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Information on dealing with operating restrictions and orders to close businesses

1. Are there further possibilities for reopening businesses and restarting operations?

With regard to the loosening measures adopted one will have to grant the governments a certain flexibility concerning the way they interpret these. Thresholds such as that of the sales area of 800 square metres, up to which shops can reopen independently of their product range, obviously result in unequal treatment. However, this does not make them inadmissible from the outset. However, the limit of illegality may be exceeded if the differentiation made is no longer viable in view of the purpose pursued by it.

In this respect, the distinction between bicycle and book shops, which are allowed to open even in large stores, and other shops raises doubts. It is not clear why browsing through a book shop in a narrow old town location should carry less risk of infection than buying a refrigerator or a notebook for the home office in a large electronics store in a spacious industrial park. It is also difficult to understand why the majority of the federal states do not want to accept a temporary reduction in sales space to 800 square metres as a milder option than complete closure, whereas the Minister-Presidents of other federal states consider this to be admissible on the basis of the principles of proportionality and equality. The differentiations, some of which have been incomprehensible since the beginning of the shutdown, also seem to be viewed with increasing scepticism in the case law (relating to summary proceedings) of the administrative courts.

Our experience in recent weeks has shown that there are certainly opportunities to enforce the further opening of stores and operations. For example, we have been able to achieve the reopening of numerous retail outlets before Easter through formal applications to Land health ministries and law and order authorities in federal states such as Lower Saxony, Brandenburg and Thuringia. The decision of the Federal Government and the German Laender of 15 April 2020 and its implementation at Land level can further facilitate this. The decisive factor will be the circumstances of the individual case and their appropriate but at the same time consistent presentation to the ministries and authorities.

2. When is a company of systemic importance?

The corona crisis shows that companies and supply chains are not sufficiently protected. In contrast to the shutdowns of the industry in Spain, Italy, Belgium and South Africa, in our experience German non-systemically important companies are threatened by closures initiated by the health authorities due to COVID-19 diseases in the workforce. As a rule, such forced business interruptions are also not insured. Even major repairs and maintenance are banned nationwide because of the external workers, or the company's own personnel must first be quarantined after a work-related stay abroad.

In some corona decrees of the Laender as well as in some guidelines of federal ministries, certain groups of professions or even entire industrial sectors are classified as critical infrastructure or as systemically important. However, this does not mean that the companies have gained anything in legal terms. The decrees in question do neither refer to the companies themselves nor to the industry. The guidelines lack legal effect. However, anyone who improperly issues certificates of necessity for their own or external personnel risks a fine. A warning under competition law, on the other hand, can hit those companies that claim to be systemically important without being so.

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In order to give companies legal certainty, we have developed a **company-specific sample application form** for classification as a systemically important company in view of the numerous unclarified legal definition and interpretation questions regarding the concept of systemic importance and the resulting lack of official forms. Such a classification protects the companies and, in the event of unlawful refusal, at the same time lays the basis for possible claims for compensation and official liability.

3. Are there claims for compensation and state liability?

In the press and legal literature the question is raised whether companies affected by plant closures - so far or in the future - may be entitled to compensation from the state and even a wave of compensation is to be expected. The core issue is who (and under what conditions) has to bear the financial burden resulting from the protection of the general public. Unfortunately, there is no clear answer to this question.

In most cases, the compensation regulations of the German Protection against Infection Act (IfSG) are not directly applicable. However, the IfSG provides for compensation claims for certain less severe interventions, which sometimes leads to the conclusion that there must be compensation claims for the economically dramatic plant closures in the course of the corona epidemic and that such a serious encroachment on fundamental rights without compensation is not proportionate. This argument is important from the point of view of justice, but it does not mean that a claim - which is codified - is actually enforceable.

In addition to the IfSG, there are other norms and recognised legal concepts from which compensation claims could arise. Here too, however, it is not clear if and in which cases the respective prerequisites for a possible claim for compensation exist or do not exist.

It is quite clear, however, that there will be numerous cases where the respective plant closure was/is illegal, whether because the order was issued in the first few days of the shutdown in a hurry and without sufficient legal basis, or because the order is now being maintained under the relaxation measures for longer than necessary or for longer than competitors would be expected to do. At any rate, in the event of unlawfully ordered or maintained plant closures, we believe there is a chance of successfully asserting claims for compensation.

So far, the courts have largely confirmed the measures taken on the basis of the corona decrees. However, these are exclusively decisions in summary proceedings. For example, in a decision of 9 April 2020, Mannheim Administrative Court pointed out that the measures to fight the pandemic may also be directed against so-called non-peacebreakers, i.e. also, for example, against companies where no employee was infected with the coronavirus. However, the court expressly left open whether the provisions of the IfSG, on which the challenged corona decree is based, can be constitutional and a sufficient legislative authorisation for the nationwide closure of certain types of companies. The clarification of this question is reserved for the main proceedings, according to the court.

In other respects, too, there has certainly been judicial criticism of individual measures. Prominent support comes, among others, from the former chairman of the Federal Constitutional Court, Hans-Jürgen Papier, who points out various constitutional concerns. Wolfgang Schäuble says that the measures are - only - "essentially" legal.

The large number of affected parties means that the circumstances of the individual case differ considerably. Companies affected by plant closures should therefore examine whether there is any evidence that the closure of the plant might be illegal in their case.

We will be happy to answer these and other questions on how to deal with the consequences of the corona pandemic measures.

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