
BEITEN BURKHARDT

Special Newsletter
Retail business in the corona crisis

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For Crying out Loud, How Do I Get my Business Back up and Running?

Practical advice and recommendations for the gradual reopening of retail outlets

Who may open, who may not? What about the 800 square metres? Is there a chance of opening my store and getting compensation? These are the questions that worry retailers these days. Before proceeding any closer to the actual debate on opening up the market, let us briefly shed light on the currently confusing and extremely volatile legal situation and make recommendations for action, one essential thing first:

Your position should not be "Tolerate and liquidate"!

Some people may think that it makes no sense to resist and that one can wait and still insist on compensation later on. However, such a procedure contradicts central principles of state liability law and can quickly lead to a situation in which one can neither open one's shop nor assert claims later on. Hence the clear recommendation: Seek opening first and foremost!

But now a brief look at the current situation:

Decision of the Federal Government and the State Governments of 15 April 2020

According to the decision taken in the conference call between the German Chancellor and the Heads of state government on 15 April 2020, the German authorities are allowed to reopen under additional conditions regarding hygiene, access control and avoidance of queues:

- all shops with up to 800 square metres of sales area;
- regardless of the sales area: car dealers, bicycle dealers and bookstores.

Implementation in the federal states

As could not be expected otherwise due to the responsibilities of the federal states and the differing attitudes of the state governments, the federal states implemented the regulations in detail in very dissimilar ways. This affects several areas:

- **Timing:** In most of the federal states the relaxations have been in force since 20 April 2020, in Bavaria only since 27 April 2020, in Berlin already since 18 April 2020, in Brandenburg since 22 April 2020.
- The **type of shops** that are allowed to reopen **without** restriction of sales area: Bookshops and bicycle shops (from 29 April 2020 in Bavaria only with space restrictions), car dealerships as well as DIY and garden centres almost everywhere, in some cases also flower shops, baby shops, furniture stores.

- The possibility of **opening with reduced sales area**: In most federal states, opening beyond this was permitted from the very start if the store in question reduced its sales space (within the meaning of the German Land Use Ordinance (BauNVO)) to up to 800 square metres (e.g. through effective barriers and separation from the other areas). In Bavaria, this was at first explicitly not possible according to the interpretation guidelines but was changed following a court decision on 27 April 2020: From 29 April 2020, all shops will be allowed to limit their sales area to 800 square metres. The principle of one customer per 20 sqm sales area applies. Baden-Wuerttemberg had initially also not allowed the reduction and later changed its position because of a court decision.
- Different regulations also apply to **shopping centres**, some of which are also bound by the 800 sqm limit (Bavaria).

Fast-track case law

In view of this inconsistency and the fact that in many cases the limit of 800 square metres was considered by many to be random and difficult to understand, it is not surprising that since then the administrative courts of first and second instance have been confronted with innumerable cases of expedited proceedings (*Eilanträge*) of various kinds in a very short period of time and have already taken a whole series of decisions. Especially in those cases in which the courts have ruled in favour of the applicants and have allowed the opening of shops, there is a high probability that the decisions in the main action will stand. Unfortunately, the courts' decisions are as inconsistent in detail as the regulations of the federal states:

- There should now be agreement that the reduction of sales areas of larger shops to 800 sqm must be permissible, at least in individual cases.
- In some cases the courts have objected in principle to the 800 sqm limit, in other cases they have expressly considered it a suitable differentiation criterion. At present, the prevailing trend is still in favour of maintaining the 800 sqm rule but this may change quickly as soon as more landmark decisions are available from the Higher Administrative Courts and Administrative Courts.

What are the consequences for the (large-scale) retailer?

In principle: Nobody who is not covered by the general opening clauses should throw in the towel and come to terms with the current situation. There are several options which can be combined and of course bring one closer to the goal of reopening the shop (at least to a reduced extent):

- **Application for a case-by-case approval** with the relevant authorities.
For this purpose, a mostly informal application with corresponding explanations on the hygiene concept (including adherence to the minimum distance of 1.5 - 2 metres between individuals), entrance controls, the parking situation (if available) and, if necessary, the separation of the sales area by means of barriers is necessary. An

appeal against the refusal can be filed quickly and, under certain circumstances, the opening can be reached in summary proceedings.

The application can be directed both to an opening of up to 800 square metres of sales area (if necessary by reducing the available space) and to an opening with considerably larger areas, if necessary also in gradations (auxiliary applications).

- Application for **judicial proceedings on the constitutionality** at the Higher Administrative Courts / Administrative Courts.
This is particularly suitable for cases in which large-scale retail trade is to be reopened without sales area restrictions, for example with the aim of being included in the catalogue of generally permitted retail trade stores or of being allowed to reopen stores at several locations in one country. Expedited proceedings are also possible within the framework of the judicial proceedings on the constitutionality.
- **In cases of doubt: Open the store and take action against any prohibition.**
In this option, judicial clarification would be performed at a later stage, with the risk of committing an administrative offence, possibly subject to a fine which can also be appealed against.

Which of the above-mentioned options promises the greatest success in the individual case is to be considered on the basis of the specific situation in the respective country and current case law.

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