uniform EU rule of law framework.

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#### Relation between the EU Charter and ECHR

The ECHR was not referred to in this case.

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#### Use of Judicial Interaction technique(s)

strategic use of the preliminary reference mechanism by the national ordinary courts in order to disapply the caselaw of the national constitutional court that is in breach of EU law; consistent interpretation with the EU law of the national constitutional provisions by the national referring court, as opposed to the interpretation provided by the constitutional court; disapplication of national law in favour of the EU law by the national referring court; preserving the efficiency of the judicial cooperation mechanism through art. 267 TFEU

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#### Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

The national referring court pointed out that the conflicting perspectives of the CJEU and respectively the Romanian Constitutional Court on the judicial independence criteria when put into practice were likely to undermine the coherent application of EU law horizontally at the national level (i.e. by different national ordinary courts).

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#### Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

6.3.1. The referring court refers more broadly to the settled case-law of the Court of Justice according to which any national court has the obligation to disapply, in the case before it, any provision of national law which is contrary to a provision of EU law having direct effect, and to the binding nature of preliminary rulings given by the Court. 6.3.2. The referring court also refers to the Decision no 390/2021 of 8 June 2021, by the Curtea Constituțională (Constitutional Court) rejected as unfounded a plea of unconstitutionality raised in respect of several provisions of the legislation governing the SIIJ. In that judgment, the Curtea Constituțională (Constitutional Court) stated, inter alia, first of all, that, in so far as the primacy accorded to EU law is limited in the

Romanian legal order by the requirement of respect for national constitutional identity, it was incumbent upon it to ensure the supremacy of the Romanian Constitution on Romanian territory. Consequently, that court considers that although an ordinary court has jurisdiction to examine the conformity with EU law of a provision of national legislation, such an ordinary court has no jurisdiction to examine the conformity with EU law of a national provision which has been found to comply with Article 148 of the Romanian Constitution by the Curtea Constituțională (Constitutional Court). In addition, according to the Curtea Constituțională (Constitutional Court), point 7 of the operative part of the judgment of 18 May 2021, Asociația 'Forumul Judecătorilor din România' and Others (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393), is unfounded in the light of the Romanian Constitution. While Article 148 of that constitution enshrines the primacy of EU law over conflicting provisions of national legislation, the reports drawn up pursuant to Decision 2006/928, by reason of their content and effects, do not constitute rules of EU law which a national court should apply as a matter of priority, by disapplying the conflicting national rule. Lastly, the Curtea Constituțională (Constitutional Court) stated in that same judgment No 390/2021 of 8 June 2021 that if some courts were to disapply, of their own motion, national provisions which they considered to be contrary to EU law while others were to apply the same provisions, considering them to be consistent with EU law, legal certainty would be greatly undermined, which would lead to the principle of the rule of law being infringed.

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#### Strategic use of judicial interaction technique (purpose aimed by the national court)

The referring court used the preliminary ruling mechanism as a strategic litigation tool, in order to circumvent a decision of the national Constitutional Court by which the latter prohibited the control of compatibility of the national legislation with the EU law once the national legislation had been declared constitutional, under disciplinary sanctions. Given the potential systemic effect of such decision, the referral made by the national ordinary court serves two purposes: preserving the independence of the judiciary and granting primacy of EU law at the national level.

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#### Impact on Legislation / Policy

The Grand Chamber Judgment in the RS case was decisive for the entry into force on 16 December 2022 of the Romanian amended Laws of Justice. As a notable first result, the disciplinary offences generating concerns for the judicial independence and the primacy of EU law were de jure abolished. Currently, while non-compliance with the Constitutional Court's decisions is no longer regulated as a distinct disciplinary offense within the text of the law, it can still engage the disciplinary liability of the judge or the prosecutor to the extent that it is proven they exercised their functions in bad faith or gross negligence. Second, as part of the entering into force of the new legislation, in its Decisions no. 520/2022 and 521/2022 of 9 November 2022, delivered within the framework of the a priori control of constitutionality of the above-mentioned laws, the Romanian Constitutional Court rejected the exceptions of non-constitutionality raised by the Romanian Ombudsman and several deputies, of which some regarded this very change (see 7.3 below). In addition, the Minister of Justice had to defend the modification against the accusation that it weakened the authority of the Constitutional Court and did so by referring to the Judgement in RS. See <https://www.linkedin.com/pulse/comunicat-de-pres%C4%83-drept-la-replic%C4%83-c%C4%83t%C4%83lin-predoiu/?originalSubdomain=ro>

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#### Notes on the national implementation of the preliminary ruling by the referring court

The outcome achieved by the referring court is consistent with the CJEU doctrine on the primacy of EU law in its relation with the independence of the judiciary. The referring court uses the Grand Chamber Judgement in RS as full support empowering it to disapply the consequences of the The Decision no. 390/8 June 2021 of the Romanian Constitutional Court and apply the criteria indicated in the CJEU (Grand Chamber) Judgement in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociația Forumul Judecătorelor din România (AFJR) of 18 May 2021.

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Did the national court quote case law of the CJEU/ECtHR (in particular cases not already referred to by the CJEU in its decision) or the Explanations?

The national referring court did not quote other judgements of the CJEU/ECtHR than those mentioned at point 4.3 and that were also referred to in the CJEU RS Judgement.

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Did the national court quote soft law instruments, such as GRECO Reports, Venice Commission, CEPEJ Reports, or CCEJ Reports?

The standards and recommendations of GRECO and the Venice Commission are mentioned by the ordinary referring Court in its judgement following the Grand Chamber Judgement in the RS case.

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Did the national court take into account national case law on fundamental rights?

The national case law on fundamental rights was not considered an important element in this case.

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If the court that issued the preliminary reference is not a last instance court, and the “follow up” was appealed before a higher court, include the information

Pursuant to national procedural law, the judgment of the national court subsequent to the Grand Chamber Judgment was final.

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Impact on national case law from the same Member State or other Member States

The RS Judgment is for the moment too recent for an accurate evaluation of its impact within the national courts practice. However, it appears to have supported a more friendly attitude towards EU law from the part of the national Constitutional Court and supported the government through the Minister of Justice in the successful attempt to determine the change of the national relevant legislation (see points 7.1 and 7.3). The RS Judgment also functions as an escort argument supporting the national courts to apply the CJEU (Grand Chamber) Judgment in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociația Forumul Judecătorelor din România (AFJR) of 18 May 2021 (as described at point 7.2). Similarly and predictably, the RS Judgment will also support the national ordinary courts when applying the subsequent Judgment of the Court (Grand Chamber), in Case C-107/23, PPU [Lin] of 24 July 2023, ECLI:EU:C:2023:606.

In its Decision no.520/2022 the Romanian Constitutional Court rejected the exception of unconstitutionality raised by the Romanian Ombudsman concerning the modification of the legal provision imposing sanctions for the judges who disobey the decisions of the national



Constitutional Court. Within that procedure, the Government presented its observations and relied heavily on the EU relevant caselaw concerning Romania, also mentioning the RS Judgement. Contrary to this line of arguments, a separate opinion presented by one of the constitutional judges considered the RS Judgment to be irrelevant, as only covering exceptional situations.  
[https://www.ccr.ro/wp-content/uploads/2022/11/Decizie\\_520\\_2022.pdf](https://www.ccr.ro/wp-content/uploads/2022/11/Decizie_520_2022.pdf)

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#### [Connected national caselaw / templates](#)

Judgment of the Court (Grand Chamber) in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociația Forumul Judecătorilor din România (AFJR) of 18 May 2021, ECLI:EU:C:2021:393; Judgment of the Court (First Chamber), C-817/21, R.I. v Inspecția Judicială and N.L., of 11 May 2023, ECLI:EU:C:2023:391; Judgment of the Court (Grand Chamber), in Case C-107/23, PPU [Lin] of 24 July 2023, ECLI:EU:C:2023:606.

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#### [\(Link to\) full text](#)

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=254384&pageIndex=0&doclang=EN&mo>  
; [https://www.ccr.ro/wp-content/uploads/2021/06/Decizie\\_390\\_2021.pdf](https://www.ccr.ro/wp-content/uploads/2021/06/Decizie_390_2021.pdf)

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