DOI 10.24147/2542-1514.2019.3(2).77-83

PRECLUSION IN GERMAN ADMINISTRATIVE PROCEEDINGS

Markus Heintzen
Free University of Berlin, Berlin, Germany

Article info

Received – 2019 April 20
Accepted – 2019 May 30
Available online – 2019 September 12

Keywords

Preclusion, administrative law, administrative law court cases, principle of legal protection, European Court of Justice, Federal Constitutional Court of Germany

The subject. The article describes preclusion in German Administrative Law.

The purpose of the paper is to confirm or disprove hypothesis that the preclusion is an integral part of the administrative and judicial practice of Germany, despite its low efficiency. The main results and scope of their application. There are relations of between the constitutional principle of legal protection (Abs. 4 of Art. 19 of the Basic Law for the Federal Re- public of Germany) and preclusion. It is shown that there are different types of preclusion in German Administrative Law, depending on the status of the administrative procedure. It can occur in the administrative process between citizen and the administrative authority and in the administrative court process. In both acts there is to differ between those who plea an infringement of their own rights and those who consider the rights of third parties. Examples for preclusion from different areas of the law like tax or environmental law are given. Another aspect is the difference between formal and material preclusion. While for- mal preclusion is limited to the administrative process and does not affect the administrative court case, material preclusion effects both acts, the administrative process and the court case.

The next part concentrates on the limits set by the constitution and European law. A decision by the European Court of Justice and by the Federal constitutional court of Germany (Bundesverfassungsgericht) are presented to specify these limits. The ECJ has a stricter approach than the German constitutional court, which ruled, that preclusion does not violate the constitutional principles of legal protection and fair hearing. Nonetheless the ECJ also agreed laws that hinder abusive pleas.

Conclusions. The last part contemplates the practicability of preclusion and concludes, that the effects are relatively modest and the target of acceleration is often not attained. How- ever, the German model of preclusion has a disciplining effect on participants in administrative procedures and the judicial process; has firmly entered German administrative and judicial practice and does not contradict the constitutional guarantee of legal protection.

* *The article is prepared on materials of the report on Russian-German scientific conference "Access to justice for the shield in Germany and Russia", held in Berlin on may 11-12 2017, supported by the German research society (Deutsche Forschungsgemeinschaft) and in part supported by RFBR three years (2016-2018) research project No. 16-03-00465-ОГН "Access to the judicial protection of subjective public rights: the limits of social support and the prospects for development in the context of e-justice".

ISSN 2542-1514 (Print)

I. Preclusion in the civil and administrative process: introduction

Preclusion in jurisprudence means that legal arguments on the merits will be ignored in the legal process because they are submitted late. This does not mean missing the deadline for a good reason. Excusable, justified delay does not prevent the restoration of the missed deadline. We are talking about unjustified delays, possible procedural delays. The pre-exclusion does not affect access to a particular judicial process, but the presentation of arguments in the relevant case.

In German civil proceedings, it is a question of preventing or rejecting evidence submitted late by the plaintiff or the defendant. This corresponds to the civil procedure principle of competition (Beibringungsgrundsatz) – free submission of evidence by stakeholders, where the parties themselves, without the intervention of the court, determine which facts and arguments must be represented in the process. The regulation serves to speed up proceedings and protect against deliberate delays .

The antithesis of this principle is the research principle (Untersuchungsgrundsatz) of the administrative procedure law. Paragraph 1 § 86 of the German Code of administrative procedure (Verwaltungsgerichtsordnung-VwGO)/ hereinafter - CAS / reads: "the Court examines the circumstances of the case ex officio ... the Court is not bound by the arguments and petitions of the parties to examine the evidence." This is not consistent with the conduct of the administrative court, where the court ignores facts and evidence if they are filed late. Since the preclusion is an encumbrance on the citizen, it conflicts - in addition to the conflict with the research principle-with the guarantee of effective legal protection (para.4 Art. 19 of the Basic law of Germany /further-OZ/). Given both of these conflicts, we can say that recluse in administrative proceedings has its constitutional and legal boundaries outlined by the provisions of paragraph 4 of article 19 OZ and the principle of law, which is covered and which is based on the research principle of administrative procedure.

However, administrative law is also aware of pre-exclusive regulations. They relate to administrative litigation. In addition, they apply to administrative procedures in public administration bodies that precede judicial proceedings and have no analogues in civil law. With regard to administrative procedures, the research principle also applies, albeit in a somewhat weakened form. While the administrative court, by virtue of the law, fully investigates all the circumstances of the case itself, the administrative body makes only the establishment of these facts (the activity of establishing the circumstances of the case is narrower than their investigation). This body is also not bound by the arguments and requests of the parties to examine the evidence. The basis for the application of preclusion in administrative law is the obligations of the parties to participate in the process and the obligations of broadly understood participants in the process to promote justice.

II. Review of administrative-procedural and administrative-procedural legislation

In this section, we turn to the different types of preclusion. In the aspect of the study of the conditions of access to court is particularly important preclude in administrative procedure (administrative/pre-trial preclude), which is associated with the second type of preclusive preclusive in the judicial process (judicial preclude). With regard to pre-trial or administrative preclusion, it can be divided into types according to the following criteria: by the subject/person affected by the preclusion, by the subject areas or branches of law in which the legislator uses the instrument of preclusion , and by typical pre-exclusive effects.

1. Preclusion in administrative procedure

(a) Classification by subject affected by the preclusion

By this criterion distinguish preclude the participants of administrative procedure, and interested parties in preclusion associations and preclusion administrative authorities. Preclusions of participants of administrative procedure and interested persons are designated by generic concept individual preclusion. Stakeholder pre-exclusion means that third parties whose rights and interests are affected by the permitting procedure (e.g. a building permit) or the approval procedure of a building plan/planning project are excluded from objecting to a project that has been approved, e.g. a new motorway.

Environmental associations and other associations (unions), which have the right to participate in the proceedings of third parties on behalf of their members and the right to bring a class action, occupy a special position. Preclusive rules for unions in General similar to preclusive rules for interested persons. From such interested third parties who do not have their own rights

ISSN 2658-4050 (Online)

in the legal relationship, but declare their own interests and the interests of the public (common interests), it is necessary to distinguish third parties involved in the process, claiming their own rights, for example, neighbors in the procedures for issuing a construction permit to the developer . Finally, it is necessary to distinguish from the affected third parties other interested administrative bodies that participate, along with the responsible (authorized) administrative body, in complex administrative procedures as bearers of public interests.

So far, the types of preclusion presented referred to the position of a third party in the administrative procedure, and not to the position of its direct participants (applicants, addressees of the administrative act) or the position of the administrative body that carries out the administrative proceedings. However, German law knows the preclusion in bipolar procedure as well. An example is paragraph 1 § 66 of the Social Code I (Sozialgesetzbuch I – SGB I) of Germany. According to the specified norm the applicant (the recipient of social benefits) which is not carrying out the duties on assistance and participation in administrative procedure and thereby considerably complicating clarification of circumstances of the case, in fact the inaction authorizes suspension or the termination of providing to it social services (payments) completely or in part without further research of circumstances Another example is § 346b of the Federal Tax code (Abgabenordnung-AO), which deals with taxpayers who fail to comply with their tax filing obligations. If, for this reason, the financial authority itself issues a notification on the assessment of the tax to be paid, and the taxpayer objects to such calculation, but also under this procedure does not fulfill its obligations to participate in and facilitate administrative proceedings, then the taxpayer may be set a period with exclusive effect. Examples of such conditions and obligations of applicants can also be found in the administrative procedures for granting refugee status (and in these procedures – especially strict requirements), in the procedures for competitions and examinations.

Fiction of authorization (Genehmigungsfiktion) is the equivalent of preclusion for the Commissioner to issue an administrative decision of the authority directly participating in administrative proceedings. In accordance with § 42A of the Act on administrative procedures (Verwaltngsverfahrensgesetz – VwVfG) in conjunction with the special administrative law a permit is issued (fiction of authorization), if the administrative body does not Express its will about given him by all the rules and the full application for a permit within the statutory period.

(b) Classification by subject – by the branch of law or legislation affected

If we refer to this criterion of classification of preclusion, it can be stated that in the first place, the legislator provides for preclusive sanctions in the legislation of a dedicated spatial planning, for example, the law on road construction, urban planning, moreover, in environmental law, particularly in obtaining permission for the construction of buildings that impact on the environment (Anlagezulassungen). Important legal provisions are § 73 of the administrative procedures Act (VwVfG), § 4A of the Building Code (Baugesetzbuch – BGB) and § 2 paragraph 3 of the environmental remedies Act (Umwelt-Rechtsbehelfsgesetz – UmwRG). This is usually a process involving many people with similar interests. What stands out is the neighbors ' objection to a building permit: it is not usually a complex process involving many people with the same interests .

The above-mentioned pre-exclusive rules in social and tax law live an independent life. Specialization of the German legal order leads to the fact that in judicial decisions and scientific arguments about them not enough attention is paid to modern trends in the development of preclusion, which are disclosed in General administrative law. Conversely, the concept of preclusion in General administrative law is not linked to the study of preclusion in particular administrative areas. Only with the adoption of the Law on the harmonization of planning procedures (Planungsvereinheitlichungsgesetz - PlVereinhG) and the Act on legal remedies in environmental matters (UmwRG) in the General part of administrative law there has been some harmonisation of the various cases of the use of preclusion

(C) Differences between formal and material preclusion

The distinction between formal and substantive preclusion runs through all areas and branches of law. In a purely formal preclusion, its effect is limited to proceedings before an administrative body. Accordingly, the statement of the merits of the case and the facts, excluded in the administrative procedure in connection with the applied preclusion, in the trial is again possible. Material preclusion means the exclusion of objections, facts, evidence not only in the administrative and procedural, but also in the subsequent judicial process. The formal prelude seems somewhat inconsistent, but it is a misleading impression. It allows the administering authority to

ISSN 2542-1514 (Print)

complete the procedure, without violating the principle of research and expect that will be reduced due to preclusive driven mass flow of applicants to the court – not least because of the duration and cost of the trial. Formal pre-exclusion in its purest form is less interference with the procedural rights of the persons concerned and therefore easier to justify from the constitutional point of view.

2. Preclusion in the administrative judicial process

"Material preclusion" is a good transition from administrative - procedural to administrative-judicial preclusion. There are two types of preclusion in the judicial process: administrative-accessory (additional to administrative-procedural) and judicial-Autonomous. Administrative preclude the accessory would be an extension of the administrative preclusion in the trial (this is also the material preclude). Such an extension may be mandatory by law or left to the discretion of the courts. An example of the latter is the possibility set out in paragraph 3, paragraph 1, § 76 of the financial litigation Act (FGO).

From the material preclusion, which assumes that the consequences of misconduct in administrative procedure are relevant in administrative litigation, different preclusive rules that relate to misconduct only in the trial. Such rules are contained in CASS, and the laws about the proceedings to financial disputes, the proceedings of social dispute, which is meaningful also cover the relevant regulation (§§ 87b CAS /VwGO/, 79b of the Act on proceedings for financial disputes /Finanzgerichtsordnung – FGO/, 106a of justice Law of social disputes /Sozialgerichtsgesetz – SGG/). According to § 87b CAS (VwGO), for example, the court may set a time limit for the plaintiff or, respectively, the parties to present evidence and may reject what is submitted to the court late, as well as decide the case without further examination of the evidence. Both decisions, made within the discretion of the court, are not separate from each other, but they can be challenged only together with the final decision on the results of the process. It is usually a ruling (cf. 2 § 146 CASS /VwGO/).

III. European law and constitutional law

In this section we will consider the European legal and constitutional legal framework that determines the content of pre-exclusive rules in the current legislation.

1. Decision of the EU Court of Justice of 15 October 2015

With regard to European law, as a General rule, EU member States have procedural and legal autonomy in the implementation of EU law. However, this autonomy is not unlimited, especially in the field of environmental law, as was relatively recently confirmed in the judgment of the court of Justice of the European Union of 15 October 2015 .

The case challenged a German injunction that established a material pre-exclusion for environmental associations. This requirement was found to be incompatible with two European Union Directives that guaranteed the public, whose rights are affected by projects that have an impact on the environment, "free" or, accordingly, sufficiently broad access to the courts. Arguments relating to legal security and procedural efficiency have not been sufficient for the EU court of Justice to justify the restrictions, despite the fact that the national legislator is given the opportunity to issue orders for the purpose of ensuring the effectiveness of trials to exclude abuse of rights or false arguments. The EU Court does not give a more detailed reason why both arguments about legal security and procedural efficiency are not convincing.

The decision of the ECJ does not concern administrative procedure law in its entirety. It is a matter of the material preclusion of associations in processes that are influenced by European environmental law. In this area, and the changes that are currently contemplated by the German legislator, are possible only to a limited extent .

2. Position of the Federal constitutional court

While the EU court of Justice took care to prepare a "surprise" for national law, the position of the German FCC after the decision in the Sasbach case of 8 July 1982 (Sasbach-Beschluss) remained fairly clear. Formal and also substantive preclusion is compatible with the guarantee of effective legal protection enshrined in article 19, paragraph 4, of the Basic law, as well as with the constitutional requirements of a lawful judge in civil proceedings (proposal 2, paragraph 1, of article 101 of the oz) and the right to be heard in court (paragraph 1, article 103 of the OZ), provided that the law clearly and unambiguously refers to the preclusion and determines its scope and that the time limit is not disproportionately short. In German procedural law, the most common term is one month, which is considered

reasonable and sufficient.

IV. The feasibility preclusive rules

In contrast to the problem of constitutionality of preclusion, the problem of its expediency is on a different plane. In summing up the above considerations, we must not miss this question. The use of pre-exclusive sanctions in many cases does not achieve the expected acceleration effect. This occurs in situations where a preclusion must be imposed by an administrative body or a court in a particular case, but the introduction requires investigation of the circumstances of the case or the exercise of discretion and may therefore be subject to further appeal. Another situation is in the cases when in the interests of research of the principle exceptions are made, for example: preclude administrative body is under the condition that preclusive interests don't matter to the legality of decisions (proposal 2 paragraph 3A of § 73 of the Law on administrative procedures /VwVfG/). To sum up briefly: the devil is not so terrible as he is painted. For example, the tax-law pre-exclusive rule contained in § 364b of the tax code (AO) hardly applies in reality .

V. Final remarks

Preclusion is designed to combat the root of human evil: careless attitude to time and deliberate tactics of abuse of rights. To this end, Germany at any rate offers a significant quantitative regulatory Arsenal. The fact that the results of the struggle are still modest does not contradict common sense: the main evil can at best be mitigated, but not eradicated. Nor is it surprising that constitutional law as a whole does not resist this struggle and supports it. It is surprising, however, the hostility to the preclusion of the court of justice of the EU, whose General counsel was not afraid to encroach on the foundations of German administrative procedural law, specifically paragraph 1 § 113 CAS (VwGO). It is impossible not to notice that the arguments on preclusion contained in the Judgment of the EU Court of justice of 15 October 2015 are brief and unfounded . However, the EU court of Justice itself also allows the application of specific procedural rules against abuse and unfair conduct. Perhaps German Federal lawmakers need to be bolder with the enactment of the environmental remedies Act (UmwRG) Novella and stick more consistently to the German pre-concession model. Over the past decades, this model has acquired a conceptual and systemic legal framework, has been tested by time and meets the constitutional requirements of effective legal protection.

REFERENCES

1. Musielak H.-J., Voit W. (eds.). *Grundkurs ZPO* [*Basic course of Civil Procedure*]. Munich, C.H. Beck Publ., 2014. 563 p. (In German).

2. Musielak H.-J., Voit W. (eds.). *ZPO. Kommentar* [*Code of civil procedure. Commentary*]. Verlag Franz Vahlen, 2017. 2993 p. (In German).

3. Brandt K. Präklusion im Verwaltungsverfahren [Preclusion in Administrative proceedings]. *Neue Zeitschrift für Verwal-tungsrecht = New Journal of administrative law,* 1997, iss. 3, pp. 233–237. (In German). Ehlers D., Pünder H. (eds.). *Allgemeines Verwaltungsrecht* [*General Administrative Law*]. Berlin, Boston, 2016. 1003 p. (In German).

4. Guckelberger A., Geber F. Präklusion unter dem Einfluss der Aarhus-Konvention [Preclusion under the influence of the Aarhus Convention]. *Zeitschrift für Europäisches Umwelt- und Planungsrecht = Journal for European environmental and planning law*, 2014, vol. 12, iss. 3, pp. 167–177. (In German).

5. Siegel T., Waldhoff C. (eds.). *Öffentliches Recht in Berlin* [*Public law in Berlin*]. C.H. Beck Publ., 2017. 352 p. (In German).

6. Hoffmann-Riem W., Schmidt-Assmann E., Vosskuhle A. *Grundlagen des Verwaltungsrechts. Bd. III: Personal, Finanzen, Kontrolle, Sanktionen, Staatliche Einstandspflichten* [*Principles of administrative law. Vol. III: personnel, Finance, control, sanctions, state Responsibility*]. Munich, C.H. Beck Publ., 2012. 1538 p. (In German).

7. Führ M., Schenten J., Schreiber M., Schulze F., Schütte S. Evaluation der Verbandsklagemöglichkeiten nach dem UmwRG [Evaluation of the possibilities of association settlements according to the Environmental Law], in: *Environmental Research Plan of the Federal Ministry for the Environment, Nature Conservation, construction and nuclear safety*. Dessau-Rosslau, 2014. Available at: http://www.umweltbundesamt.de/publikationen/evaluation-von-gebrauch-wirkung-der. (In German).

8. Siegel T. Die Präklusion im europäisierten Verwaltungsrecht [The preclusion in European administrative law].

ISSN 2542-1514 (Print)

Neue Zeitschrift für Verwaltungsrecht = New Journal of administrative law, 2016, no. 6, pp. 337–341. (In German).

9. Ludwigs M. Bausteine des Verwaltungsrechts auf dem Prüfstand des EuGH, Die Revolution ist ausgeblieben [The cornerstones of administrative law tested by the EU Court: the revolution did not happen]. *Neue Juristische Wochenschrift = New Journal of administrative law,* 2015, iss. 48, pp. 3484–3487. (In German).

10. Durner W. Präklusion in Deutschland nach dem Urteil des EuGH in der Rs. C-137/14 [Preclusion in Germany, according to the judgment of the ECJ in the Rs. C-137/14], in: Hebeler T., Hofmann E., Proelss A., Reiff P. (eds.). *Umwelt- und Technikrecht. Bd. 133: Planungsrecht im Umbruch: Europäische Herausforderungen* [*Environmental and technology law. Vol. 133: planning law in transition: European challenges*]. Berlin, 2017, pp. 125–157. (In German).

11. Zeissler C., Schmitz V. Das Urteil des EuGH vom 15.10.2015 in der Rechtssache C-137/14 als Ende der umweltrechtlichen Präklusion? [The judgment of the ECJ of 15.10.2015 in case C-137/14 as the end of the environmental legal Statute of preclusion?]. *Umwelt- und Planungsrecht = Environmental and planning law,* 2016, iss. 1, pp. 1–7. (In German).

12. Kopp F.O., Ramsauer U. (eds.). *Verwaltungsverfahrensgesetz Kommentar* [*Commentary to Administrative Procedure Act*]. Munich, 2017. 1868 p. (In German).

INFORMATION ABOUT AUTHOR

Markus Heintzen – Doctor of Law, Professor, Department of Public Law, State, Administrative and Tax Law
Free University of Berlin
3, Boltzmann Str., Berlin, 14195, Germany
e-mail: markus.heintzen@fu-berlin.de

BIBLIOGRAPHIC DESCRIPTION

Heintzen M. Preclusion in German administrative proceedings. *Pravoprimenenie = Law Enforcement Review*, 2019, vol. 3, no. 2, pp. 77–83. DOI: 10.24147/2542-1514.2019.3(2).77-83. (In Russ.).