

Ruling No. 3-18-529 / 137 of the Administrative Chamber of the Supreme Court of 19 May 2020

(Environment - Directive 92/43/EEC - Conservation of natural habitats - Special areas of conservation - Assessment of the effects of a plan or project on a special area of conservation - Preliminary assessment to determine whether the effects of the plan or project on a special area of conservation should be assessed - Measures that may be taken into account

Two environmental organizations had appealed to the court to challenge the plan determining the location of the Rail Baltic rail line. Among the allegations presented by the petitioners, the Supreme Court considered important the position regarding the Natura bird area, which the proposed railway line did not cross, but crossed at a distance of about 100 meters.

The Supreme Court did not consider it correct that in assessing the environmental impact of the railway route, a distinction was made between the direct and indirect effects of the railway (direct effects if the route physically crosses a Natura site and indirect effects if the route passes through a protected area). Following the judgment of the Court of Justice in Case C-142/16, *Commission v. Germany*, the Natura site may be significantly affected by activities both inside and outside the site, and the indirect impact of the proposed activity on the Natura site may not be less significant than the direct impact. The preliminary Natura assessment should analyze the situation of the Natura site and any changes that may occur as a result of the proposed activity. At the same time, the Natura site may also be affected by damage to habitats outside the site (C-461/17 *Holohan*). In this case, the preliminary assessment had recognized the possibility of disturbing protected birds (eagles, black storks, wild boars) within a radius of 1 km of the railway, but no appropriate assessment under Article 6(3) of Directive 92/43/EEC had been carried out.

The Supreme Court also stressed that mitigation measures should not be taken into account in the pre-assessment phase.

- a complete and accurate analysis of mitigation measures must be conducted at the appropriate assessment stage (C-323/17 *People Over Wind and Sweetman*). While the Supreme Court considered the road corridor modification to be a permissible adjustment to the planning solution at the preliminary assessment stage, the requirements to minimize railway noise and plan construction work outside the breeding season are mitigation measures. The relocation of the corridor did not preclude a significant impact on the birding area and therefore an assessment was required.

The Supreme Court also explained the substantive requirements for the Natura assessment and the shortcomings of the assessment to date.