



Japan Local Government Centre, London

Monthly Report November 2009 (Germany) - Constitutional Court restricts liberal trading hours in Berlin

The German Constitutional Court has declared on 1st December 2009 that the relatively liberal rules regarding trading hours in Berlin are in part a breach of the constitution. The plaintiffs were the Protestant Church of Berlin-Brandenburg-Silesian Upper Lusatia and the Archbishopric of the Catholic Church in Berlin. Both churches felt that the wide-ranging liberalisation of trading hours even on Sundays and feast days, in particular the four Sundays before Christmas, substantially limited their constitutional right to freedom of religious practice. The constitutional judges ruled that gainful employment should in principle not be conducted on Sundays and feast days.

Exceptions to this rule need to be based on solid grounds. The simple shopping and selling interests of consumers and traders is not sufficient. Only genuine public interest such as large-scale touristic events or street festivals can justify the extension of trading hours to include Sunday and feast days. The judges emphasised not only the need to secure space for religious observance, but also pointed out the importance of work-free Sundays for the conduct of social and private life. Family trips, meeting with friends as well as voluntary activities all need a common minimal time frame. During the court case hearings, occupational scientists also confirmed the importance of free time on Sundays as a rest period necessary for the health of employees. It was also pointed out that for the exercise of their democratic voting rights citizens need time on election Sundays.

The court judgement took a stance against comprehensive trading on Sundays and feast days conducted for purely commercial reasons. Nevertheless in case of single events which provide a good reason, extension of trading hours to include Sundays and feast days is still possible. Trading on continuous Sundays and feast days is however not compliant with the constitution – which means that from 2010 onwards, shops in Berlin will not be allowed to open on the four Sundays before Christmas.

The development towards longer trading hours for shops can be traced back to the 19th century. Social democrats and the churches in league with the (catholic) centre party (Zentrumspartei) mounted opposition to Bismarck's (the first chancellor of the German Empire from 1871 to 1890) idea to extend trading hours in support of competition. They wanted to protect religious observance for the believers and rest hours for the workers. In 1891, protection for Sundays where no trading was allowed was codified in the trade

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code (Gewerbeordnung). The Weimar constitution from 1919 also confirmed the Sunday protection as a Christian-social democratic common cause in article 139. This rule was then also taken over into the 'basic law' (Grundgesetz), the constitution of the new Federal Republic of Germany in 1949 as article 140. Interestingly the EU has so far not attempted to legislate in the area of trading hours.

In view of consumer needs and the business interests of the large-scale department stores as well as discount supermarkets which found political representation in the FDP, from 1957 onwards trading hours were gradually but systematically extended. Smaller traders and the employees in the retail sector tried to resist this development, but their efforts were in vain. For the employees in the retail sector, longer trading hours resulted in a significant worsening of their working conditions, as they have to work longer hours. Unpaid overtime, no time off on Sundays, the expansion of the low-pay sector and disregard of the rules governing rest hours and maximum working time have since become endemic in the retail sector.

The starting point in 1957 was the introduction of the 'late Saturday trading hours', under which shops could stay open until 12 am on Saturdays, with the first Saturday every month and the four Saturdays before Christmas trading until 4 pm. From 1996, Saturday opening times were generally until 4 pm. On weekdays, opening hours expanded from 6:30 pm to 8:30 pm – before this date, only on Thursdays was trading allowed until 8:30. This was known as the 'service evening'. From 2003, trading hours until 8:30 were also extended to Saturdays. The further liberalisation of trading hours happened under the first reform of the federal system enacted in 2006. The competences for the regulation of trading hours passed to the *Länder*, which then had the freedom to introduce more liberal or more restrictive trading hour regulations.

The *Länder* used this new competence differently. In nine out of sixteen *Länder*, trading hours are 24 hours between Monday and Saturday. Mecklenburg-Vorpommern has the rule that all shops have to close between 10 pm Saturday and 12 pm Sunday. Saxony-Anhalt proscribes the end of trading for Saturday to be between 8 pm and 12 pm. Bavaria, the Saarland and three other *Länder* have decided that trading hours on a weekday, including Saturday, should be between 14 and 20 hours.

The judgment by the Constitutional Court concerning the regulations of trading hours in Berlin does not bring a complete halt to the extension of trading hours to Sunday and feast days. Even though it emphasises the special importance Sundays and feast days have for rest, recuperation and religious practice, in well-supported instances trading is possible even on those days. However trading on consecutive Sundays has now been proved unconstitutional. The judgment can therefore be read as defining the minimum standards of protection for the traditional protection of Sundays and feast days as rest days.

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The *Länder* in Germany will have to reform – insofar as is necessary – the laws governing trading hours in their jurisdiction. Furthermore, the Christian religious groups received confirmation regarding their right to legal action in relation to the protection of Sundays, and, possibly more important, their role in politically representing secular-social interests has been strengthened.

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