

# Draft Act

## of the Federal Government

### **Draft of an Act transposing Directive (EU) 2023/1544 and implementing Regulation (EU) 2023/1543 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings within the European Union**

#### **A. Problem and objective**

The draft is intended to transpose Directive (EU) 2023/1544 of the European Parliament and of the Council of 12 July 2023 laying down harmonised rules for the designation of designated establishments and the appointment of legal representatives for the purpose of gathering electronic evidence in criminal proceedings (OJ L 191, 28.7.2023, p. 181). Secondly, it implements Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings (OJ L 191, 28.7.2023, p. 118). The two dossiers were discussed in the bodies of the European Union under the heading of 'e-evidence'. The European regulations respond in particular to the rapidly increasing importance of digital media in the planning and execution of criminal offences. They make it possible for law enforcement authorities in the EU Member States, under certain conditions, to order the preservation and production of certain personal data on a cross-border basis.

The new framework act, which implements the e-evidence mechanism in the German legal system, responds to the rapidly increasing importance of digital media in the planning and execution of criminal activities. The act creates a uniform legal framework and ensures a workable and user-friendly design of the e-evidence-specific regulations. The aim is to increase the efficiency of law enforcement in the Federal Republic of Germany and in the European Union.

This draft lies within the context of the goals of the UN General Assembly resolution of 25 September 2015 entitled 'Transforming our world: the UN 2030 Agenda for Sustainable Development', the timely achievement of which is at risk. The draft contributes to the achievement of goals 16.a and 16.6 to support the fight against crime and to build effective institutions at all levels.

#### **B. Solution**

The requirements of Directive (EU) 2023/1544 and the implementing provisions for Regulation (EU) 2023/1543 will be standardised in a new framework act. This is structured into four parts as follows:

- The general part contains provisions applicable to the entire framework act.
- The provisions transposing Directive (EU) 2023/1544 introduce the European requirements into national law.
- Regulation (EU) 2023/1543 is embedded in the existing German regulatory framework with implementing provisions.

- The fine provisions penalise violations by service providers of the obligations imposed on them by the framework act and Regulation (EU) 2023/1543.

As national law currently imposes obligations on service providers that go beyond content, contrary to Article 1(4) of Directive (EU) 2023/1544, the provision in the Telecommunications Act (TKG) on the appointment of authorised representatives is declared inapplicable within the scope of this Directive.

The Telecommunications and Digital Services (Data Protection) Act (TDDDG) is supplemented with an authorisation for data processing for service providers on the basis of European preservation and production orders.

## **C. Alternatives**

None.

## **D. Budgetary expenditure without compliance costs**

With the entry into force of the Act in 2026, the Federal Government will incur one-off staff expenses estimated at EUR 1 216 000.

From 2027, estimated permanent annual staff expenditure of EUR 741 000 will be incurred.

The additional material and staffing requirements will be offset financially and in terms of positions in budget line item 07.

The States will incur additional staff requirements totalling around EUR 273 000.

## **E. Compliance costs**

### **E.1 Compliance costs for citizens**

Citizens will not incur any compliance costs.

### **E.2 Compliance costs for businesses**

For businesses, annual compliance costs will increase by approximately EUR 126 000. In total, a one-off expenditure of around EUR 1.3 million will be incurred.

Administrative costs under this section arising from information obligations

Of these, around EUR 123 000 are attributable to administrative costs arising from information obligations.

### **E.3 Administrative compliance costs**

The administration will incur one-off compliance costs of EUR 948 000 in 2026. This is incurred exclusively at the federal level.

The annual compliance cost amounts to approximately EUR 816 000. This is attributable to the state level (including municipalities) in the amount of EUR 257 000, whereas around EUR 559 000 are incurred at the federal level.

## **F. Additional costs**

For the present regulations, the burdening and relieving effects on the issuing authorities from the §§ 9 und 10 and the burdening effects on the competent local and higher regional courts due to the legal protection provisions in the §§ 13 bis 17 must be taken into account, as well as the activities of the public prosecutor's offices as enforcement authorities in accordance with § 18 Absatz 2.

As Regulation (EU) 2023/1543 simplifies the procedures for collecting the necessary data, fewer bodies will need to be involved in future. In this regard a relief effect may be expected for an estimated EUR 2.7 million for the Federal Republic of Germany.

# Draft Act of the Federal Government

## Draft Act transposing Directive (EU) 2023/1544 and implementing Regulation (EU) 2023/1543 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings within the European Union<sup>1</sup>

of ...

The Federal Parliament has adopted the following Act:

### Artikel 1

## Act on European Production and Preservation Orders of Electronic Evidence

### (Electronic Evidence Implementation and Enforcement Act - EBe-wMG)

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<sup>1</sup> Notified in accordance with Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17/9/2015, p. 1);

Articles 1(1) to (6) and 18(1), 3(1)(a), 7(1) and Articles 2 and 3 of this Act are intended to transpose Directive (EU) 2023/1544 of the European Parliament and of the Council of 12 July 2023 laying down harmonised rules on the designation of designated establishments and the appointment of legal representatives for the purpose of gathering electronic evidence in criminal proceedings (OJ L 191, 28.7.2023, p. 181).

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## Teil 1

### General provisions

#### § 1

##### **Definitions**

For the purposes of this Act, the definitions set out in Article 2 of Directive (EU) 2023/1544 as amended on 12 July 2023 and Article 3 of Regulation (EU) 2023/1543 as amended on 12 July 2023 shall apply. The term 'addressee' is used within the meaning of Article 7(1) of Regulation (EU) 2023/1543, as amended on 12 July 2023.

## Teil 2

### Implementation of Directive (EU) 2023/1544

#### § 2

##### **Scope of application**

(1) This part applies to orders and decisions for collecting electronic evidence in criminal proceedings on the basis of:

1. Regulation (EU) 2023/1543, as amended on 12 July 2023,
2. Directive 2014/41/EU in the version of 13 December 2023,
3. of the Convention of 29 May 2000 - drawn up by the Council in accordance with Article 34 of the Treaty on European Union - on Mutual Assistance in Criminal Matters between the Member States of the European Union (Federal Law Gazette 2005 II p. 650, 651) and
4. national law, if the order or decision is addressed to a natural or legal person acting as a representative or designated establishment of a service provider in the territory of the Federal Republic of Germany.

(2) This part is without prejudice to the powers of the German investigating authorities to contact directly the service providers established in the territory of the Federal Republic of Germany in accordance with European Union law and national law on the collection of electronic evidence in criminal proceedings.

#### § 3

##### **Designated establishments and representatives (addressees)**

(1) Service providers with one or more establishments in the territory of the Federal Republic of Germany and in other Member States of the European Union that apply the legal instruments referred to in § 2 Absatz 1 must designate at least one of these establishments as the addressee in accordance with Absätze 4 und 5. When designating, a place shall be chosen where the service provider offers their services. If establishments

exist exclusively in Member States within the meaning of Satz 1 where the service provider does not offer services, one of these establishments must be designated as the addressee in accordance with Absätze 4 und 5. The addressee is responsible for the reception, compliance and enforcement of decisions and orders falling within the scope of § 2 Absatz 1.

(2) Service providers with one or more establishments exclusively within the territory of the Federal Republic of Germany shall Absätze 4 und 5 designate as addressees within the meaning of Absatz 1 Satz 4 at least one of these establishments if they offer their services in the territory of the Federal Republic of Germany and, in addition or alternatively, in another Member State of the European Union.

(3) Service providers who offer their services in the territory of the Federal Republic of Germany but do not have an establishment there or in a Member State of the European Union that applies the legal instruments referred to in § 2 Absatz 1, shall appoint at least one representative as addressee within the meaning of Absätze 4 und 5 in the territory of the Federal Republic of Germany or in a Member State of the European Union that applies the legal instruments referred to in Absatz 1 Satz 4 and in which they offer their services, in accordance with § 2 Absatz 1.

(4) Service providers who are established or offer services in the territory of the Federal Republic of Germany, shall provide their addressees with the powers and resources necessary to comply with decisions and orders issued by a Member State of the European Union which fall within the scope of application defined in § 2 Absatz 1.

(5) Service providers offering services in the European Union on 18 February 2026, are obliged to designate or appoint at least one addressee by 18 August 2026 in accordance with Absätzen 1 bis 3. Service providers that start offering services in the European Union after 18 February 2026 shall be required to designate or appoint at least one addressee in accordance with Absätzen 1 bis 3 within six months of the date on which they started offering services in the European Union.

(6) Addressees of service providers established or offering services in the territory of the Federal Republic of Germany are obliged to co-operate with the competent authorities when receiving decisions and orders pursuant to § 2 Absatz 1 in accordance with the applicable legal provisions.

#### § 4

### **Notifications and languages**

(1) Service providers whose addressees have their registered office in the territory of the Federal Republic of Germany shall notify the Federal Office of Justice, in accordance with the Absätze 3 bis 5, of the contact details of these addressees and any changes thereto in text form.

(2) Service providers that have designated or appointed their addressees in other Member States of the European Union; and

1. are established on the territory of the Federal Republic of Germany without offering services here, or
2. offer their services on the territory of the Federal Republic of Germany

shall notify the contact details of these addressees and any changes thereto in text form in accordance with Absätze 3 bis 5 to the central authorities designated by the

respective Member States of the European Union in accordance with Article 6(1) of Directive (EU) 2023/1544 in the version of 12 July 2023.

(3) Service providers must indicate the exact geographical scope of application in the notifications when designating or assigning

1. several addressees in the territory of the Federal Republic of Germany,
2. one or more addressees in other Member States of the European Union in addition to one or more addressees in the territory of the Federal Republic of Germany,
3. several addressees only in other Member States of the European Union.

(4) In the notifications, service providers shall indicate which official language or languages of the European Union may be used in exchanges with the addressee(s). If the addressee is established in Germany, these languages must include the German language.

(5) Notifications shall be made immediately after the expiry of the relevant time limit from § 3 Absatz 5 or, in the case of changes, immediately after their occurrence.

## § 5

### **Joint responsibility of service provider and addressee**

(1) Both the service provider and the addressee are responsible for any non-compliance with obligations arising from decisions and orders falling within the scope of § 2 Absatz 1. This applies regardless of which of them committed the act or omission that constitutes the violation, and even if there are no suitable internal procedures in the relationship between the service provider and the addressee.

(2) The joint liability pursuant to Absatz 1 shall not apply if the act or omission giving rise to the violation constitutes a criminal offence in the territory of the Federal Republic of Germany.

## § 6

### **Central authority**

(1) The Federal Office of Justice as a central authority monitors compliance with the obligations of service providers and their addressees arising from the §§ 3 und 4 in the territory of the Federal Republic of Germany. The Federal Office of Justice may collect and further process the data, including personal data, necessary for the performance of the task referred to in sentence 1. In addition, the Federal Office of Justice may request information and evidence from the addressees located on German territory, in particular concerning the equipping of the addressees with powers and resources in accordance with § 3 Absatz 4.

(2) The Federal Office of Justice shall cooperate and coordinate with the central authorities of other Member States of the European Union and, where necessary, with the European Commission in order to fulfil its responsibility in accordance with Absatz 1. In doing so, the Federal Office of Justice shall assist the central authorities of the other Member States of the European Union by providing all appropriate information and assistance.

(3) The Federal Office of Justice shall transmit the information received according to § 4 and related updates to the European Judicial Network in criminal matters immediately upon receipt from the service providers so that it may be published on its publicly accessible website. In addition, the Federal Office of Justice publishes the information on its own website.

(4) The Federal Office of Justice shall inform the Commission annually concerning which service providers have not complied with their obligations referred to in Absatz 1 in accordance with the §§ 3 und 4, which enforcement measures have been taken against them and which penalties have been imposed on them.

## Teil 3

### Implementation of Regulation (EU) 2023/1543

#### Kapitel 1

#### General provisions

##### § 7

#### **Applicability of other procedural and jurisdictional provisions**

To the extent that Regulation (EU) 2023/1543 in the version of 12 July 2023 and the following provisions of Part Three of this Act do not contain specific procedural and jurisdictional provisions, the provisions of the Judicial Organisation Act, the Judicial Organisation (Implementation) Act, the Code of Criminal Procedure, the Juvenile Courts Act, the Tax Code and the Act to Combat Undeclared Work and Illegal Employment shall apply.

#### Kapitel 2

#### European production- and preservation orders

##### § 8

#### **Data categories for outgoing orders**

(1) Subscriber data within the meaning of Article 3(9) of Regulation (EU) 2023/1543 in the version of 12 July 2023 are in particular

1. Existing data as referred to in Article 3(6) and data as referred to in Article 172 of the Telecommunications Act,
2. Existing data as referred to in Article 2(2)(2) of the Telecommunications and Digital Services (Data Protection) Act.

(2) Data requested solely for the purpose of identifying the user within the meaning of Article 3(10) of Regulation (EU) 2023/1543 in the version of 12 July 2023 are in particu-

lar usage data in accordance with Article 2(2)(3)(a) of the Telecommunications and Digital Services (Data Protection) Act.

(3) Traffic data within the meaning of Article 3(11) of Regulation (EU) 2023/1543 in the version of 12 July 2023 are in particular

1. traffic data pursuant to Article 3 No. 70 of the Telecommunications Act,
2. usage data in accordance with Article 2(2)(3)(b) and (c) of the Telecommunications and Digital Services (Data Protection) Act.

## § 9

### **Procedure for European Production Orders with respect to subscriber and identification data**

(1) The competence of courts and public prosecutor's offices to issue European Production Orders for obtaining subscriber data or data requested for the sole purpose of identifying the user pursuant to Article 4(1)(a), of Regulation (EU) 2023/1543, as amended on 12 July 2023, and to transmit the associated certificate, is governed by Section 8 of Book I StPO.

(2) To the extent that they may act under national law for law enforcement purposes, the following authorities are competent to issue European Production Orders to obtain subscriber data or data requested solely for the purpose of identifying the user in accordance with Article 4(1)(b) of Regulation (EU) 2023/1543 as amended on 12 July 2023:

1. the investigators of the public prosecutor's office (Article 152 of the Judicial Organisation Act),
2. the tax authorities in the cases referred to in Article 399(1) and Article 386(2) of the Tax Regulation,
3. the authorities of the customs administration in the cases referred to in Articles 14a and 14b of the Act on combating undeclared work and illegal employment;

(3) In cases of Absatzes 2, the issuing authorities transmit the European Production Order to the public prosecutor's office for validation. If validated, the public prosecutor's office shall transmit the European Production Order Certificate to the addressee. The decision on validation and transmission of the certificate to the addressee shall be recorded.

(4) Territorial competence for validation shall lie with the investigating Public Prosecutor's Office. If, in accordance with national law, the tax authorities or customs authorities carry out the investigations themselves, the public prosecutor's office at the regional court in whose territory the issuing authority has its seat is responsible for the validation. The States may make different arrangements for territorial competence.

(5) If the competence of the courts to issue orders is established under national law, the procedure shall be determined in accordance with § 10 Absatz 2 und 3.

§ 10

**Procedure for European Production Orders with respect to traffic and content data**

(1) The competence of the courts to issue European Production Orders to obtain traffic data, except for data requested for the sole purpose of identifying the user or to obtain content data pursuant to Article 4(2)(a), of Regulation (EU) 2023/1543, as amended on 12 July 2023, and to transmit the associated certificate, is governed by Section 8 of Book I of the Code of Criminal Procedure.

(2) Prior to initiation of the public prosecution, the European Production Order is issued at the request of the investigating public prosecutor's office, in cases where the tax authorities or customs authorities conduct the investigation independently in accordance with national law, at the latter's request. The provisions of Article 162(1), first sentence, and (3), as well as Article 169 of the Code of Criminal Procedure, Section 3 of Part 8 of the Tax Code and Section 4 of the Act on combating undeclared work and illegal employment shall apply accordingly.

(3) On issuing the European Production Order, the court shall send the certificate to the addressee. If one of the authorities mentioned in Absatz 2 Satz 1 has requested the issuance of the European Production Order, but a judicial review shows that the relevant conditions are not fulfilled, the court shall deny the request. Articles 304 and 306 of the Code of Criminal Procedure shall apply accordingly to legal remedies against the denial. The adoption of the European Production Order and the transmission of the associated certificate or the rejection of the application shall be recorded.

§ 11

**Competent executing authority**

(1) The executing authority as defined in Article 3(17) of Regulation (EU) 2023/1543, in the version of 12 July 2023, is the Public Prosecutor's Office. The public prosecutor's office at the regional court in whose territory the addressee of the order resides or has their registered office has territorial competence. The States may make different arrangements for territorial competence.

(2) Where the issuing authority of another Member State of the European Union approaches a non-competent domestic authority, the request shall be forwarded without delay to the competent authority according to Absatz 1 and the issuing authority shall be informed of the competent authority.

§ 12

**Statistical obligations**

(1) Within their respective areas of competence, the State judicial authorities and the Federal Attorney General collect the data referred to in Article 28(2) of Regulation (EU) 2023/1543, as amended on 12 July 2023, and transmit these to the Federal Office of Justice each calendar year by 28 February of the year following the reporting year.

(2) The Federal Office of Justice shall compile an overview of the data referred to in paragraph 1 and transmit the overview to the European Commission at the latest by 31 March of the year following the reporting year.

## Kapitel 3

### Legal protection

#### Abschnitt 1

### Legal remedies against outgoing orders

#### § 13

##### Applicable provisions

(1) For legal remedies against European Production Orders requesting subscriber data, Article 98(2) second sentence, Article 304(1) and Articles 306 and 310(2) of the Code of Criminal Procedure shall apply accordingly. The same applies to European Production Orders issued by the public prosecutor's office to collect data for the sole purpose of identifying the user.

(2) For legal remedies against European Production Orders requesting traffic data, Article 101a(6), second sentence, in conjunction with Article 101(7), second sentence, and Article 311 of the Code of Criminal Procedure shall apply accordingly. The same applies to court-ordered European production orders for the collection of data exclusively for the identification of users.

(3) For legal remedies against European production orders requesting content data, Article 95a (5) sentences 1 and 2, Article 101(7) sentences 2 and 3, Article 304 (1), Articles 306, 310(2) and Article 311 StPO shall apply accordingly.

(4) The legal remedies under the Absätze 1 bis 3 are only available to persons whose data has been requested by means of a European Production Order under Regulation (EU) 2023/1543, as amended on 12 July 2023.

#### § 14

##### Judicial decision

(1) The court shall examine, in the case of European production orders, whether the conditions for adoption laid down in Article 4(1), (2), (4) and (5) and Article 5 of Regulation (EU) 2023/1543, as amended on 12 July 2023, are met.

(2) If the conditions are not met, the court shall find that the order is unlawful and annul the European Production Order.

## **Abschnitt 2**

### **Procedure in case of conflicting obligations**

#### § 15

##### **Judicial procedures**

(1) For the application by the issuing authority for a judicial decision on conflicting obligations pursuant to the second sentence of Article 17(3) of Regulation (EU) 2023/1543, as amended on 12 July 2023, legal recourse to the ordinary courts is open.

(2) The Higher Regional Court shall decide on the application of the issuing authority pursuant to Absatz 1. The Higher Regional Court in whose territory the issuing authority has its seat, has territorial competence. By way of derogation from Satz 1, the Federal Court of Justice shall decide in cases in which the Federal Attorney General or the investigating judge of the Federal Court of Justice has issued the order.

(3) The issuing authority shall attach to the request the result of its review of the reasoned objection and any comments made by the executing State pursuant to the first sentence of Article 17(3) of Regulation (EU) 2023/1543 in the version of 12 July 2023.

(4) For calculating the time limit pursuant to the third sentence of Article 17(2) of Regulation (EU) 2023/1543 in the version of 12 July 2023, Articles 42 and 43(2) of the Code of Criminal Procedure shall apply accordingly.

#### § 16

##### **Judicial decision**

The decision of the Higher Regional Court or the Federal Court of Justice pursuant to Article 17(5) or (8) of Regulation (EU) 2023/1543 in the version of 12 July 2023 shall be made by means of an unappealable order.

## **Abschnitt 3**

### **Legal remedies against decisions in enforcement proceedings**

#### § 17

##### **Applicability of the Administrative Offences Act**

For legal remedies against decisions in execution proceedings pursuant to the second sentence of Article 16(10) of Regulation (EU) 2023/1543, as amended on 12 July 2023, the provisions of Section 5 of Part 2 of the Administrative Offences Act shall apply accordingly.

## Teil 4

### Provisions concerning fines and restrictions of a fundamental right

#### § 18

##### Provisions concerning fines

(1) It shall be an administrative offence for any person to intentionally or negligently act

1. contrary to § 3 Absatz 1 Satz 1, 2 oder 3 or § 3 Absatz 2 to fail to record a statement as mentioned therein, or to not do the same correctly or punctually,
2. to not appoint a responsible representative, or to not do the same correctly or punctually, contrary to § 3 Absatz 3, or
3. in violation of § 4 Absatz 1 oder 2 to fail to send a notification or to fail to do the same in full or punctually,

(2) An administrative offence is committed by whomsoever violates Regulation (EU) 2023/1543, as amended on 12 July 2023, by intentionally or negligently

1. not acting, not acting correctly or not acting punctually, in opposition to Article 10(1) or (2) sentence 2,
2. not ensuring that requested data is transmitted, in opposition to Article 10(2) sentence 1,
3. not ensuring that requested data is transmitted, in opposition to Article 10(3),
4. not transmitting requested data or not transmitting them punctually, in opposition to Article 10(4) sentence 1,
5. in opposition to Article 10(6)(1)(1), (7)(1), (8)(1) or Article 11(5)(1), (6)(1) or (7)(1), not informing or not informing correctly or punctually any authority as referred to in those provisions,
6. in opposition to Article 10(6)(1)(2), failing to make a report or to do so correctly, completely and punctually,
7. not ensuring that they may obtain the clarification or correction referred to in the second sentence of the second subparagraph of Article 10(6) or the second subparagraph of Article 11(5),
8. in opposition to Article 11(1) sentence 1 in conjunction with sentence 2, failing to provide requested data or failing to provide it punctually or for the required duration,
9. violating an enforceable injunction pursuant to the third sentence of Article 11(1),
10. in opposition to Article 11(2), failing to secure the requested data, or failing to secure it for the required period, or

11. in opposition to Article 13(4), not taking or not taking correctly or fully any of the measures as referred to in this same.

(3) The regulatory offence may be punished

1. in the cases of

a) Absatzes 1 and

b) Absatzes 2 Nummer 1 bis 4 und 7 bis 11

by a fine of up to five hundred thousand euro.

2. in the cases of Absatzes 2 Nummer 5 und 6 with a fine of up to one hundred thousand euro.

(4) In derogation from , also in conjunction with Article 30(2) sentence 2 of the Administrative Offences Act, an administrative offence under Absatz 3 Nummer 1 Buchstabe against a Absatz 2 Nummer 1 bis 4 und 7 bis 11 service provider with a total turnover of more than EUR 25 million may be punished with a fine of up to 2 percent of the total turnover.

(5) In derogation from Absatz 3 Nummer 2, also in conjunction with Article 30(2) sentence 2 of the Administrative Offences Act, an administrative offence under against a service provider Absatz 2 Nummer 5 oder 6 with a total turnover of more than 5 million EUR may be punished with a fine of up to 2 percent of the total turnover.

(6) Total turnover in the sense of Absätze 4 und 5 is the sum of all turnover generated worldwide by the service provider in the financial year preceding the decision of the authority . The total turnover can be estimated.

(7) Article 17 (2) of the Administrative Offences Act does not apply to the imposition of fines on a service provider in the cases referred to in Absatzes 2.

(8) The administrative authority as defined in Article 36(1)(1) of the Administrative Offences Act is

1. in the cases of Absatzes 1, the Federal Office of Justice,

2. in the cases of Absatzes 2, the executing authority in accordance with § 11 Absatz 1.

## § 19

### **Restrictions of a fundamental right**

The secrecy of telecommunications (Article 10(1) of the Basic Law) shall be restricted in accordance with this Act.

## Artikel 2

### Amendment of the Telecommunications Act

The Telecommunications Act of 23 June 2021 (Federal Law Gazette I p. 1858), as last amended by Article 1 of the Act of 24 December 2025 (Federal Law Gazette 2025 I No. 181), is amended as follows:

After Article 170(11), the following paragraph 12 shall be inserted:

(1) ' The provisions of paragraph 1(3)(b) and paragraph 2(2)(c) shall not apply to the scope of Directive (EU) 2023/1544 as amended on 12 July 2023.'

## Artikel 3

### Amendment to the Telecommunications and Digital Services (Data Protection) Act

The Telecommunications and Digital Services (Data Protection) Act of 23 June 2021 (Federal Law Gazette I p. 1982; 2022 I p. 1045), as last amended by Article 44 of the act of 12 July 2024 (Federal Law Gazette 2024 I No. 234), is amended as follows:

1. The Table of Contents is amended as follows:

a) The following text is inserted after the reference to 13:

'Article 13a Compliance with obligations pursuant to Articles 10 and 11 of Regulation (EU) 2023/1543, as amended on 12 July 2023'.

b) The following text is inserted after the reference to 24:

'Article 24a Compliance with obligations pursuant to Articles 10 and 11 of Regulation (EU) 2023/1543, as amended on 12 July 2023'.

2. After Article 13, the following Article 13a is inserted:

#### 'Article 13a

Fulfilment of obligations under Articles 10 and 11 of Regulation (EU) 2023/1543

Providers of telecommunications services and the § 3 Absatz 1 bis 3 addressees established by them pursuant to of the Electronic Evidence Implementation and Enforcement Act may process personal data to the extent necessary for complying with a European Production Order or a European Preservation Order pursuant to Regulation (EU) 2023/1543, as amended on 12 July 2023. The secrecy of telecommunications (Article 10(1) of the Basic Law) is restricted to that extent.'

3. The following Article 24a is inserted after Article 24:

'Article 24a

Fulfilment of obligations under Articles 10 and 11 of Regulation (EU) 2023/1543

Providers § 3 Absatz 1 bis 3 of digital services and the addressees established by them pursuant to the Electronic Evidence Implementation and Enforcement Act may process personal data to the extent necessary for complying with a European Production Order or a European Preservation Order pursuant to Regulation (EU) 2023/1543, as amended on 12 July 2023.

## Artikel 4

### Entry into force

(1) This Act shall enter into force on the day following promulgation, subject to Absatzes 2.

(2) On 18 August 2026, the following will enter into force:

1. in Artikel 1, §§ 7 bis 17, 18(2), 3(1)(b) and (2), (4) to (7) and 8(2) and § 19 of the Electronic Evidence Implementation and Enforcement Act, and
2. Artikel 3.

#### EU legal acts:

1. Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ L 130, 1.5.2014, p. 1; L 143, 9.6.2015, p. 16), as last amended by Directive (EU) 2023/2843 of 13 December 2023 (OJ L, 2023/2843, 27.12.2023).
2. Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings (OJ L 191 of 28.7.2023, p. 118)
3. Directive (EU) 2023/1544 of the European Parliament and of the Council of 12 July 2023 laying down harmonised rules on the designation of designated establishments and the appointment of legal representatives for the purpose of gathering electronic evidence in criminal proceedings (OJ L 191 of 28.7.2023, p. 181)

## **Justification**

### **A. General part**

#### **I. Objective of and need for the provisions**

On the one hand, the Act serves to implement Directive (EU) 2023/1544 of the European Parliament and of the Council of 12 July 2023 laying down harmonised rules on the designation of designated establishments and the appointment of legal representatives for the purpose of gathering electronic evidence in criminal proceedings (OJ L 191, 28.7.2023, p. 181; hereinafter referred to as: Directive (EU) 2023/1544). On the other hand, the act implements Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and the execution of custodial sentences following criminal proceedings (OJ L 191, 28.7.2023, p. 118; hereinafter: Regulation (EU) 2023/1543).

The Act lies within the context of the goals of the United Nations General Assembly Resolution of 25 September 2015 'Transforming our world: the UN 2030 Agenda for Sustainable Development', the timely achievement of which is at risk. The draft contributes to the achievement of goals 16.a and 16.6 to support the fight against crime and to build effective institutions at all levels.

##### **1. Directive (EU) 2023/1544**

Article 7(1) of Directive (EU) 2023/1544 requires Member States to adopt the laws, regulations and administrative provisions necessary to comply with this same, at the latest by 18 February 2026.

The aim of the Directive is to establish harmonised rules for the representation of certain service providers in the European Union. The aim is to ensure that decisions taken by the competent authorities of the Member States to collect electronic evidence in criminal proceedings may be received, followed up and enforced.

In order to achieve this, the Electronic Evidence Implementation and Implementation Act introduces a new framework act. In addition, adjustments are required in the Telecommunications Act (TKG) as well as in the Telecommunications and Digital Media (Data Protection) Act (TDDDG).

##### **2. Regulation (EU) 2023/1543**

Regulation (EU) 2023/1543 applies from 18 August 2026 in all Member States of the European Union, with the exception of Denmark, which, in accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, which are annexed to the TEU and to the TFEU, has not taken part in the adoption of that Regulation and is not bound by it or subject to its application. As directly applicable Union law, the Regulation does not require implementation in the Federal Republic of Germany. However, individual implementing provisions are necessary to ensure that the Regulation is applied smoothly and as clearly as possible in conjunction with national law.

The aim of Regulation (EU) 2023/1543 is to create a new legal framework for the cross-border retrieval of electronic evidence. The authorities of a Member State may have such evidence secured or requested to be obtained directly from a service provider that has designated its establishment or appointed its representative in another Member State of

the European Union, irrespective of where the data are located (Article 1(1) of the Regulation). Pursuant to Article 1(2) of Regulation (EU) 2023/1543, a European Production Order or a European Preservation Order may also be requested by the accused or their defence counsel within the framework of the applicable defence rights, if and to the extent provided for in national criminal procedural law. The Code of Criminal Procedure (StPO) provides for corresponding provisions in Article 136 (1) sentence 3 and in Article 166 in preliminary and interlocutory proceedings and in Article 244 (3) to (6) for criminal proceedings.

To implement Regulation (EU) 2023/1543, the newly introduced Electronic Evidence Implementation and Enforcement Act provides for more specific regulations. They concern, in particular, competences and procedures relating to the orders provided for in the Regulation. Legal protection is also provided for.

Further rules, such as those on the handling of incoming orders and decisions by executing authorities, may be laid down in the Guidelines on International Cooperation in Criminal Matters (RiVAST) in order to facilitate the application of the Regulation and the Directive in legal practice.

## **II. Background of the legal instruments**

Regulation (EU) 2023/1543 with accompanying Directive (EU) 2023/1544 responds to the rapidly increasing cross-border use of electronic communications and digital services in the planning and execution of criminal activities. This poses particular challenges for criminal authorities. On the one hand, data required as electronic evidence may be located in the territory of other Member States, and on the other hand, the traditional methods of investigation cooperation often prove to be too cumbersome in view of dynamic and decentralised storage locations in digital contexts.

Not least in the light of the Brussels terrorist attacks of 22 March 2016, the Member States of the European Union, in the conclusions of the Council of the European Union of 9 June 2016, called on the European Commission to develop a common approach of the European Union, in particular to speed up mutual legal assistance procedures and to cooperate with service providers. The European Parliament took up this point in its resolution on combating cybercrime of 3 October 2017. It emphasised that fragmented legal frameworks may be a problem for service providers seeking to comply with requests from criminal authorities. The European Parliament therefore called on the European Commission to present a proposal for a European Union legal framework for electronic evidence with sufficient safeguards as regards the rights and freedoms of all those concerned.

On 17 April 2018, the European Commission then submitted to the Council of the European Union and the European Parliament a draft package consisting of a Regulation and Directive, based on Article 82(1) (for the Regulation) and Articles 53 and 62 of the Treaty on the Functioning of the European Union (for the Directive). The core idea of the legal instruments is to bypass the traditional mechanism of legal assistance through cooperation between individual authorities and to authorise and enable investigating authorities to address orders to secure or hand out data directly to service providers in another Member State of the European Union.

Negotiations on the package of measures began in April 2018 in the Council Working Group COPEN. In December 2018, the Council of the European Union (Justice and Home Affairs) reached a general consensus about large parts of the text of the Regulation (see Council document 15104/17 COPEN 380 of 8 December 2016). The Federal Republic of Germany did not agree to the general consensus and issued a protocol declaration after failing to achieve a clear and transparent anchoring of fundamental rights. Following a pause due to the pandemic, the tripartite negotiations between the European Commission, the European Parliament and the Council of the European Union began in early 2021, resulting in a compromise that was still acceptable to the Federal Republic of Ger-

many. A relatively robust information procedure and specific provisions for protecting the data of persons subject to professional secrecy were agreed in the Regulation. The Federal Republic of Germany therefore had no objections at the time of the final Council referral on 27 June 2023. However, it issued a protocol statement according to which the grounds for refusal protecting individual rights were to be examined compulsorily within the framework of the information procedure, which was not sufficiently clearly expressed in the recitals of the Regulation. From the point of view of the rule of law, it is also essential that legal protection exists not only against restitution orders and in the issuing State, but also against preservation orders and in the executing state.

The Regulation and the Directive are published in the Official Journal of the European Union (OJ L 191/118, 28 July 2023, L 191/181, 28 July 2023). The Regulation applies in the Member States of the European Union from 18 August 2026, and the Directive shall be transposed by 18 February 2026.

### **III. Main content of the legal instruments**

#### **1. Regulation (EU) 2023/1543**

The Regulation establishes a European Production Order and Preservation Order to secure and obtain electronic evidence across borders directly from the service providers concerned (Article 1(1) of the Regulation).

For the purposes of determining whether there is a cross-border situation, the decisive factor is not the place where the data in question are processed, but the place of establishment of the addressee acting on behalf of the service provider concerned (Article 3(1) of the Regulation). The obligations pursuant to the Regulation apply to all service providers carrying out their business within the European Union (Article 2(1) of the Regulation). The scope of application includes subscriber, traffic and content data (Articles 4, 5 and 6 in conjunction with Article 3(8) to (12) of the Regulation); real-time collection is not provided for. The orders may be issued in the context of and for criminal proceedings and for the execution of custodial sentences or detention measures with a minimum duration of four months (Article 2(2) of the Regulation).

For the procedure, the Regulation distinguishes first of all between a preservation order (Article 6) and a production order (Article 5). With regard to a production order, a further distinction is made: Is it directed at subscriber data and traffic data serving identification purposes only ("identification data") or at content and (other) traffic data? As the former categories of data are considered less sensitive, less stringent conditions for authorisation must be observed (Article 4(1), Article 5(3) of the Regulation). The same applies to preservation orders (with regard to all categories of data, Article 4(3), Article 6 of the Regulation). In all cases, the investigating authority of the State wishing to issue an order must assess the proportionality of the measure (Article 5(2), Article 6(2) of the Regulation). While the public prosecutor may (also) order the preservation and release of subscriber and identification data for all criminal offences (Article 4(1) and (3), Article 5(3), Article 6(3) of the Regulation), the release of traffic and content data may only be ordered by the court in connection with offences for which a maximum sentence of 3 years applies or for certain categories of offences (for example in the area of child sexual abuse offences or terrorism) (Article 4(2), Article 5(4) of the Regulation). A further prerequisite for production and preservation orders is that a similar order could be issued in a comparable national case under the same conditions (Article 5(2), Article 6(3) of the Regulation). Production orders shall in principle be addressed to the service provider acting as controller within the meaning of Regulation (EU) 2016/679 (Article 5(6) of Regulation (EU) 2023/1543). Where data held by a service provider for an authority are concerned, a European Production Order may only be issued if the authority concerned is located in the issuing State (Article 5(8) of the Regulation). The aim is to prevent the investigating authorities of a Member

State from accessing the data (retained by service providers) of authorities of other Member States by means of a European Production Order. If the authority is in the issuing State, no restriction applies. The background to this is the consideration that the authorities of the issuing State may make use of their national instruments if the data is stored by a provider with addressees in Germany. If, on the other hand, the authority has chosen a provider with addressees in other EU countries, this is considered pure coincidence from an investigation perspective. The investigators should then not be placed in a worse position compared to a purely national situation, which is why the instruments of Regulation (EU) 2023/1543 should be available to them. In cases where a service provider stores or otherwise processes data protected by professional secrecy in the framework of an infrastructure, the Regulation also contains a separate provision laying down restrictive conditions for the collection of content and traffic data (Article 5(9) of the Regulation). As in the case of public authorities, this provision ensures that foreign investigating authorities do not, in principle, have direct access to the data of subjects of professional secrecy stored with service providers. Instead, the data must be requested by way of other mutual legal assistance (usually via a European Investigation Order) (so that authorities involved on the German side may check the existence of a prohibition of seizure pursuant to Articles 97(1)(3), 53(1)(3) of the German Code of Criminal Procedure). An exception to this principle applies in the following cases: The person concerned is resident in the issuing State (where they have stored their data with a service provider with addressees in another Member State), Article 5(9)(a) of Regulation (EU) 2023/1543. The rationale for this provision is the same as with regard to domestic authorities (see above). Thus, only the German investigating authorities have access to the data (stored with service providers) of subjects of professional secrecy established in Germany by means of a European Production Order, which must take into account the prohibitions on seizure in the StPO. Other exceptions apply where an order addressed to the subject of professional secrecy itself could jeopardise the investigation (Article 5(9)(b) of the Regulation) and where the professional secrecy has been lifted in accordance with the applicable law (Article 5(9)(c) of the Regulation). The law of the issuing State decides whether the data is subject to the protection of professional secrecy.

As a general rule, orders for the production of content or traffic data are subject to the information requirement laid down in Article 8 of the Regulation: In principle, orders in the form of a European Production Order Certificate (EPOC) must be addressed not only to the addressee of the service provider concerned (Article 9 in conjunction with Article 7 of the Regulation), but also to a designated authority in the executing State. This notification is required unless there is sufficient indication that both the place of inspection and the place of residence of the person concerned by the data request are in the issuing State (Article 8(2) of the Regulation). The notified authority examines the order against a catalogue of grounds for refusal (fundamental rights, immunities and privileges, freedom of the press, ne bis in idem, double criminality; Article 12(1) of the Regulation). For this purpose, a period of ten days is envisaged, except in urgent cases (Article 10(4) of the Regulation: eight hours), during which the service provider may not release the data (suspension effect; Article 10(2) of the Regulation) and must first secure it (Article 10(1) of the Regulation). If the notified authority invokes a ground for refusal, the issuing authority must revoke the order and the service provider may not transmit the data (Article 12(2) of the Regulation). Otherwise, the service provider must hand these over to the issuing authority after the expiry of the review period (ten days or earlier if the notified authority confirms that it does not wish to raise a ground for refusal, Article 10(2) of the Regulation).

Orders for the production of subscriber and identification data, as well as preservation orders, are not accompanied by a notification requirement. The service provider must back up the data without undue delay (Article 10(1), Article 11(1) of the Regulation) and, in the case of production orders, at the latest within ten days (in emergencies, without undue delay, at the latest within eight hours) (Article 10(3) and (4), first sentence, of the Regulation). If only the preservation is ordered, it must be provided for 60 days, extendible in principle by 30 days (Article 11(1) of the Regulation).

In cases where a service provider does not comply with an order addressed to it, Article 16 of the Regulation provides for an execution procedure. Within this framework, the service provider has the possibility to object to the execution of the production or preservation order on the basis of a catalogue of reasons (paragraph 3(a)). These grounds include, in addition to formal aspects such as lack of competence of the issuing authority, immunities and privileges and freedom of the press (paragraph 4(a) to (f), paragraph 5(a) to (e)). The executing authority also examines the relevant catalogue, extended to cover cases of manifest violation of fundamental rights (paragraph 4(g), paragraph 5(f)). If the service provider considers that, by complying with a production order, it would be in breach of its legal obligations with regard to a third country, it may initiate the review procedure provided for in Article 17 of the Regulation. During this process, a court in the issuing State may decide whether the order should be upheld. Where the service provider breaches its obligations under Articles 10, 11 and 13(4) of the Regulation, the penalties provided for in Article 15 of the Regulation shall be imposed.

The Regulation standardises the right of data subjects to effective legal remedies against production orders in the issuing State. The guarantees of fundamental rights in the executing state remain expressly unaffected, as do other legal remedies under national law (Article 18). The person whose data is sought must in principle be informed of the production without undue delay (Article 13(1) of the Regulation). In order to ensure a secure and rapid exchange of data between authorities and addressees, Article 19 et seq. of the Regulation provides for the creation of a decentralised IT system. Member States shall allow service providers access to this through their respective national IT systems and service providers shall ensure that their addressees may use the system (Article 19(2) and (3) of the Regulation). For sending orders as well as for other communication events, the Regulation provides for standardised forms in the annexes.

Pursuant to Article 14 of the Regulation, service providers may apply to the issuing State for reimbursement of their data reporting costs, provided that this is provided for in comparable national situations. Reimbursement shall be made in accordance with the respective national law. Since the relevant regulations in Germany in Annex 3 to the Judicial Remuneration and Compensation Act do not contain any restriction on German service providers, service providers from other Member States may also rely on this.

## **2. Directive (EU) 2023/1544**

The accompanying directive obliges service providers to set up one or more addressees within the EU so that decisions and orders to collect electronic evidence in criminal proceedings may be received and complied with.

This includes not only orders and decisions issued on the basis of Regulation (EU) 2023/1543, but also orders and decisions issued on the basis of Directive 2014/41/EU of 3 April 2014 on the European Investigation Order in criminal matters (Directive 2014/41/EU) and the Convention of 29.5.2000, drawn up by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union (first sentence of Article 1(2) of Directive (EU) 2023/1544). The legal assistance procedures provided for in the two instruments remain unchanged (see below for details). Finally, Directive (EU) 2023/1544 applies to national orders and decisions on the collection of electronic evidence in criminal proceedings addressed by an authority to addressees on its territory (Article 1(2), second sentence, of the Directive). Irrespective of this, direct data requests by national authorities to service providers established on their territory are still possible (Article 1(3) of the Directive). In addition, as Directive (EU) 2023/1544 does not apply at all, direct retrieval of data on their own and external territory in the field of security or for the performance of the central authority function are not affected.

Article 3 of the Directive requires Member States to ensure that all service providers whose activity extends to the territory of the European Union establish an addressee there (paragraph 1). This must be located in a Member State applying the above-mentioned legal instruments and in which the services are actually offered (Article 3(2)(a) of the Directive). The Directive distinguishes between two types of addressees, namely 'designated establishments' and 'representatives', according to the following system: Where service providers already have one or more establishments in an EU Member State applying the above-mentioned legal instruments, they shall designate one – or more – as the addressee or addressees within the meaning of the Directive (Article 3(1)(a)). Where establishments are located only outside the EU or in Member States which do not apply the aforementioned legal instruments, service providers shall appoint one or more representatives (Article 3(1)(b) and (c)). Within the scope of the Directive, Member States may not impose obligations on service providers that go beyond its content, in particular with regard to the designation of designated establishments or the appointment of representatives (Article 1(4) of the Directive). This does not apply to the area of security or the exercise of a central authority function, as these are not covered by Directive (EU) 2023/1544 (see above). Member States have to designate one or more central authorities to ensure the consistent application of the Directive (Article 6(1) of the Directive). To this end, they shall consult and cooperate with each other and, where appropriate, with the European Commission (Article 6(3) of the Directive). Where service providers fail to comply with their obligations relating to the establishment of addressees, Member States must provide for penalties (Article 5 of the Directive).

#### **IV. Main content of the draft**

The requirements of Directive (EU) 2023/1544 and the implementing rules for Regulation (EU) 2023/1543 are to be standardised in a new basic law. This establishes a uniform legal framework and ensures a practicable and user-friendly design of the e-evidence-specific rules.

In addition to a series of new regulations, the implementation of the directive also requires adjustments to national law: In order to comply with the prohibition in Article 1(4) of Directive (EU) 2023/1544 to impose obligations on service providers that go beyond the Directive, the applicability of national rules requiring the establishment of authorised agents in the context of the implementation of surveillance measures and information obligations for criminal proceedings, as they exist in the Telecommunications Act, should be restricted. With the amendments to the TDDDG, the draft law also creates the necessary legal basis for data processing to fulfil the obligations under Regulation (EU) 2023/1543.

The act is divided into four articles. Artikel 1 is dedicated to the transposition of Directive (EU) 2023/1544 and the implementation of Regulation (EU) 2023/1543. Artikel 2 contains the necessary amendments to the Telecommunications Act, Artikel 3 the amendments to the Telecommunications and Digital Services (Data Protection) Act. Artikel 4 governs the entry into force of the Act.

Artikel 1 is structured into four parts as follows: General rules, transposition of Directive (EU) 2023/1544, implementation of Regulation (EU) 2023/1543 and provisions concerning fines and restrictions of a fundamental right.

##### **1. Part 1: General provisions**

§ 1 refers to the definitions in Article 3 of Regulation (EU) 2023/1543 for the definitions applicable to the Act. It also specifies that the term "addressee" is used within the meaning of Article 7(1) of Regulation (EU) 2023/1543.

## **2. Part 2: Implementation of Directive (EU) 2023/1544**

According to the provisions of Part 2 transposing Directive (EU) 2023/1544 § 2 apply not only to decisions and orders under Regulation (EU) 2023/1543, but also to those based on Directive 2014/41/EU and the Convention of 29.5.2000 established by the Council in accordance with Article 34 of the Treaty on European Union on Mutual Assistance in Criminal Matters between the Member States of the European Union. They also apply to national orders in criminal proceedings issued by a German investigating authority to an addressee (within the meaning of § 3 Absatz 1 bis 3 this Act) on German territory (see details below).

The core of the regulations is the obligation of service providers in § 3 to designate establishments or to appoint representatives. The addressees must report these to the Federal Office of Justice at § 4, stating their contact details and the official language to be used in communication with the authorities or, in the case of addressee institutions in other Member States of the European Union, to the central authorities there.

The duties of the Federal Office of Justice as a central authority are summarised in § 6. Among other things, it monitors compliance with the service provider obligations set out in §§ 3 und 4 and transmits the information received from the service providers to the European Judicial Network in criminal matters.

## **3. Part 3: Implementation of Regulation (EU) 2023/1544**

Teil 3 contains three chapters: General rules, European Production Orders and legal protection.

Kapitel 1 includes the general regulations. § 7 contains a general reference to the provisions of the Judicial Organisation Act and its Introductory Act as well as to the provisions of the Juvenile Courts Act and the Code of Criminal Procedure. The reference applies to the extent that no special procedural provisions arise from Teil 3 of this Act and Regulation (EU) 2023/1543.

Kapitel 2 contains the implementing provisions for European Production Orders. § 8 links first the divergent terminologies of the Regulation and of national law. § 9 lays down the competence of courts and public prosecutor's offices to issue and validate production orders for subscriber data and data requested solely for the purpose of identification in accordance with Article 4(1)(a) of Regulation (EU) 2023/1544. As other competent authorities within the meaning of Article 4(1)(b) of the Regulation, a number of secondary competent authorities (the investigators of the public prosecutor's office, the tax authorities and customs authorities) are designated in § 9 Absatz 2 accordance with the national rules on exchanges of available information. § 9 Absatz 3 und 4 regulate the procedure and responsibilities in the public prosecutor's validation procedure. § 10 addresses the power of issuance in the case of production orders relating to the particularly sensitive traffic and content data referred to in Article 4(2) of the Regulation, which lies with the courts. The Absätze 2 und 3 relate to the process and responsibilities in the adoption procedure. § 11 shall be determined by the competent executing authority. Finally, § 12 regulates the statistics obligations of the state judicial authorities and the Federal Attorney General.

Kapitel 3 regulates legal protection.

Abschnitt 1 handles legal remedies against outgoing orders. These are subject to the provisions of the Code of Criminal Procedure, which also apply in the case of national orders and to which reference is made at § 13, subdivided according to the various categories of data. In terms of content, the court seised shall verify, in accordance with § 14 Absatz 1, whether the issuance rules laid down in Articles 4 and 5 of Regulation (EU) 2023/1543 are complied with.

Abschnitt 2 deals with the procedure in the case of conflicting obligations pursuant to the second sentence of Article 17(3) of the Regulation. In accordance with § 15, the Higher Regional Court or, in the case of investigations by the Federal Public Prosecutor, the Federal Court of Justice, is responsible for the decision to be made here. The decision is made by a non-appealable decision (§ 16).

Abschnitt 3 concerns legal remedies against decisions in execution proceedings and declares the provisions of the Administrative Offences Act applicable.

#### **4. Part 4: Provisions concerning fines and restrictions of a fundamental right**

The fourth part of the Act lays down in § 18 Absatz 1 the provisions concerning fines transposing the first sentence of Article 5 of Directive (EU) 2023/1544 and in § 18 Absatz 2 those implementing Article 15(1) in conjunction with Article 16(10) of Regulation (EU) 2023/1543. § 18 Absatz 1 is ancillary to the establishment, notification, equipment and co-operation obligations of service providers. § 18 Absatz 2 shall apply to the obligations relating to the execution of the European Preservation and Production Order.

§ 19(Restrictions of a fundamental right) takes account of the citation requirement of Article 19(1)(2) of the Basic Law.

#### **V. Executive footprint**

No stakeholders or commissioned third parties have contributed significantly to the content of the draft.

#### **VI. Alternatives**

None. As the draft serves the mandatory implementation and execution of European legal acts, there are no alternatives.

#### **VII. Legislative powers**

The Federal Government's legislative competence for the provisions in Article 1 of the draft implementing Regulation (EU) 2023/1543 and transposing Directive (EU) 2023/1544 is derived from Article 74(1)(1) of the Basic Law (criminal law, judicial proceedings). The provisions in Articles 2 and 3 of the draft amendment to the Telecommunications Act and the Telecommunications and Digital Services (Data Protection) Act are based on the legislative powers under Article 73(1)(7) of the Basic Law (telecommunications) and Article 74(1)(11) of the Basic Law in conjunction with Article 72(2) of the Basic Law. A federal regulation is necessary here in order to preserve the unity of law in the general interest. A diversity of legislation at State level would create unreasonable obstacles to cross-border legal transactions and thus run counter to the objective of the Act to increase the efficiency of law enforcement in the Federal Republic of Germany and in the European Union. To the extent that service providers are requested to provide information by law enforcement authorities of other Member States in the area of mutual legal assistance, uniform standards must apply nationwide, irrespective of the addressee's seat.

#### **VIII. Compatibility with European Union law and international treaties**

The draft serves to implement Regulation (EU) 2023/1543 and Directive (EU) 2023/1544 and is compatible with European Union law. The draft is compatible with the international treaties to which the Federal Republic of Germany is a party. The obligations under Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015

laying down a procedure for the provision of information in the field of technical regulations and of rules on information society services (OJ EC No L 241, p. 1 of 17.09.2015) have been complied with.

## **IX. Impact of the legislation**

### **1. Legal and administrative simplification**

Regulation (EU) 2023/1543 is directly applicable law in the Federal Republic of Germany, but this must be supplemented by implementing provisions in order to achieve the intended effect in the national competence. The implementing provisions will be laid down in a new framework act together with the regulations for the implementation of the Directive, so that all relevant national provisions are combined in a single resource for easy use by legal professionals. The provisions of the draft help avoid legal uncertainties in the field of European preservation and production orders, thus leading to a clearer legal situation.

### **2. Sustainability aspects**

The draft is in line with the core philosophy of the Federal Government on sustainable development as set out in the German Sustainability Strategy, which supports the implementation of the UN resolution Transforming our world: the UN 2030 Agenda for Sustainable Development.

By introducing EU legislation on the acquisition of electronic evidence in criminal proceedings into the German legal system, it contributes to the achievement of SDG 16 'Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'. Goal 16.a of this Sustainable Development Goal calls for support for the relevant national institutions, in particular through international cooperation in capacity building at all levels to prevent violence and combat terrorism and crime. The draft furthers the achievement of this goal by regulating the direct retrieval of electronic evidence data by law enforcement authorities from providers of electronic communications services in other Member States. The draft thus strengthens cross-border cooperation in criminal matters between the Member States of the European Union. This will improve the fight against crime both at national and European level and increase security in the Federal Republic of Germany and in Europe.

By regulating the granting of administrative assistance by the Federal Office of Justice to the competent authorities of other Member States, including in the transmission of information to the addressees of telecommunications service providers, the draft also contributes to the achievement of goal 16.6, which requires the establishment of efficient, accountable and transparent institutions at all levels.

The draft thus follows the sustainability principles of the German Sustainability Strategy '(1.) Consistently apply sustainable development as a guiding principle in all areas and in all decisions' and '(5.) Preserve and enhance social cohesion in an open society'.

### **3. Budgetary expenditure without compliance costs**

The Federal Government will incur additional expenditure for the Act.

With the entry into force of the Act in 2026, on the basis of the case numbers for specialised tasks set out in 4.2.1, it is currently estimated that there will be a one-off staff requirement for a period of one year for a total of 4.0 FTEs in senior positions (consisting of 1.3 FTEs A15 and 2.7 FTEs A14), 4.6 FTEs in upper-level positions (A12) and 3.8 FTEs in mid-level positions (A9m). One-off staff costs of EUR 1 216 000 are estimated. Staff re-

quirements are higher in this case, as the initial setup of the addressees by the service providers obligated will lead to a high volume of cases to be processed.

From 2027, there will be a permanent, annual staffing requirement for specialist tasks and IT tasks totalling an estimated 1.9 FTEs in senior positions (consisting of 1.1 FTE A14 and 0.8 FTE A15), 3.7VZ FTEs in upper-level positions (A12) and 2.0 FTEs in mid-level positions (A9m). Overall, the permanent staffing requirement is estimated at EUR 741 000 per year. In order to fulfil the statistics obligation, there are no additional staff requirements for the Federal Office of Justice, as the annual expenditure is only in the order of minutes.

The additional material and staffing requirements will be offset financially and in terms of positions in budget line item 07.

The States will incur additional staff requirements of an estimated EUR 273 000 due to their obligations with respect to fines. The fulfilment of statistics obligations is not expected to give rise to additional staffing needs for the States or the Federal Attorney General. The additional expenditure is in the order of minutes.

#### 4. Compliance costs

##### **Compliance costs for businesses**

Seq. No.	Article of draft legislation; provision (articles); designation of the requirement	IP	Annual number of cases and unit	Annual expenditure per case (minutes * labour costs per hour (business sector) + operational costs in euro)	Annual compliance costs (in thousands of EUR) or 'minor' (justification)	One-time number of cases and unit	One-off expenditure per case (minutes * labour costs per hour (business sector) + operational costs in euro)	Non-recurrent compliance costs (in thousands of EUR) or 'minor' (justification)
4.2.1	Article 1 EBe-wMG; § 3 Absatz 1 bis 3 and § 4; obligations of service providers	Yes	900 service providers	136.4 EUR = (155 / 60 * 52.80 EUR/h (WZ: J))	123	9 000 service providers	136.4 EUR = (155 / 60 * 52.80 EUR/h (WZ: J))	1 228
4.2.2	Article 1 EBe-wMG; § 3 Absatz 4 Obligations of service providers		1 service providers	2 886.4 EUR = (3 280 / 60 * 52.80 EUR/h (WZ: J))	3	10 service providers	2 886,4 EUR = (3.280 / 60 * 52.80 EUR/h (WZ: J))	29
Total (in thousands of euro)					<b>126-</b>			<b>1 256-</b>
of which information duties (IP)					<b>123-</b>			

**Compliance costs for the authorities**

Seq. No.	Article of draft legislation; provision (articles); Designation of the requirement	Federal Government/ State	Annual number of cases and unit	Annual cost per case (minutes * labour cost per hour depending on hierarchy level) + operational costs in euro)	Annual compliance costs (in thousands of EUR) or 'minor' (justification)	One-time number of cases and unit	One-off cost per case (minutes * labour costs per hour depending on hierarchy level) + operational costs in euro)	Non-recurrent compliance costs (in thousands of EUR) or 'minor' (justification)
4.3.1	Article 1 EBewMG; § 6 Absatz 1 ; responsibilities of the Federal Office of Justice as supervisory authority	Federal Government	1 Federal Office of Justice	559 547 EUR = (188 153 / 60 * 67.60 EUR/h) + (361 292/ 60 *40.40 EUR/h) + (185 132/ 60 *33.80 EUR/h) + 0 EUR/h)	559	1 Federal Office of Justice	947 550 EUR = (393 842/ 60 * 67.60 EUR/h) + (450 849 / 60 * 40.40 EUR/h) + (355 474 60 * 33.80 EUR/h) + 0 EUR)	948
4.3.2	Article 1 EBewMG; § 12 Absatz 1; Statistics obligation of the State administrations of justice	State	16 State judiciary		'minor' (minor expenditure per case)	0 State judiciary	0 EUR = (0 0 EUR)	0,0
4.3.3	Article 1 EBewG; § 12 Absatz 1 ; Statistics obligation of public prosecutor's offices	State	140 public prosecutor's offices		'minor' (minor expenditure per case)			
4.3.4	Article 1 EBewG; § 12 Absatz 1 ; Statistics obligation of the Federal Attorney General	Federal Government	1 Federal Attorney General		'minor' (low number of cases and minor expenditure per case)			
4.3.5	Article 1 EBewMG; § 18 Absatz 1; Responsibilities of the public prosecutor's offices in adminis-	State	140 public prosecutor's office	1,839.0 EUR = (396 / 60 * 43.90 EUR/h (100% gD) + 1,550 EUR)	257			0,0

Seq. No.	Article of draft legislation; provision (articles); Designation of the requirement	Federal Government/ State	Annual number of cases and unit	Annual cost per case (minutes * labour cost per hour depending on hierarchy level) + operational costs in euro)	Annual compliance costs (in thousands of EUR) or 'minor' (justification)	One-time number of cases and unit	One-off cost per case (minutes * labour costs per hour depending on hierarchy level) + operational costs in euro)	Non-recurrent compliance costs (in thousands of EUR) or 'minor' (justification)
	trative fine proceedings							
Total (in thousands of euro)					<b>816-</b>			<b>851-</b>
of which at federal level					<b>559-</b>			<b>851-</b>
of which at state level (including municipalities)					<b>257-</b>			<b>0-</b>

#### 4.1 Compliance costs for citizens

Citizens will not incur any compliance costs.

#### 4.2 Compliance costs for businesses

Below is a description of the compliance cost estimate for businesses by requirement.

##### 4.2.1 Obligations of service providers under § 3 Absatz 1 bis 3 and § 4

One-off compliance costs:

Number of cases	Time requirement per case (in minutes)	Hourly pay (in euro)	Material costs per case (in euro)	Staff costs (in thousands of euro)	Material costs (in thousands of euro)
9 000	155	52,80		1 228	
Compliance costs (in thousands of euro)				1 228	

Change in annual compliance costs:

Number of cases	Time requirement per case (in minutes)	Hourly pay (in euro)	Material costs per case (in euro)	Staff costs (in thousands of euro)	Material costs (in thousands of euro)
900	155	52,80		123	
Change in compliance costs (in thousands of euro)				123	

Compliance costs within the meaning of the provisions on the designation or appointment of addressees pursuant to § 3 Absatz 1 bis 3 and on the notification obligations pursuant to § 4 arise if

- i. a service provider with an establishment, exclusive or otherwise, in the territory of the Federal Republic of Germany designates its establishment in Germany, or
- ii. it is a service provider from another EU Member State that offers its services (inter alia) in Germany and appoints its representative there,
- iii. it is a service provider outside the EU that offers its services (among others) in Germany and appoints its representative there.

For the further calculation, it is assumed that it is most cost-effective for the service providers - regardless of their head offices - to designate only one addressee, even if their service is offered in several countries. Since it may also be assumed that the addressee will probably be appointed where the head office is located and that foreign, in particular non-EU service providers, will prefer to appoint their representative in English-speaking areas, it is assumed that the situations from ii) and iii) will hardly occur in practice.

As regards the determination of the number of cases, it is first examined which economic operators are affected by the scheme. These are:

- Electronic communications services
  - o publicly available electronic communications services that provide access to the internet and thus connections to virtually all termination points of the internet, regardless of the network technology and terminal equipment used (§ 1 Satz 1 in conjunction with Article 3(3)(a) of Regulation (EU) 2023/1543, Article 2(4)(a) of Directive (EU) 2018/1972 and Article 2(2)(2) of Regulation (EU) 2015/2120),
  - o interpersonal communications services (§ 1 Satz 1 in conjunction with Article 3(3)(a) of Regulation (EU) 2023/1543 Article 2(4)(b) of Directive (EU) 2018/1972),
  - o Services consisting wholly or mainly in the conveyance of signals, such as transmission services used for machine-to-machine communications and broadcasting (in § 1 Satz 1 in conjunction with Article 3(3)(a), of Regulation (EU) 2023/1543 and Article 2(4)(c) of Directive (EU) 2018/1972);
- Internet domain name and IP numbering services such as IP address allocation services and domain name registrar services and privacy and proxy services related to domain registration (§ 1 Satz 1 in conjunction with Article 3(3)(b) of Regulation (EU) 2023/1543),
- other information society services (in § 1 Satz 1 in conjunction with Article 3(3)(c) of Regulation (EU) 2023/1543 and Article 1(1)(b) of Directive (EU) 2015/1535):
  - o services provided remotely without the parties to the transaction being simultaneously physically present,'
  - o services rendered electronically, which are transmitted from the origin and received at the destination by means of electronic equipment for the electronic processing (including digital compression) and storage of data, and which are entirely transmitted, forwarded and received by wire, by radio, by optical means or by other electromagnetic means,
  - o services rendered at the individual request of a recipient, which are provided through the transmission of data based on an individual request.

No official or unofficial statistics are available on the number of companies affected. Based on

- i. analyses of the Business Register (URS) and the Inward Foreign Affiliates Statistics (IFATS) for the economic classes 61.20 (Wireless communications), 61.30 (Satellite telecommunications), 61.90 (Other telecommunications excluding wire-

- line telecommunications), 63.11 (Web portals) and 63.99 (Other information service activities),
- ii. the estimate as to the Act implementing Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC and implementing Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services and amending further laws (see publication no. 676/23, p. 60 sqq.) and
- iii. exchanges with the Federal Office of Justice

for the further procedure, a total number of cases of around 10 000 people affected is estimated, with about ten percent of foreign-controlled service providers. Due to the assumptions made above, these ten percent are not taken into account for the estimate.

Thus, for the fulfilment of the obligation, about 9 000 service providers are assumed for the one-off compliance costs. An annual fluctuation of ten per cent is assumed for the annual change in compliance costs (900 service providers). This share is freely estimated, as no relevant information could be researched for this purpose either.

The assumed time required of 155 minutes is made up of various standard values from the guidelines for determining and presenting compliance costs in regulatory projects of the Federal Government. 60 minutes for familiarisation with the information obligation, 60 minutes for internal meetings, 30 minutes for filling out forms, labelling, marking and five minutes for data transmission and publication.

The wage rate used is the average wage rate for economic section J Information and Communication of EUR 52.80 per hour.

This changes the annual compliance costs by around EUR 123 000, and gives rise to a one-off compliance cost of around EUR 1.2 million.

#### 4.2.2 Obligations of service providers in accordance with § 3 Absatz 4

One-off compliance costs:

Number of cases	Time requirement per case (in minutes)	Hourly pay (in euro)	Material costs per case (in euro)	Staff costs (in thousands of euro)	Material costs (in thousands of euro)
10	3 280	52,80		29	
Compliance costs (in thousands of euro)				29	

Change in annual compliance costs:

Number of cases	Time requirement per case (in minutes)	Hourly pay (in euro)	Material costs per case (in euro)	Staff costs (in thousands of euro)	Material costs (in thousands of euro)
1	3 280	52,80		3	
Change in compliance costs (in thousands of euro)				3	

Service providers established in the Federal Republic of Germany or offering services in the territory of the Federal Republic of Germany must provide their addressees with the powers and resources necessary to comply with decisions and orders.

The Federal Office of Justice's monitoring obligation concerns all service providers who have established their addressees in the territory of the Federal Republic of Germany.

The wage rate is taken from 4.2.1. This changes the annual compliance costs by around EUR 3 000 and results in a one-off compliance costs of around EUR 29 000.

### 4.3 Compliance costs for the administration

Below is a description of the compliance cost estimate for the administration by requirement.

#### 4.3.1 Responsibilities of the Federal Office of Justice

One-off compliance costs for the Federal Government:

Number of cases	Time requirement per case (in minutes)	Hourly pay (in euro)	Material costs per case (in euro)	Staff costs (in thousands of euro)	Material costs (in thousands of euro)
1	393 842	67,60	0	444	
1	450 849	40,40	0	304	
1	355 474	33,80	0	200	
Compliance costs (in thousands of euro)				948	

Change in annual compliance costs for the Federal Government:

Number of cases	Time requirement per case (in minutes)	Hourly pay (in euro)	Material costs per case (in euro)	Staff costs (in thousands of euro)	Material costs (in thousands of euro)
1	188 153	67,60	0	212	
1	361 292	40,40	0	243	
1	185 132	33,80	0	104	
Change in compliance costs (in thousands of euro)				559	

The Federal Office of Justice, as the central authority in accordance with § 6 Absatz 1, monitors service providers in the fulfilment of their obligations under §§ 3 und 4. To this end, it shall cooperate and coordinate with the central authorities of other Member States and, where necessary, with the European Commission. In doing so, the Federal Office of Justice shall assist the central authorities of the other Member States by providing all appropriate information and assistance (§ 6 Absatz 2). The Federal Office shall publish and update the information received on the publicly available website of the European Judicial Network in criminal matters and on its own website (§ 6 Absatz 3). In addition, in the event of breaches of the obligations arising from the §§ 3 und 4 in accordance with § 18 Absatz 8 Nummer 1, the Federal Office of Justice is responsible for prosecuting and punishing the administrative offence. In addition, the Federal Office of Justice shall inform the Commission annually of which service providers have failed to comply with their obligations, the enforcement measures taken against them and the penalties imposed on them (§ 6 Absatz 4). In addition, the Federal Office of Justice collects the data referred to in Article 28(2) of Regulation (EU) 2023/1543 and transmits these annually to the Commission (§ 12 Absatz 2).

In 2026, a total time requirement of 1 200 164 minutes is expected. The costs arise from work on the IT situation and administration, the examination of initial filings, the exchange with service providers and central authorities, the examination of notifications and objections, and the decision on objections. The respective activities are carried out by mid-level positions (355 474 minutes), upper-level positions (450 849 minutes) and senior positions (393 842 minutes).

The respective time requirement and the respective wage cost rates in accordance with Annex 9 of the Guidelines for the Determination and Presentation of Compliance Costs in Federal Government Regulatory Proposals (EUR 33.80 per hour in mid-level positions, EUR 40.40 per hour in upper-level positions, and EUR 67.60 per hour in senior positions) result in a one-off compliance cost of around EUR 948,000.

The annual time requirement amounts to a total of 689 577 minutes and is attributable in particular to the processing of change notifications from service providers, the review of the list of service providers to be monitored, the administrative offence proceedings conducted and the statistics obligations. In addition, further ongoing expenses arise from IT situation and administration tasks. The activities are again divided between the different levels of the hierarchy, with 188 153 minutes for mid-level positions, 316 292 minutes for the upper-level positions, and 188 153 minutes for senior positions. After taking into account the respective time requirement and wage cost rates, the annual compliance cost is therefore around EUR 559 000.

#### 4.3.2 Statistics obligations of the State judicial authorities pursuant to § 12 Absatz 1

Change in annual compliance costs of the States:

The state judicial authorities collect or collate the aforementioned data from the public prosecutor's offices within their area of competence and transmit these same to the Federal Office of Justice each calendar year by 31 March of the year following the reporting year. This is a table with approximately ten types of cases. The expense arises from inspection and dispatch. Due to the low expenditure per case, it is assumed that there is a minor change in compliance costs.

#### 4.3.3 Statistics obligation of public prosecutors in accordance with § 12 Absatz 1

The change in the annual compliance cost of the public prosecutor's offices due to the obligations arising from § 12 Absatz 1 currently not yet reported, as the European Commission has not yet taken a binding decision on the automation of statistical collection within the decentralised IT system pursuant to Article 19 of Regulation (EU) 2023/1543. However, due to the minor expense per case, it is assumed that this is a minor change in compliance costs.

#### 4.3.4 Statistics obligation of the Attorney General pursuant to § 12 Absatz 1

The change in the annual compliance costs of the Federal Government due to the obligations under § 12 Absatz 1 cannot yet be indicated, as the European Commission has not yet adopted a binding decision on the automation of statistical data collection within the decentralised IT system in accordance with Article 19 of Regulation (EU) 2023/1543. However, due to the singular number of cases and the small amount of expenditure per case, it is assumed that this is a small change in fulfilment costs.

#### 4.3.5 Responsibilities of the public prosecutor's offices in administrative fines proceedings in accordance with § 18 Absatz 2

Change in annual compliance costs of the States:

Number of cases	Time requirement per case (in minutes)	Hourly pay (in euro)	Material costs per case (in euro)	Staff costs (in thousands of euro)	Material costs (in thousands of euro)
140	396	43,20	1 550	40	217

Change in compliance costs (in thousands of euro)				257	

Failure by service providers to comply with orders may result in administrative fines. A total time requirement of 55,510 minutes is assumed. It is assumed that this also includes the time requirement if the service providers take legal action against the fines. In Germany, there are approximately 116 public prosecutor's offices and 24 Prosecutor General's Offices. An annual time requirement of 396 minutes is therefore to be expected per public prosecutor's office. The wage rate for the upper intermediate civil service of the States of EUR 43.20/hour is applied (Guidelines p. 69).

According to feedback from the States, the determination of the fine leads to additional costs. An auditor is commissioned to determine the total turnover of a service provider. According to the Guide, operational costs arise from expenses for the use of external services. Based on interviews with auditors, a standard value of EUR 155 per hour is assumed. It is assumed that 10 hours of time will be incurred per case, i.e. a total of EUR 1 550 per case.

This will change the annual compliance cost for the States by around EUR 257 000.

## 5. Other costs

For the present regulations, the burdening and relieving effects for the issuing and validation authorities from the §§ 9 und 10 as well as the burdening effect on the competent public prosecutor's offices, local courts and higher regional courts due to the legal protection provisions in the §§ 13 bis 17 as well as the activity of the public prosecutor's offices as enforcement authorities in accordance with § 11 Absatz 1 when receiving information in accordance with Article 8 of Regulation (EU) 2023/1443 must be taken into account.

Since in future national authorities will no longer have to be continuously involved in data queries from other EU countries, a relief effect may be mapped. With regard to the amount, the European Commission assumes in its cost estimate (see page 99 of the impact assessment; Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters and Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings) a maximum of EUR -7.2 million for all Member States.

To estimate the cost changes, the Commission had used the number of annual requests to the five largest service providers as a basis. Germany was at the top of the list with around 35,000 enquiries - around 38 per cent of all enquiries from the EU (see impact assessment cited above, page 15). For the calculation of the further costs of the two implementation projects, the EUR -7.2 million must therefore be taken on a relative basis so that they correspond to around EUR -2.7 million (EUR -7.2 million \* 0.38).

## 6. Other legal consequences

Effects in terms of equality policy or consumer policy are not expected. The same applies to demographic impacts.

## **X. Time limitation; evaluation**

Since the provisions are the transposition of European requirements and Directive (EU) 2023/1544 and Regulation (EU) 2023/1543 apply indefinitely, there is no time limitation.

With regard to the administrative implementation of European Union legal acts, an evaluation is not envisaged; an evaluation will be carried out at European level in accordance with Article 33 of Regulation (EU) 2023/1543. Article 33 of Regulation (EU) 2023/1543 requires the European Commission to carry out the evaluation by 18 August 2029 at the latest and to submit an evaluation report to the European Parliament and the Council of the European Union and to the European Data Protection Supervisor and the European Union Agency for Fundamental Rights.

## **B. Specific part**

### **Re Artikel 1 (Act on European Production and Preservation Orders for Electronic Evidence)**

#### **Re Teil 1 (General provisions)**

Part 1 contains general, overarching provisions for both the transposition of Directive (EU) 2023/1544 and the implementation of Regulation (EU) 2023/1543.

#### **Re § 1 (Definitions)**

§ 1 refers to Article 2 of Directive (EU) 2023/1544 and Article 3 of Regulation (EU) 2023/1543 for the definition of the terms used in the Act. For the term 'addressee', which is not defined there, reference is made to the use of the term in Article 7(1) of Regulation (EU) 2023/1543.

#### **Re Teil 2 (implementation of Directive (EU) 2023/1544)**

Part 2 contains the provisions for the implementation of the Directive.

#### **Re § 2 (Scope)**

§ 2 regulates the scope of application and thus transposes Article 1(2) and (3) of Directive (EU) 2023/1544.

#### **Re Absatz 1**

Directive (EU) 2023/1544 has no impact on the substantive validity of Directive 2014/41/EU and the Convention on Mutual Assistance in Criminal Matters between EU Countries (EU MLA Convention). Electronic evidence may also continue to be obtained by means of the legal assistance mechanisms provided for in the two mechanisms. The procedures remain unchanged; the orders must therefore be addressed to an authority in the receiving State and cannot be delivered directly to the service providers. However, the territorial competence of the authority receiving the request depends on the location of the addressees as established in accordance with Directive (EU) 2023/1544: The authorities of the Member State where the addressee is located shall be responsible for the execution of requests under Directive 2014/41/EU and the EU MLA Convention. For example, if a French service provider establishes an addressee in Sweden on the basis of Directive (EU) 2023/1544, a European Investigation Order would have to be sent to the competent authority in Sweden and no longer - as before the appointment of an addressee - to a French authority.

§ 2 Absatz 1 Nummer 4 this Act clarifies that the addressees to be established under Directive (EU) 2023/1544 are also competent to receive purely national orders and decisions that have no cross-border implications within the meaning of the e-evidence package (see Article 1(1), Article 3(3) of Regulation (EU) 2023/1543). If addressees are established in the territory of the Federal Republic of Germany, German investigating authorities may therefore use them for investigations on the basis of the Code of Criminal Procedure (StPO). The background to this is the consideration that, from the point of view of the investigating authorities, it is merely a coincidence in which territory an addressee is located. If the service provider has chosen German territory, all other Member States may take action and use the addressee by means of Regulation (EU) 2023/1543. The German authorities should have the same right, on the basis of national orders.

## **Re Absatz 2**

It follows from Absatz 2 that the German investigating authorities may continue to contact service providers established in Germany to collect electronic evidence in criminal proceedings. Therefore, if a service provider has an establishment in Germany and has established an addressee in another Member State - so that the scope of application of Regulation (EU) 2023/1543 is in principle open - this does not prevent an investigation measure limited to Germany in accordance with Union law and national law. The background to this is that the e-evidence package is intended to improve the position of the member states, i.e. to make it easier for them to carry out investigations. Existing possibilities are therefore not curtailed. This is also without prejudice to query permissions outside the criminal proceedings (e.g. in security, personal protection and witness protection operations), as these are not covered by the scope of the e-evidence Regulation at all. It is also without prejudice to queries in central authority procedures.

## **Re § 3 (Designated establishments and representatives (addressees) )**

In transposing Article 3 of Directive (EU) 2023/1544, the provision regulates the details of the obligation of service providers to establish addressees. In accordance with the first sentence of Article 1(5) of the Directive, this applies to all service providers whose offer extends to the European Union. In accordance with Article 3(2)(a), of Directive (EU) 2023/1544, the addressee should be established in a Member State where the services are actually offered.

In implementation of Article 3(1) of the Directive, the connecting factor for the obligation to provide an addressee facility in § 3 is (primarily) the existence of an establishment or (secondarily) the provision of services in Germany. A terminological distinction is made: If an existing establishment is to be considered as the addressee, it must be named as the "designated establishment"; if this is not the case, a "representative" must be appointed.

Pursuant to the second sentence of Article 1(5) of the Directive, a derogation from the obligation to establish addressees applies only to providers established in the territory of only one Member State and offering their services only there.

§ 3 against this background, regulates three basic scenarios. Firstly, the one in which establishments exist in Germany and also in other member states of the European Union that apply the legal instruments mentioned in § 2 Absatz 1 (Absatz 1). Furthermore, account is taken of the special situation in which one or more establishments exist solely in Germany and the services are offered not only in Germany or exclusively in other Member States (Absatz 2; if an establishment exists only in Germany, the services are only offered there, the directive pursuant to Article 1(5) sentence 2 does not apply, see above). Finally, in the case of Absatzes 3, the service provider either has no establishment at all in the EU or only in a Member State that does not apply the legal instruments listed in § 2 Absatz 1 of this Act.

§ 3 This Act does not regulate the situation in which there is no establishment in Germany, but in another Member State that applies the legal instruments listed at § 2 Absatz 1. In this case, the obligations laid down in Article 3(1) of Directive (EU) 2023/1544 do not apply to the Federal Republic of Germany: As explained above, the primary connecting factor for the obligations is the existence of an establishment in one of the participating Member States. As soon as a corresponding establishment exists, the Member State concerned must ensure that the addressee is properly designated. The mere offering of services in the Federal Republic of Germany does not in itself give rise to an obligation; this is only the case under Article 3(1) of Directive (EU) 2023/1544 if there is no establishment in one of the Member States that apply the legal instruments listed at § 2 Absatz 1.

The reference to Absätze 4 und 5 in the Absätzen 1 bis 3 makes it clear that service providers must ensure that both the establishments to be designated and the representatives to be appointed have the powers and resources to comply with the decisions and orders and that they must be designated within the specified period.

### Re Absatz 1

Absatz 1 implements Article 3(1)(a) of Directive (EU) 2023/1544 and concerns the first of the above-mentioned variants. There are establishments both in Germany and in other Member States that apply the legal instruments mentioned in § 2 Absatz 1. In this situation, at least one of these establishments must be named as the addressee. Select a Member State where the services are offered. This follows from Article 3(2)(a) of the Directive. In the unlikely case that services are not offered in any country of establishment, there is a conflict between the requirement of Article 3(2)(a) of the Directive on the one hand and that of Article 3(1)(a) of the Directive on the other hand: On the one hand, the addressee should be established where the services are offered; on the other hand, if there are establishments in the relevant Member States, one of these must be selected. In the special situation examined here, the latter obligation takes precedence. This follows from a teleological interpretation of Directive (EU) 2023/1544: Its goal is to streamline and optimise the processes of cross-border data requests. For this, it is important to be able to draw on the resources of an existing establishment, which is well-established in its routines. The argument that, for reasons of relevance to the matter in question, the addressee States should also be those in which the services are offered, is relatively less important. If this obligation were given priority here, a representative (new) would have to be established, so that tried and tested processes could not be used. This could lead to efficiency losses, which would not be within the meaning of the Directive.

### Re Absatz 2

Absatz 2 concerns the second of the above-mentioned situations. It also transposes Article 3(1)(a), of Directive (EU) 2023/1544, taking into account the particular nature of the second sentence of Article 1(5) of that Directive: If an establishment is located on German territory, Germany is obliged to ensure the establishment of an addressee. However, if, as in the scenario of Absatzes 2, there is no other establishment in the EU, the obligation only applies if the service provider's offering is not limited to Germany. This means that the service provider is present on the market either in Germany and in other Member States, or only in other Member States. In both cases, the establishment located in Germany should be designated as responsible. To the extent that no services are offered in Germany, there is again a conflict between the requirement of Article 3(2)(a) of the Directive on the one hand and that of Article 3(1)(a) of the Directive on the other. This must be resolved in favour of the designation of the existing establishment (see paragraph 1 above).

### **Re Absatz 3**

In the third of the above variants, the service provider either has no establishment at all in the EU or only in a Member State that does not apply the legal instruments listed in § 2 Absatz 1 this Act. These cases are dealt with in Article 3(1)(b) and (c) of the Directive. If the service provider's offer extends to the territory of the Federal Republic of Germany, Germany must arrange for the establishment of an addressee. The service provider must then appoint a legal representative in Germany or in a Member State that applies the legal instruments § 2 Absatz 1 listed in (and where it offers services).

### **Re Absatz 4**

In accordance with Absatz 4, the service providers obligated under the Directive must provide their addressees with powers and resources in such a way that they may comply with the decisions and orders falling within the scope of the Act (§ 2 Absatz 1). This obligation applies both to service providers who have established their addressees in the territory of the Federal Republic of Germany and to those who have established their addressees in one or more other Member States but offer their services here.

### **Re Absatz 5**

Absatz 5 transposes Article 3(6) of Directive (EU) 2023/1544 and determines the date from which the service providers obliged under the Directive must have established at least one addressee within the meaning of Absätze 1 bis 3. In principle, a six-month time limit applies: If the services are already offered at the time of entry into force of the Directive, this would mean 18 August 2026. If the services are only offered after the date of entry into force of Directive (EU) 2023/1544, the addressee must be established six months after the start of the offer.

### **Re Absatz 6**

Absatz 6 provides that the addressees of service providers obliged under the Directive who are established in the territory of the Federal Republic or offer their services here must cooperate with the competent authorities in the receipt of decisions and orders in accordance with § 2 Absatz 1 in accordance with the legal provisions referred to therein. This general cooperation obligation of the addressees is not explicitly laid down in Directive (EU) 2023/1544. However, it may be inferred from the responsibility of the Member States to monitor the correct reception of the decisions and orders by the addressees, Article 3(4), second sentence, of Directive (EU) 2023/1544.

### **Re § 4 (Notifications and languages)**

§ 4 transposes Article 4 of Directive 2023/1544, which requires service providers to communicate the contact details of their addressees and the language regime to the central authorities to be designated in each Member State (see 6). In doing so, the Directive is linked, on the one hand, to the existence of an addressee and, on the other hand, to the provision of services in the respective territory of the Member State. The detailed contact details are set out in the software provided by the European Commission for the notification of service providers (Court Data Base). The data entered in the forms of the software will be automatically transmitted to the Federal Office of Justice. If the Federal Office of Justice validates the data, an access account will be created for the service provider and the information will be made available for publication on a dedicated website of the European Judicial Network in criminal matters. If the service provider's registration application is rejected, the notification must be made again, taking into account the reasons for rejection provided by the Federal Office of Justice. With this transmission channel, the text form is complied with.

## **Re Absatz 1**

**Absatz 1** concerns the case in which the service providers have established an addressee in Germany. You must provide the Federal Office of Justice with its contact details and any changes thereto in text form (Article 4(1) of Directive 2023/1544).

## **Re Absatz 2**

**Absatz 2** regulates the situation in which the service providers have established their respective addressees on the territories of other Member States of the European Union and have an establishment in the Federal Republic of Germany (**Nummer 1**) or offer services in Germany (**Nummer 2**). In such cases, they must inform the central authorities designated by the respective Member State of the European Union (in which the addressee was established) of the contact details of the addressees and of any changes thereto in text form (Article 4(1) of Directive 2023/1544).

## **Re Absatz 3**

**Absatz 3** concerns cases in which the service providers have designated several addressees - either domestically or (if applicable additionally) in another Member State. In this situation, the notifications referred to in **Absätzen 1 und 2** must additionally indicate the exact spatial area of responsibility of the respective addressee (Article 4(3) of Directive 2023/1544).

## **Re Absatz 4**

**Absatz 4** supplements the notification obligations of the **Absätze 1 und 2** with a notification obligation on the language regime: The service provider shall indicate which official language or languages of the European Union may be used in exchange with the addressee(s). If the addressee is in the territory of the Federal Republic of Germany, German must be one of those languages (Article 4(2) and (3) of Directive 2023/1544).

## **Re Absatz 5**

**Absatz 5** clarifies that the notifications in accordance with **Absätzen 1 bis 3** must be made immediately after the expiry of the respective time limit for the designation or appointment of the addressee. If there are any changes, these must be reported as soon as they occur. Such a deadline is not explicitly provided for in the Directive; it only regulates deadlines for the establishment of the addressees as such (in this Act **§ 3 Absatz 5**). However, since the notifications are essential for the functioning of the E-Evidence Mechanism, the obligation to communicate without delay arises from the interpretation of the Directive: If it were left to the service providers to initiate notifications only with significant delay, the decisions and orders falling within the scope could not in the meantime be served as intended. This contradicts the fundamental idea of the e-evidence package (maximising the efficiency of law enforcement). The Act therefore also provides for a time limit for the transmission of notifications.

## **Re § 5 (Joint responsibility of service provider and addressee)**

**§ 5** implements Article 3(5) of Directive (EU) 2023/1544.

## **Re Absatz 1**

**Absatz 1 Satz 1** refers to Article 3(5), first sentence, of Directive (EU) 2023/1544. The provision regulates the joint responsibility of addressees and service providers regarding violations of the obligations arising for one of them from the legal instruments referred to in **§ 2 Absatz 1** of this Act (Regulation (EU) 2023/1543, Directive 2014/41/EU, Convention established by the Council in accordance with Article 34 of the Treaty on European Union on

Mutual Assistance in Criminal Matters between the Member States of the European Union). If the decisions and orders to preserve or collect electronic evidence that fall within the scope of application are not properly implemented, a fine may be imposed on both the addressee and the service provider. **Absatz 1 Satz 2**, transposing the second sentence of Article 3(5) of Directive (EU) 2023/1544, provides that the lack of appropriate internal procedures between addressees and service providers cannot serve as justification for the breach of obligations.

### **Re Absatz 2**

**Absatz 2 Satz 2** in accordance with the third sentence of Article 3(5) of Directive (EU) 2023/1544, provides that joint responsibility shall **Absatz 1 Satz 1 und 2** cease to apply where the act or omission giving rise to the violation in Germany constitutes a criminal offence.

### **Re § 6 (Central authority)**

Article 6(1) of Directive (EU) 2023/1544 requires Member States to designate one or more central authorities to ensure a coherent application of the law. Accordingly, **§ 6** contains the following specifications:

### **Re Absatz 1**

It follows from **Absatz 1** that the Federal Office of Justice acts as the central authority and, in this role, monitors the fulfilment of the obligations arising for service providers and their addressees from **§§ 3 und 4** (Article 6(1) in conjunction with Articles 3 and 4 of Directive EU 2023/1544). In doing so, the Federal Office of Justice monitors that the addressees cooperate with the competent authorities when receiving decisions and orders in accordance with **§ 2 Absatz 1** the applicable rules (Article 3(4), second sentence, of the Directive, **§ 3 Absatz 6** this Act). This refers to the cooperation obligations that arise for the addressees from the legal instruments mentioned in **§ 2 Absatz 1**. In this respect, the Federal Office of Justice is not responsible for individually monitoring compliance with each individual order, as enforcement measures in specific cases are the responsibility of the public prosecutor's office as the competent authority. The Federal Office of Justice, on the other hand, is **§ 3 Absatz 6** called upon in cases where there is a pattern of systematic non-compliance. In order for the Federal Office of Justice to become aware of such cases, the Guidelines for Criminal Traffic with Foreign Countries (RiVAST) should provide for notification by the public prosecutor's offices.

In order to fulfil its monitoring obligations, the Federal Office of Justice must obtain an overview of the range of service providers obliged by Directive (EU) 2023/1544 in respect of which a designation of addressee in the Federal Republic of Germany could be considered or, in the event of failure to designate the addressee, a penalty under Article 18(1) would have to be applied. For this purpose, the Federal Office of Justice may collect and further process the necessary data, including personal data. This provision takes due account of the double-door model. This is because, in addition to a (still to be created) transmission authorisation, an authorisation to retrieve and process the relevant data at the recipient is also required.

Monitoring also includes the proper allocation of powers and resources to the addressees in accordance with **§ 3 Absatz 4** (Article 4(2) sentence 2 of Directive EU 2023/1544). In order to implement its monitoring obligations, the Federal Office of Justice may request information and evidence from the addressee.

### **Re Absatz 2**

**Absatz 2** lists the actors with which the Federal Office of Justice must cooperate and coordinate, namely with the central authorities of other Member States and, where necessary,

with the European Commission. In doing so, the central authorities of other Member States must be supported by all appropriate information and administrative assistance (Article 6(3) of Directive EU 2023/1544).

### **Re Absatz 3**

This paragraph transposes Article 4(4) of the Directive. According to the Directive, the Member States of the European Union must ensure that the up-to-date information necessary for the application of the Directive is always available on a special website of the European Judicial Network in criminal matters. This should enable the issuing authorities to take swift and targeted action when collecting electronic evidence. Pursuant to Absatz 3, the Federal Office of Justice must forward the information received under § 4 and any related updates to the European Judicial Network in criminal matters for publication immediately upon receipt. According to the third sentence of Article 4(4) of the Directive, the information 'may be disseminated in order to make it more easily accessible to the competent authorities'. Against this background, Absatz 3 Satz 2 provides that the Federal Office of Justice will also publish the information provided by the service providers on its own website.

### **Re Absatz 4**

This paragraph regulates the obligation of the Federal Office of Justice to inform the Commission annually which service providers have not complied with their obligations under §§ 3 und 4 this Act, what enforcement measures have been taken against them and what sanctions have been imposed on them.

### **Re Teil 3 (Implementation of Regulation (EU) 2023/1543)**

Teil 3 lays down the rules for the implementation of the Regulation.

### **Re Kapitel 1 (General provisions)**

#### **Re § 7 (Applicability of other procedural and jurisdictional provisions)**

Pursuant to § 7, the provisions of the Judicial Organisation Act and its Introductory Act, the Code of Criminal Procedure and the Juvenile Courts Act (JGG) apply accordingly, to the extent that neither Regulation (EU) 2023/1543 nor this Act provide for special or conflicting procedural provisions. The reference is intended to fill gaps, for example with regard to the precise regulation of competence and the organisation of courts. The applicability of special provisions of the JGG shall be ensured in the event that the person affected by the data query should be a young person or adolescent within the meaning of Article 1 of the JGG. In cases involving a juvenile, this ensures that the provisions on the involvement of legal guardians and legal representatives (in particular Articles 67 and 67a JGG) apply.

### **Re Kapitel 2 (European Production and Preservation Orders)**

The first chapter contains the provisions on European Production Orders, in particular on their issuance, review and transmission.

#### **Re § 8 (Data categories for outgoing orders)**

The terms used in Regulation (EU) 2023/1543 for the individual data categories (see Article 3(8) et seq. of the Regulation) do not always correspond to the terminology used in German law. There are also references to data categories in various national laws. Against this background, § 8 aims to bring together the terms used in the Regulation, on the one hand, and in German law, on the other hand, and thus ensure greater application certainty in the field of outgoing European Production and Preservation Orders. The provi-

sion is an aid to interpretation; it does not restrict the scope of Regulation (EU) 2023/1543. On the one hand, not all data categories may be exhaustively described and, on the other hand, the provision does not make any statement with regard to incoming European Production and Preservation Orders. These must be observed and implemented by the addressees in the Federal Republic of Germany irrespective of the present regulation.

The content data category, which has not been legally defined in German law either, is completely omitted. The explanations provided in Article 3(12) of Regulation (EU) 2023/1543 adequately cover the possible use cases. Relevant in national law may be various grounds for authorisation (e.g. Articles 94, 98; 95, 95a; 99 StPO, in the case of selective collection also Article 100a StPO).

### **Re Absatz 1**

In **Absatz 1**, subscriber data within the meaning of Article 3(9) of Regulation (EU) 2023/1543 is treated and linked to the category of inventory data in national law. According to the national definitions in Article 3(6) of the German Telecommunications Act (TKG) and Article 2(2)(2) of the German Telecommunications and Digital Services (Data Protection) Act (TDDDG), this is data that is required for the establishment, content organisation, amendment or termination of a contractual relationship between the telecommunications service or digital service and the end user. It therefore concerns the contractual framework conditions that exist independently of a communication process. This usually includes the name, address and registration information (such as e-mail address) of the user. The term "inventory data" also includes the customer data that the providers named in Article 172 TKG are obliged to collect, even if this is not necessary for operational reasons. This includes, for example, the date of birth of the end-user, the telephone number assigned by the provider and, if a terminal device has been provided, its device number (IMEI number). All these categories may also be found in Section F(a), of the form set out in Annex I to Regulation (EU) 2023/1543.

### **Re Absatz 2**

The same purpose as **Absatz 1** follows **Absatz 2** with regard to data requested solely for the purpose of identifying the user (Article 3(10) of Regulation (EU) 2023/1543). These data have an equivalent in the usage data described in Article 2(2)(3)(a) of the TDDDG. This refers to the personal data of a user of digital services, the processing of which is necessary to enable and charge for the use of these services. In national law, however, the concept of 'usage data' goes beyond the concept of data requested solely for the purpose of identifying the user, as used by the Regulation, and also includes, in Article 2(2)(3)(b) and (c) of the TDDDG, data which, according to the terminology of the Regulation, fall within the concept of traffic data. This is because, unlike national law, Regulation (EU) 2023/1543 does not distinguish between telecommunications services and digital services. Against this background, the reference in Absatz 2 of this Act is limited to Article 2(2)(3)(a) of the TDDDG and thus to the data that allows identification. This is usually the last login IP address including timestamp and port number, which subsequently provide information about the subscriber by means of a qualified inventory data query (see also the exemplary list in Section F(b) of the form in Annex I to Regulation (EU) 2023/1543).

### **Re Absatz 3**

**Absatz 3** finally, concerns traffic data as defined in Article 3(11) of Regulation (EU) 2023/1543, referring to the national standard definition in the TKG (Article 3(70)). This is data that is required for the provision or billing of a telecommunications service, i.e. regularly the "classic" connection data and, in the case of mobile connections, also location data. Included also are the other data covered by the national concept of usage data in Article 2(2)(3)(b) and (c) of the TDDDG, which go beyond mere identification data (see above at Absatz 2). This includes information on the digital services used and on their

use. The data will regularly contain information on the IP addresses used, port numbers and the data volume.

### **Re § 9 (Procedures for European Production Orders with respect to subscriber and identification data)**

The provision shall be read in conjunction with § 10. The two provisions concretise Article 4(1) and (2) of Regulation (EU) 2023/1543. It specifies which types of authorities the Member States may declare competent to issue European Production Orders. In doing so, the Regulation follows a graded approach, in line with the underlying understanding of the severity of the measures in question: Accordingly, production orders for content data as well as traffic data not exclusively used to identify the user are considered to be particularly invasive. The production order is considered to be less invasive if it relates to subscriber data and to traffic data used exclusively to identify the user. Against this background, Article 4(1) and (2) of Regulation (EU) 2023/1543 specify, on the one hand, the type of authorities to which the final decision to issue a production order may be assigned by the Member States of the European Union. In the case of the more invasive measure, this competence must lie with a judge or a court of law (Article 4(2)(a)), while otherwise a public prosecutor's office may also be granted this power (Article 4(1)(a) of the regulation). On the other hand, the Regulation provides for the possibility of designating authorities which may issue orders but must have them validated by the primary competent authorities before sending them (Article 4(1) and (2), respectively, point (b)). Only in the emergency situation of Article 4(5) - limited to subscriber and identification data - does the Regulation provide for an exception to the requirement of prior validation; this must be carried out within 48 hours.

The Regulation thus provides (in Article 4(1) and (2), point (a) in each case) for a number of authorities to which the power to order may be delegated. At the same time, however, it refers to the requirements of national law: This is because orders may only be issued if they could have been issued in a similar form in a comparable national case under the same conditions (Article 5(2) sentence 2 of the Regulation for the production order).

§ 9 of the Act, against this background, regulates the material and territorial competence of the respective issuing authorities as well as the validation procedure concerning subscriber data and identification data.

### **Re Absatz 1**

Absatz 1 provides that the primary competence of courts and public prosecutor's offices to issue European Production Orders to obtain subscriber data or data requested for the sole purpose of identifying the user pursuant to Article 4(1), point (a), of Regulation (EU) 2023/1543 (and for the transmission of the associated certificate) shall be governed by the eighth section of Book 1 of the Code of Criminal Procedure. It contains the legal bases for data collection.

The following applies: The provisions on inventory data information in Article 100j(1) sentence 1, (2) and (5) of the Code of Criminal Procedure do not contain any limiting rules on competence, which is why, in addition to the courts, the public prosecutor's offices are also responsible for requests for information on inventory data.

For the collection of data exclusively for the purpose of identifying the user, Article 100k(3) StPO establishes the competence of the public prosecutor's office if the content of the use of the digital service is already known. However, if identification data is to be collected from digital services without the requirements of Article 100k(3) StPO being met or if identification data is to be collected from telecommunications services, the courts are responsible without exception (Article 100k(1) and (2), Article 100g(1) and (2) StPO). In these situations, the procedure is based on the regulations of § 10 that apply to traffic data, to which Absatz 5 explicitly refers (see below for more details).

Since the Regulation, in its Article 9(1), distinguishes between the European Production Order and the associated European Production Order Certificate (EPOC, see above) and the corresponding responsibilities in the validation process are different (see Absatz 3), this Act takes both reference points into account.

## Re Absatz 2

Absatz 2 is based on Article 4(1)(b) of Regulation (EU) 2023/1543. This authorises the Member States to designate further competent authorities which may issue European Production Orders for subscriber data and data requested solely for the purpose of identifying the user, but which must have them validated by a judge, a court, an investigating magistrate or a public prosecutor (see above). Absatz 2 gives the authorities listed therein secondary powers to the extent that they are authorised under national law to take action in criminal prosecution. This addition ensures that the designated authorities are not granted more extensive powers in implementing the Regulation than would be the case in a purely national situation. Therefore, no new powers are created for the respective bodies. The limitation to 'law enforcement' also makes it clear that further national data collection powers – such as for security purposes – are not covered by the regulations.

The investigators of the public prosecutor's office Nummer 1 are listed in, who, in national cases, may also request information on the available data pursuant to the first sentence of Article 100j(1) StPO. In addition to police officers, this includes in particular the officials of the tax authorities and the customs administration in cases in which they act as investigators of the public prosecutor's office as required by law (e.g. Article 404 of the Tax Code (AO), Article 14 of the Act on combating undeclared work and illegal employment (SchwarzArbG), Article 21 of the Foreign Trade Act).

The Nummern 2 und 3 also empower the tax authorities and customs authorities in the situations in which they are not acting as investigators for the public prosecutor's office, but substitute for the former as per legal regulation. This relates to the independent investigative powers of the tax authorities in accordance with Articles 399 (1) and 386 (2) of the German Tax Code (AO) (for example in the case of exclusively tax offences) and in accordance with the cases listed in Articles 14a and 14b of the Act on combating undeclared work. The designation of these authorities as issuing authorities with merely secondary competence, whose orders require validation by the public prosecutor's office, results from the wording of the Regulation (which refers to "public prosecutor's office" in Article 4(1)(a)) and the case law of the European Court of Justice on the European Investigation Order (judgement of 2 March 2023, Case C-16/22) on the comparable question of interpretation.

## Re Absatz 3

Absatz 3 regulates the validation procedures for the cases referred to in Article 4(1)(b) of Regulation (EU) 2023/1543. The Regulation does not regulate the procedure; this Act contains the necessary provisions. Where an issuing authority may act in accordance with paragraph 2, it shall transmit its order in accordance with Absatz 3 Satz 1 to the public prosecutor's office. This shall be done in electronic form using the transmission channel required in Article 19(1) of the Regulation via the decentralised IT system to which all bodies involved in the issuing and validation process must be connected. The public prosecutor's office verifies the legality of the order in the light of the conditions set out in Regulation (EU) 2023/1543 (see below § 14 Absatz 1 about this law). In the case of validation, the public prosecutor's office transmits the order in the form of a certificate (EPOC) to the addressee. This is also done using the decentralised IT system and the reference implementation software provided by the Commission (Article 22 of the Regulation), which provide the necessary processes and information to forward the order. The decision of the public prosecutor's office on the validation and, where appropriate, the transmission of the EPOC to the addressee shall be recorded in the file.

## **Re Absatz 4**

**Absatz 4** regulates the territorial competence for validation (the material competence results from paragraph 3). According to sentence 1, the public prosecutor's office conducting the investigation is generally responsible for this, in accordance with its position as the owner of the investigation proceedings; this may also be the Federal Attorney General. This ensures continuity in terms of content.

To the extent that the secondary competent issuing authority conducts the investigation itself under national law, the public prosecutor's office in whose territory the issuing authority has its seat is competent.

States may make arrangements that deviate from territorial competence, for example for reasons of specialisation.

## **Re Absatz 5**

**Absatz 5** lays down a procedure that deviates from **Absätze 3 und 4** and refers to the processes provided for in Article 10 (2) and (3). This provision is necessary because national law sets different requirements for the collection of identification data. In the case of digital services, a simplified collection of identification data by the public prosecutor's office is possible under the conditions laid down in Article 100k(3) StPO. If these conditions (knowledge of the content of the use) are not met or if data is to be collected from a telecommunications service, only a jurisdiction under Article 100k(1) and (2) StPO or Article 100g StPO remains (see Article 8 above). The procedure in these cases therefore corresponds to that of the production order for traffic data, which is why reference is made to the processes provided for in Article 10 (2) and (3).

## **Re § 10 (Procedure for European Production Orders concerning traffic and content data)**

### **Re Absatz 1**

**Absatz 1** refers to production orders for traffic data with the exception of data requested solely for the purpose of identifying the user and content data. The provision implements Article 4(2)(a), of Regulation (EU) 2023/1543, according to which (only) a judge, a court or an investigating judge with competence in the case in question may be granted the power to issue an order.

In national law, according to Section 8 of Book 1 StPO, the courts are competent for the collection of traffic and content data, since the enabling bases to be used in this respect each provide for a judicial reservation and urgent orders are excluded on the basis of the system of the Regulation in these cases (cf. Article 4(5) of the Regulation, which makes it clear that no subsequent validation is permitted for traffic and content data).

### **Re Absatz 2**

**Absatz 2** contains more detailed provisions on the material and territorial competence of the courts. In order to embed the requirements of the Regulation in the national system of criminal prosecution, it is laid down that the court's production order in the course of the investigation must be preceded by a request from the authority responsible for the investigation under national law (the public prosecutor's office, the tax authority or customs authority). With Satz 2, Article 162, paragraph (1) sentence 1 and paragraph (3) and Article 169 StPO are declared applicable accordingly. Article 162(1) sentence 1 concerns the appointment of the investigating judge in preliminary proceedings. The reference to Article 162(3) StPO ensures that, after the public action has been brought, the court hearing the case has competence to issue the production order. Article 169 StPO may be applied accordingly in order to include the investigating judges of the Higher Regional Court and the

Federal Court of Justice in the scope of application. The reference to the provisions of the Tax Code and the Act to Combat Undeclared Work and Illegal Employment is intended to cover situations in which the right of application is assigned to bodies other than the public prosecutor's office. These are the cases in which the customs and financial authorities carry out the investigations independently and therefore submit applications to the competent courts.

These regulations also apply to the collection of identification data via § 9 Absatz 5, to the extent that this is the responsibility of a judge under national law.

### **Re Absatz 3**

Absatz 3 regulates the issuance procedure. The competent court shall examine, on the basis of the conditions laid down in Regulation (EU) 2023/1543, whether the European Production Order may be issued. If this is the case, the court shall issue the order and transmit the corresponding certificate (EPOC) to the addressee using the decentralised IT system (Article 19(1) of the Regulation) and the reference implementation software (Article 22 of the Regulation) made available by the Commission, which shall provide the necessary procedures and information for forwarding the order (see above). If the issuance of the production order is preceded by an application by the public prosecutor's office conducting the proceedings (or one of the other authorities named in Absatz 2 Satz 1), the requesting authority has the right of appeal pursuant to Articles 304 and 306 StPO if the application is rejected - similar to the national powers. The last sentence of the paragraph concerns the documentation obligation in the file for both issuance and rejection cases.

These regulations also apply to the collection of identification data via § 9 Absatz 5, to the extent that this is the responsibility of a judge under national law.

### **Re § 11 (Competent executing authority)**

The rule specifies who acts as executing authority, according to Article 3, point (17), of Regulation (EU) 2023/1543. The executing authority has two main tasks:

On the one hand, it receives the notifications referred to in Article 8 of Regulation (EU) 2023/1543, which applies when querying content and traffic data (with the exception of those intended exclusively for identification purposes). In principle, the corresponding production orders must not only be addressed to the designated establishment or the representative of the service provider, but also to the enforcement authority (Article 8(1) of the Regulation), which must verify the existence of a ground for refusal by the information provided by the issuing authority (Article 12(1), Article 8(3) of the Regulation). A requirement for the executing authority to document the outcome of the audit should be laid down in the RiVAST.

The obligation to inform does not only apply where there are reasonable grounds to believe that the place of commission of the offence is in the issuing State and that the person whose data is requested is established in the issuing State (Article 8(2) of the Regulation). In recitals 52 and 32, the Regulation describes the cases in which this is to be assumed. Accordingly, the existing national rules on competence in criminal proceedings are not affected. Article 7 StPO and Article 9 StGB must therefore also be applied.

On the other hand, the executing authority is competent for the enforcement procedure provided for in Article 16 of the Regulation against service providers who do not comply with a preservation or production order. The executing authority must recognise and execute the order sent to it by the issuing authority without further formalities (Article 16(1), (2) and (3)). In doing so, it shall formally request the addressee of the service provider to comply with its obligation and give it the opportunity to comment (Article 16(3)). The addressee may then rely on the grounds for refusal referred to in paragraphs 4 and 5. If the

authority ultimately establishes enforceability and the addressee has failed to comply, a financial penalty shall be imposed in accordance with Article 15 of the Regulation.

### **Re Absatz 1**

Absatz 1 designates the public prosecutor's office as the executing authority. Territorial competence lies with the regional court in whose territory the addressee of the order – i.e. the designated establishment or the representative of the service provider – is located. The States may make different arrangements for territorial competence, in particular to allow for a concentration of competence in the sense of specialisation. This could be particularly useful in connection with the receipt of notifications, since the corresponding infrastructure and expertise must be available for processing within the shortest possible time.

### **Re Absatz 2**

Given the volatility of digital evidence, the processes under Regulation (EU) 2023/1543 all concern efficiency and speed. In some cases, it may be problematic that the issuing or requesting authorities of a Member State of the European Union have ambiguities regarding the competences in the receiving Member State. If a domestic authority that is not competent receives a production or preservation order or a request (for example pursuant to Article 12(5), first sentence, of Regulation (EU) 2023/1543), it shall immediately forward it to the competent authority and inform the issuing authority about the competent authority.

### **Re § 12 (Statistics obligations)**

#### **Re Absatz 1**

Article 28(2) of Regulation (EU) 2023/1543 requires Member States to collect, maintain and report comprehensive statistical data to the European Commission by 31 March each year. In order for the Federal Republic to comply with this, the State judicial authorities and the Federal Attorney General must be obliged to collect the data from the competent authorities and to transmit these same to the Federal Office of Justice by 28 February of the year following the reporting year.

It follows from Article 28(3) of the Regulation that the data may be collected automatically, since the reference implementation software is programmed for this purpose. A separate collection of data by the competent authorities is necessary only to the extent that the information does not arise in the immediate temporal context of the data transfers (legal remedies, absence of ex-post validation and reimbursement of costs, Article 28(2)(h) to (j)).

#### **Re Absatz 2**

Absatz 2 stipulates that the Federal Office of Justice shall prepare an overview of Absatz 1 the data obtained and send it to the European Commission no later than 31 March of the year following the reporting year.

### **Re Kapitel 3 (Legal protection)**

The second chapter regulates legal protection. The term is broadly understood and includes elements of the review process referred to in Article 17 of Regulation (EU) 2023/1543.

## **Re Abschnitt 1 (Legal remedies against outgoing orders)**

### **Re Section § 13 (Applicable provisions)**

This provision serves to implement Article 18 of Regulation (EU) 2023/1543. Under this provision, persons whose data have been requested by means of a European Production Order have the right to seek effective remedies against that order. § 13 regulates the details of this same.

#### **Re Absatz 1**

Absatz 1 Satz 1 for legal remedies against European Production Orders requesting subscriber data, refer to the rules StPO applicable in similar national cases. In addition, Satz 2it provides that the same remedies apply to the data requested by the public prosecutor's office solely for the purpose of identifying the user. In practice, this concerns the situation in which such identification data are collected for digital services. The relevant provision is Article 100k(3) StPO, which allows the public prosecutor's office to retrieve identification data if it is already aware of the usage content of the digital service. In the cases referred to in the first and second sentences, the general remedies provided for in Article 98(2), second sentence StPO (in the case of a public prosecutor's order or validation) or Articles 304(1), 306 and 310(2) StPO (in the case of a court order) shall apply.

If a judicial decision is issued following an appeal based on Article 98(2), second sentence, StPO (against orders or validations issued by the public prosecutor's office), the appeal pursuant to Article 304 StPO is also opened. On the other hand, the decision based on the legal remedy under Article 304 StPO (against court orders) cannot be challenged with the further appeal under Article 310 StPO. This provision is exceptional in nature and applies only to the serious measures referred to therein. The orders in question here fall well short of this in terms of their invasiveness, so that a corresponding application is not appropriate.

The provisions referred to in § 13 Absatz 1 apply in the absence of specific regulations: Neither Article 100j StPO nor Article 100k (3)StPO contains an expressly regulated legal remedy under national law. The statements in Articles 100j(4) and 101a(7) StPO are in each case limited to notification obligations without any legal remedies.

#### **Re Absatz 2**

Absatz 2 Satz 1 on the other hand refers to the more specific provisions on traffic data in national law within the meaning of the Regulation. As follows from § 8 Absatz 3 of this Act, these include traffic data in accordance with the relevant provisions of the TKG and usage data in accordance with those of the TDDDG. Satz 2 also stipulates that the same legal remedies apply to the data requested by court order solely for the purpose of identifying the user. This concerns, for example, the situation in which identification data is collected for number-independent interpersonal telecommunication services. In national law, this measure - unlike the collection of data from digital services, see above on paragraph 1 sentence 2 - is subject to the judge's discretion, Articles 100g(1), 101a(1) sentence 1, 100e(1) sentence 1 StPO.

In these cases of data collection pursuant to Article 100g(1), in relation to the collection of stored (retrograde) location data also in conjunction with (2), or Article 100k(1) and (2) StPO, the time limited legal remedies pursuant to Article 101a(6) sentence 2 in conjunction with Article 101(79) sentence 2 StPO are applicable. The relevant time limit starts to run from the notification of the person concerned, which, in accordance with Article 13(1) of the Regulation, should be made exclusively by the issuing authority. In the case of a previous other acquisition of knowledge by the person concerned, the period begins on this date. Pursuant to Article 101(7) sentence 3, an immediate appeal against the court decision is admissible for both traffic and usage data.

### **Re Absatz 3**

**Absatz 3** regulates the legal remedies against European Production Orders collecting content data. In order to take into account all possible powers under national law, the reference includes the provisions of Article 95(5) sentences 1 and 2 StPO (with regard to the judicial order of seizure pursuant to Articles 95, 95a StPO), Article 101(7) sentences 2 and 3 StPO (with regard to judicial seizure pursuant to Article 99 StPO and the court-ordered (occasional) data collection pursuant to Article 100a StPO) and Articles 304(1), 306, 310(2) StPO (with regard to the judicial order of seizure pursuant to Articles 94, 98 StPO).

Pursuant to Article 95a(5) sentence 2 and Article 101(7) sentence 3, an immediate appeal pursuant to Article 311 StPO is admissible against the court decisions provided for therein; however, there is no further appeal against the decision pursuant to Article 304 StPO (see **Absatz 1**). While the legal remedies under Articles 95a and 101(7) are subject to a time limit - again linked to the notification of the person concerned - there is no such time limit for the appeal option under Article 304 StPO.

### **Re Absatz 4**

**Absatz 4** lays down that the legal remedies provided for in **Absätzen 1 bis 3** are only available to the persons whose data have been requested. This clarification rules out the possibility of service providers using the legal remedies provided for in **§ 13** to take action against the orders binding them. This is in line with the logic of Article 18(1) of Regulation (EU) 2023/1543.

### **Re § 14 (Court decision)**

The provision regulates the standard of judicial review and the content and legal consequences of the decision on the appeal against production orders.

### **Re Absatz 1**

**Absatz 1** defines the scope of the judicial review and refers to the requirements set out in Articles 4 and 5 of Regulation (EU) 2023/1543 : While Article 4 of the Regulation governs which authorities are competent to issue the orders (see above on the **§§ 9, 10** of this Act), Article 5 contains the substantive conditions for adoption. Accordingly, the production order must be necessary and proportionate and, moreover, may only be issued if a similar order could have been issued in a comparable national case under the same conditions (Article 5(2) of the Regulation). In conclusion, the Court of First Instance must therefore examine the matter on the basis of a double standard: On the one hand on the basis of Regulation (EU) 2023/1543, on the other hand on the basis of national law. With regard to the individual conditions, the Regulation differentiates based on the type of data requested: In the case of subscriber data or data requested solely for the purpose of identifying the user, the production order may be issued for all criminal offences (Article 5(3)). In the other cases (other traffic and content data), one of the catalogue offences referred to in Article 5(4)(b) of the Regulation must be based or the offence must be punishable in the issuing State by a maximum term of imprisonment of at least three years (Article 5(4)(a)). In both cases, the orders may also serve to enforce custodial sentences of at least four months' imprisonment or detention measures handed down in criminal proceedings (provided that they were not handed down in absentia in the event that the convicted person has evaded justice). Article 5 of the Regulation also specifies the information to be contained in the production orders (paragraph 5) and provides that, in principle, it should be addressed to the service provider acting as a controller within the meaning of Regulation (EU) 2016/679 (paragraph 6). Articles 5(8) and 9 of Regulation (EU) 2023/1543 contain special requirements for cases in which the data are stored or otherwise processed as part of an infrastructure that service providers make available to public authorities or persons subject to professional secrecy (see III.1 above for more details).

## **Re Absatz 2**

**Absatz 2** regulates the legal consequences in cases where the requirements for an order are not met. The court must establish the illegality and annul the European Production Order. With regard to data already obtained and findings derived therefrom, in individual cases, in accordance with the general principles of criminal procedure and data protection law, taking into account the weight of the procedural violation and the weight of the criminal offence pursued, it must be examined whether the unlawfulness of the European Production Order results in the requirement of data deletion or a ban on use or enforcement under criminal procedure (see, inter alia, BVerfGE 130, 1; BGHSt 58, 32, 36 et seq.).

## **Re Abschnitt 2 (Procedures in the event of conflicting obligations)**

### **Re § 15 (Court proceedings)**

The provision sets out competence and procedures in case of a request from the issuing authority pursuant to Article 17(3), second sentence, of Regulation (EU) 2023/1543. The provision applies if a service provider refuses to disclose data with reference to conflicting legal provisions of a third country. If the issuing authority wishes to maintain its investigative measure despite the objection, it must apply for a judicial decision (Article 17(3)). The court examines the facts and determines whether the order should be maintained. If the court concludes that there is no conflict of laws, the order remains in force (Article 17(5)). However, the court may maintain the order even in spite of the conflicting law of a third State where it is clear from a weighing-up exercise that the specific interest in the investigation of the criminal offence must be given priority (Article 6 of the Regulation, which lists a number of factors which must be taken into account as a matter of priority in the balancing exercise).

### **Re Absatz 1**

Pursuant to **Absatz 1**, legal recourse to the ordinary courts is opened for the application for a decision on the conflict of law.

### **Re Absatz 2**

The paragraph determines the material and territorial competence: The Oberlandesgericht (Higher Regional Court), in whose territory the issuing authority has its seat, **Absatz 1** decides on the application. The competence of the Higher Regional Courts is appropriate in view of the political scope of the decision to be taken (potential prioritisation of the German law enforcement interest over the interests of the third country). By way of derogation from the competence of the Higher Regional Court pursuant to sentence 1, the Federal Court of Justice shall have competence in cases in which the Federal Attorney General or the investigating judge of the Federal Court of Justice has issued the order.

### **Re Absatz 3**

In accordance with Article 17(3), first sentence, of Regulation (EU) 2023/1543, the issuing authority **Absatz 3** is to enclose with the application the outcome of its review of the reasoned objection and any comments made by the executing State.

### **Re Absatz 4**

In accordance with the third sentence of Article 17(2) of Regulation (EU) 2023/1543, the reasoned objection must be raised no later than 10 days after the receipt of the production order by the addressee. **§ 15 Absatz 4** refers to Articles 42 and 43(2) StPO for the calculation of this time limit. The provision thus also implements Article 17(9) of the Regulation, which provides that the time limits for the conflict-of-law proceedings are to be calculated in accordance with the national law of the issuing authority.

## **Re § 16 (Court decision)**

Article 17 of Regulation (EU) 2023/1543 provides for three possible decisions of the General Court: If it comes to the conclusion that there is no conflict of laws, it upholds the production order (Article 17 paragraph 5). If, on the other hand, the court assumes that there is a conflict, it may - after weighing up the relevant circumstances - either uphold or revoke the production order (Article 17(8)). § 16 of this Act stipulates that the respective decision shall be made by means of an unappealable ruling.

## **Re Abschnitt 3 (Legal remedies against decisions in enforcement proceedings)**

### **Re § 17 (Applicability of the Administrative Offences Act)**

§ 17 provides for the applicability of the Administrative Offences Act (OWiG) to legal remedies against decisions in enforcement proceedings pursuant to Article 16(10) of Regulation (EU) 2023/1543. The provisions in the fifth section of the OWiG are relevant for the appeal against the notification of fine, the subsequent court proceedings and the legal remedies.

## **Re Teil 4 (Provisions concerning fines and limitation of a fundamental right)**

### **Re § 18 (Provisions concerning fines)**

The provision is intended to transpose Article 5 of Directive (EU) 2023/1544 and to implement Article 15(1) in conjunction with Article 16(10) of Regulation (EU) 2023/1543. It regulates offences subject to fines and the associated fine amounts. In addition, the provisions of the OWiG (Article 2 OWiG) apply and both intentional and negligent offences are sanctioned, as it follows from Recital 70 of the Regulation and Recital 19 of the Directive that all forms of offence must be taken into account and the circumstances of the offence must be taken into account.

#### **Re Absatz 1**

Absatz 1 contains the defence of an violation of the obligations arising from §§ 3, 4 of this Act.

#### **Re Nummer 1**

Absatz 1 Nummer 1 concerns the § 3 Absatz 1 und 2 stipulated obligation for service providers to designate establishments. As the aforementioned paragraphs of § 3 also refer to its Absätze 4 und 5, this includes cases in which the establishments are not designated punctually or are not adequately equipped with powers and resources.

#### **Re Nummer 2**

§ 18 Absatz 1 Nummer 2 concerns the obligation of service providers to appoint responsible representatives as laid down in § 3 Absatz 3. Since the aforementioned paragraph of the § 3 also refers to its Absätze 4 und 5, it includes the cases in which the representative is not appointed in a timely manner or is not adequately provided with powers and resources.

#### **Re Nummer 3**

Absatz 1 Nummer 3 refers to the standardised obligation of service providers laid down in § 4 Absatz 1 und 2 to communicate contact details of the addressees to the competent central authority and to update them if necessary. Due to the explicit reference to § 4 Absatz 3 bis 5, which may be found in both § 4 Absatz 1 and Absatz 2, the other obligations mentioned there are also included: According to this, service providers must provide infor-

mation on the language regime and, in the case of multiple designations, on the geographical scope of application and make the corresponding notifications immediately to the addressee institution in § 3 Absatz 5 immediately after the expiry of the deadlines or immediately after changes occur.

## **Re Absatz 2**

Absatz 2 contains the defence of the violation of Articles 10, 11 and 13(4) of Regulation (EU) 2023/1543. The obligations enshrined in Articles 10 and 11 primarily concern the addressee within the meaning of § 3 of this Act (see also Article 7 of the Regulation). In addition to the natural persons acting on behalf of the addressee, the liability of legal persons is also covered by the applicability of Articles 30 and 130 of the OWiG. On the other hand, according to the very wording of Article 13(4) of the Regulation, both the addressee and the service provider are subject to the obligation under Article 13(4) of the Regulation.

## **Re Nummer 1**

Absatz 2 Nummer 1 refers to the obligation of the addressee in accordance with Article 10(1) or (2) sentence 2 of Regulation (EU) 2023/1543 to act upon receipt of an EPOC.

According to Article 10(1) of Regulation (EU) 2023/1543, the addressee must secure all data covered by the request without delay immediately after receipt of the production order and in such a way that subsequent production is possible

The second sentence of Article 10(2) of Regulation (EU) 2023/1543 provides for a special case concerning the first sentence of Article 10(2) (see Nummer 2). In cases where the executing authority confirms within the ten-day period referred to in the first sentence that it will not invoke a ground for refusal, the addressee must make the transfer of data as soon as possible and at the latest after expiry of the ten-day period referred to in the first sentence of paragraph 1.

## **Re Nummer 2**

Absatz 2 Nummer 2 shall penalise the violation of the addressee's obligation pursuant to Article 10(2), first sentence, of Regulation (EU) 2023/1543. This concerns the situation in which the issuing authority must inform the executing authority of the production order in accordance with Article 8 of Regulation (EU) 2023/1543. In that case, a period of 10 days shall begin to run within which the executing authority may invoke any grounds for refusal. If it does not do so, the addressee must ensure that the data are transmitted immediately after the expiry of the deadline.

In accordance with Article 8(1) and (2) of Regulation (EU) 2023/1543, the issuing authority must inform the executing authority if it requests content data or traffic data that are not used exclusively for identification; an exception applies in cases where both the person affected by the data request and the place of access are located in Germany.

## **Re Nummer 3**

Absatz 2 Nummer 3 refers to the obligation of the addressee under Article 10(3) of Regulation (EU) 2023/1543. Accordingly, if no notification procedure is to be carried out, the data must be transmitted within ten days of receipt of an EPOC at the latest.

In general, no notification pursuant to Article 8 of Regulation (EU) 2023/1543 is provided for requests for subscriber data and traffic data that are used solely to identify the user. For content and other traffic data, see above.

## Re Nummer 4

Absatz 2 Nummer 4 penalises the violation of the first sentence of Article 10(4) of Regulation (EU) 2023/1543. This contains the obligation of the addressee to transmit the requested data in emergencies without delay, but at the latest within eight hours of receipt of the EPOC.

The term 'emergency' is defined in Article 3, point (18), of Regulation (EU) 2023/1543 and describes a situation where there is an imminent danger to the life, physical integrity or safety of a person, or where the disruption or destruction of critical infrastructure may cause such a danger.

## Re Nummer 5

Absatz 2 Nummer 5 penalises violations of the addressee's obligation to immediately inform the issuing authority and, in some cases, the executing authority that it is unable to comply with the production or preservation order for various reasons.

Pursuant to Article 10(6), first subparagraph, first sentence, of Regulation (EU) 2023/1543, that obligation applies where the addressee cannot comply with its obligation to produce information because the EPOC is incomplete, manifestly incorrect or does not contain sufficient information. The first sentence of Article 10(7) of Regulation (EU) 2023/1543 requires the addressee to inform the issuing authority if, as a result of circumstances beyond its control, it is factually impossible for the addressee to release the requested data. In cases where the release of the data covered by the EPOC is not possible for other reasons, the first sentence of Article 10(8) lays down the obligation for the addressee to inform the issuing authority thereof without delay.

In addition, all three provisions oblige the addressee, in cases where the executing authority must also be informed of the production order in accordance with Article 8 of Regulation (EU) 2023/1543, to inform the issuing authority as well as the executing authority of the above-mentioned grounds.

The first subparagraph of Article 11(5), the first sentence of paragraph 6 and the first sentence of paragraph 7 of Regulation (EU) 2023/1543 contain parallel obligations for the precautionary order of the addressee to inform the issuing authority without delay of incorrect or missing information in the EPOC-PR or of any other reasons that make it impossible to back up the designated data.

The aim of the regulations is to ensure that obstacles in the processing and implementation of the orders may be quickly identified and remedied.

## Re Nummer 6

Absatz 2 Nummer 6 supports the violation of the addressee's obligation under the second sentence of the first subparagraph of Article 10(6) of Regulation (EU) 2023/1543 to inform the issuing authority, at the same time as informing it of an incorrect or incomplete EPOC, whether it was possible to identify and secure the requested data.

## Re Nummer 7

The reinforcement in Absatz 2 Nummer 7 is based on the addressee's obligation under the second sentence of the second subparagraph of Article 10(6) of Regulation (EU) 2023/1543 to ensure, in the event of notification of an incomplete or unclear EPOC, that they may also obtain any clarification or correction of the EPOC from the issuing authority. The regulation is intended to ensure an undisturbed and rapid flow of information. A parallel obligation is laid down in Article 11(5), second subparagraph, of Regulation (EU)

2023/1543 for receiving a clarification or correction of an incomplete or incorrect EPOC-PR.

### **Re Nummer 8**

Absatz 2 Nummer 8 concerns the obligation of the addressee to preserve the requested data for the periods specified therein without undue delay upon receipt of an EPOC-PR pursuant to Article 11(1) of Regulation (EU) 2023/1543. In accordance with the second sentence of Article 11(1), the preservation period is in principle 60 days from receipt of the EPOC-PR (unless the issuing authority confirms during that period that a request for production has been made, see also point 10 below).

### **Re Nummer 9**

Absatz 2 Nummer 9 concerns the duty of the addressee to store the secured data after the end of the 60-day period for a further specified interval. The prerequisite for this is that the issuing authority has requested this during the 60-day period in accordance with Article 11(1), third sentence, using the form in Annex VI and that the storage is necessary to enable a production order to be issued. The storage period is then a further 30 days.

### **Re Nummer 10**

Absatz 2 Nummer 10 in addition, concerns the obligation of the addressee under Article 11(2) of Regulation (EU) 2023/1543, which temporally follows that of Article 11(1). It concerns situations in which data were secured on the basis of an EPOC-PR and the issuing authority confirms to have submitted a request for production during the time limits referred to in Article 11(1) of the Regulation. This may be a European Production Order, a European Investigation Order or any other request for mutual legal assistance. In this situation, the addressee is obliged under Article 11(2) of Regulation (EU) 2023/1543 to maintain the preservation of the requested data for as long as it is necessary to issue them after receiving the request (or until the addressee has been informed that the preservation is no longer necessary, Article 11(3) of the Regulation). As a result, the protection period may exceed the total duration of 90 days referred to in Article 11(1) of Regulation (EU) 2023/1543.

### **Re Nummer 11**

Absatz 2 Nummer 11 refers to the obligation of the addressee and the service provider under Article 13(4) of Regulation (EU) 2023/1543 to take state-of-the-art operational and technical measures to ensure the confidentiality, secrecy and integrity of the transmitted certificates (EPOC or EPOC-PR) and the data to be released or secured.

### **Re Absatz 3**

Absatz 3 determines the upper limit of a fine to be imposed, differentiated according to the nature of the violation. In view of the principle of proportionality, it is weighted according to whether substantive core obligations of the rulebook (with a high level of injustice) or other administrative and enforcement obligations (with a lower level of injustice) are violated.

### **Re Nummer 1**

Absatz 3 Nummer 1 provides that all cases of Absatzes 1 and of Absatzes 2 Nummer 1 bis 4 und 7 bis 11 may be punishable by a fine of up to five hundred thousand EUR.

In relation to the cases of the Absatzes 1, first references are made to the violations under § 3 Absatz 1 bis 3 and § 4 Absatz 1 und 2 of this Act. It is true that these are merely administrative obligations relating to the establishment of the addressees and the communication of their contact details. However, these obligations are of central importance, as

they are the fundamental prerequisites for the functionality of the regulatory framework established by Regulation (EU) 2023/1543 and Directive (EU) 2023/1544. If the addressees are not available or their contact details are unknown or incorrect, the orders cannot be transmitted as intended.

The cases of Absatz 2 Nummer 1 bis 4 und 7 bis 11 each concern breaches of the fundamental obligations in connection with the execution of European Production Orders or European Preservation Orders pursuant to Articles 10 and 11 of Regulation (EU) 2023/1543. This also includes ensuring accessibility for the issuing authority (Absatz 2 Nummer 7), as functioning communication channels are a central element of Regulation (EU) 2023/1543, regardless of the specific context. Absatz 2 Nummer 11 sanctions violations of the equally fundamental obligation to ensure the confidentiality, secrecy and integrity of the EPOC in accordance with the current state of the art pursuant to Article 13(4) of Regulation (EU) 2023/1543.

For the violation of these fundamental positive obligations, the maximum fine amount is appropriate. Smooth cooperation between service providers and their addressees is essential in order to combat the serious forms of crime that digital media are enabling on a previously unknown scale. Therefore, a penalty framework is necessary that has an effective deterrent effect on service providers.

### **Re Nummer 2**

According to Nummer 2, the cases of Absatzes 2 Nummer 5 und 6 may be sanctioned with a fine of up to a hundred thousand EUR. The violations referred to here mostly concern the notification obligations of the addressee to the issuing and executing authority in cases where the preservation or distribution of data encounters obstacles due to different circumstances beyond the control of the provider. These notifications are intended to enable the issuing authority to eliminate any problems that are predominantly within its sphere of responsibility and, if necessary, to adapt or withdraw the order. Against this background, the violations on the part of service providers are to be classified as less serious. This is reflected in the lower maximum amount of one hundred thousand EUR.

### **Re Absatz 4**

The Absätze 4 bis 6 implement the sanctioning requirements of Article 15(1) sentence 3 of Regulation (EU) 2023/1543. The turnover-based sanction contained therein is limited to the fulfilment of obligations under Articles 10, 11 and 13(4) of the Regulation, as only these are expressly mentioned as the relevant norms in Article 15(1) sentence 1 of the Regulation. By contrast, the second sentence of Article 5 of Directive (EU) 2023/1544 contains only the usual general sanction clause ('sanctions must be effective, proportionate and dissuasive') and therefore does not require a turnover-based pecuniary fine. This deliberate decision by the Union legislator is illustrated here. The wording in Absatz 4 is based on existing national regulations for the implementation of sanction obligations under Union law.

According to Absatz 4, a service provider with a total turnover of more than EUR 25 million may be fined up to 2 per cent of this total turnover (and therefore more than five hundred thousand euro) - in deviation from Absatz 3 Nummer 1 letter b - for a breach of an obligation pursuant to Absatz 2 Nummer 1 bis 4 und 7 bis 11. This regulation ensures that even financially strong companies are threatened with a severe fine for violating core obligations.

### **Re Absatz 5**

Absatz 5 concerns the less serious violations according to Absatz 2 Nummer 5 und 6. By way of derogation from paragraph 3(2), a service provider with a total turnover of more than EUR 5 million may be liable to a fine of up to 2 per cent of the total turnover (and

consequently more than EUR 100 000). The underlying rationale is the same as for Absatz 4 (deterrent effect). The less serious offences committed by service providers with a total turnover of more than EUR 25 million are also covered by Absatz 5, as these companies automatically have a turnover of more than EUR 5 million.

### **Re Absatz 6**

Absatz 6 lays down the modalities for determining the total turnover. It shall be based on the turnover of the financial year preceding the administrative decision. This should include the annual turnover of the service provider worldwide. The executing authority may estimate the total turnover

### **Re Absatz 7**

Absatz 7 stipulates that Article 17(2) of the Administrative Offences Act does not apply to violations under Absatz 2. This excludes the possibility that the maximum amount of the fine for negligent acts will already be reduced by law to half of the maximum amount uniformly threatened for intent and negligence. Regulation (EU) 2023/1543 states in recital 70 that all circumstances of the violation must be taken into account, including whether the violation was committed intentionally or negligently. Accordingly, the Regulation requires that negligent violations should also be penalised. However, the sanction provision of Article 15(1) sentence 3 of the Regulation does not distinguish between intentional and negligent violations and therefore also applies to the latter. The regulation therefore does not provide for a regular reduction of the maximum fine for negligent violations, as provided for in Section 17(2) of the OWiG. However, the manner in which the offence was committed must be assessed together with the other circumstances when setting the fine, which also takes account of Recital 70 of Regulation (EU) 2023/1543.

### **Re Absatz 8**

Absatz 8 determines which authorities are administrative authorities within the meaning of Article 36(1)(1) OWiG.

### **Re Nummer 1**

Absatz 8 Nummer 1 stipulates that the Federal Office of Justice is the competent administrative authority for administrative offences under Absatz 1, which Directive (EU) 2023/1543 is linked. In accordance with § 6, this same is also responsible for monitoring the obligations arising from the §§ 3 und 4 provisions of the Directive, which Absatz 1 provide for sanctions in the event of violation.

### **Re Nummer 2**

Nummer 2 determines that the administrative authority responsible for administrative offences Absatz 2 is § 11 Absatz 1 the executing authority. The latter is responsible for carrying out the enforcement procedure in accordance with Article 16 of Regulation (EU) 2023/1543. Therefore, in accordance with Article 16(10) of the Regulation, it must also be the authority which imposes the penalties provided for.

### **Re § 19 (Restrictions on a fundamental right)**

The provision takes account of the citation requirement pursuant to Article 19(1) sentence 2 of the Basic Law.

### **Re Artikel 2 (Amendment to the Telecommunications Act)**

Articles 10, 11 and 19 et seq. of Regulation (EU) 2023/1543 and the implementing act to be adopted by the Commission pursuant to Article 25 of Regulation (EU) 2023/1543 con-

tain numerous provisions on the technical implementation of the production and preservation orders, on the deadlines to be met and on security standards and minimum availability targets. These are directly applicable and take precedence over the provisions of the TKG.

However, there is a need for regulation with regard to the prohibition contained in Article 1(4) of Directive (EU) 2023/1544 for Member States to impose obligations on service providers that go beyond the obligations arising from the Directive. This prohibition relates in particular to the designation of designated establishments or the appointment of representatives. As is clear from recitals 1 to 3 of the Directive, this is intended to prevent Member States from imposing their own obligations on service providers to appoint addressees on their territory, as these are incompatible with each other or could conflict with Union law and may be subject to different threats of sanctions. This would hinder the free movement of services in the internal market.

Against this background, the national provisions on the appointment of authorised agents for receipt or service should be declared inapplicable to the extent that they fall within the scope of Directive (EU) 2023/1544, i.e. exclusively criminal proceedings. It should be noted that the material scope of the Directive is not limited to measures under Regulation (EU) 2023/1543: Rather, according to Article 1(2) of Directive (EU) 2023/1544, it also includes the collection of electronic evidence on the basis of Directive 2014/41/EU and the Convention pursuant to Article 34 of the Treaty on European Union on Mutual Assistance in Criminal Matters. This means that the issuing State must also address requests under these instruments to the Member States in which the addressees designated under Directive (EU) 2023/1544 are established. However, unlike Regulation (EU) 2023/1543 (see Article 3(8) and recital 19), the aforementioned legal instruments also allow the collection of real-time data, i.e. telecommunications surveillance in the context of criminal proceedings. In view of the prohibition laid down in Article 1(4) of Directive (EU) 2023/1544 to impose obligations that go beyond the Directive, national law may not, as a consequence, impose on service providers the set-up of addressees, including in the area of telecommunications interception for the purpose of law enforcement. Therefore, the provisions contained in the TKG should be declared inapplicable to the extent that they require the appointment of authorised agents for the implementation of telecommunications surveillance for the purpose of criminal prosecution within the scope of Directive (EU) 2023/1544; this applies both with regard to operators of telecommunications systems with which publicly accessible telecommunications services are provided (Article 170(1)(3)(b) TKG) and with regard to providers of publicly accessible telecommunications services who use an operator of a telecommunications system for this purpose (Article 170(2)(2)(c) TKG). This is expressly without prejudice to the obligations referred to in Article 170(1)(3)(b) TKG and Article 170(2)(2)(c) TKG for the respective monitoring and querying powers outside of criminal proceedings (in particular danger prevention and the central authority function). In this respect, the above rules and obligations remain valid within the framework laid down in Article 1(2) of the Telecommunications Act.

### **Re Artikel 3 (Amendment of the Telecommunications and Digital Services Data Protection Act)**

#### **Re Nummer 1**

Nummer 1 contains the adjustments to the Table of Contents with regard to the insertion of paragraphs 13a and 24a in the TDDDG.

#### **Re Nummer 2**

Nummer 2 contains the new Article 13a. The provision is necessary to legally enable providers of publicly accessible telecommunications services and their addressees to

process personal data so that they may fulfil their obligations under Regulation (EU) 2023/1543 . The addressees are the designated establishments and the legal representatives set up by the service providers concerned by the Regulation in order to fulfil their obligations under Article 3(1) to (3) of the Act on European Production Orders and Preservation Orders for electronic evidence. Regulation (EU) 2023/1543 regulates the production or preservation of electronic evidence by service providers or their addressees in the context of criminal proceedings on the basis of European Production Orders or European Preservation Orders issued by competent authorities in a Member State. Those authorities may thus require a service provider that offers services in the Union and has designated an addressee in another Member State to receive orders to produce or preserve electronic evidence, irrespective of where the data are located.

While Regulation (EU) 2023/1543 imposes an obligation on addressees to comply with such a production or preservation order, it does not contain any provision that also empowers the addressee or the service provider to process personal data for that purpose. According to the case-law of the Federal Constitutional Court, when establishing an information procedure on the basis of individual powers, the legislator must create proportionate legal bases for both the transmission and the retrieval of the data (double-door; Federal Constitutional Court, decision of 27 May 2020 – 1 BvR 1873/13, 1 BvR 2618/13 –, recital 93).

This requires a legal basis in Germany for data processing for the purpose of complying with this provision (1st door). Regulation (EU) 2023/1543 does not contain any corresponding provision. In addition, there must be a legal basis for the authority to request data (2nd door). In the case of European Production and Preservation Orders from other EU Member States addressed to addressees in Germany, this legal basis may be found in Chapter II of Regulation (EU) 2023/1543 in conjunction with the national law of the respective other Member State.

Article 3(8), of Regulation (EU) 2023/1543 defines which data are to be considered as electronic evidence. This data must be processed by a service provider or on its behalf at the time of receipt of a certificate of a European production order or a certificate of a European preservation order. Obligated under a European Production Order or a European Preservation Order are service providers, including electronic communications services within the meaning of Article 2(4) of Directive (EU) 2018/1972 (Article 3(3)(a) of Regulation (EU) 2023/1543). These are generally internet access services provided for a fee, interpersonal communications services (both number-based and number-independent) and services consisting wholly or mainly of the transmission of signals, such as transmission services used for machine-to-machine communications and broadcasting. Telecommunications services provided purely for business purposes, which are not offered commercially, i.e. without being part of an economic consideration such as the provision of telecommunications within companies or other organisations in the context of employment or service relationships, are not subject to a release or preservation order and therefore do not require authorisation for data processing.

Since traffic data are subject to telecommunications secrecy, which is affected here, the second sentence of Article 13a corresponds to the citation requirement laid down in the second sentence of Article 19(1) of the Basic Law.

### **Re Nummer 3**

As in Nummer 2, the digital services affected by Regulation (EU) 2023/1543 (or their addressees) also require a special legal basis for the processing of personal data, without which a European Production or Preservation order directed at these providers would be ineffective. In this respect, Regulation (EU) 2023/1543 does not concern all digital ser-

vices (in the Regulation information society services as defined in Article 1(1)(b) of Directive (EU) 2015/1535), but only those providers of digital services that enable their users to communicate with each other or store or otherwise process data, provided that the storage of data is a defining part of the service provided to the user. Accordingly, the necessary authorisation for data processing must also be restricted to these providers. The digital services affected by European Publication or Preservation Orders include, for example, online marketplaces that enable consumers and businesses to communicate with each other and other hosting services, including cloud computing services, as well as platforms for online games and online gambling. This does not include digital services that do not allow their users to communicate with each other, but only provide communication with the service provider. Digital services that do not allow their users to store or otherwise process data or where data storage is not a determining, i.e. not an essential part of the service provided to the user, as in the case of legal, architectural, engineering and accounting services provided online, are also not covered (Recital 27 of Regulation (EU) 2023/1543). The Regulation also concerns other providers (providers of internet domain name and IP numbering services such as IP address allocation and domain name registration services, providers of domain name registrar services and providers of data protection and proxy services related to domain names), which are mentioned in addition to the specific information society services, but which are nevertheless also digital services. For these providers, too, the necessary authority to process data is provided for in Article 24a.

#### **Re Artikel 4 (Entry into force)**

##### **Re Absatz 1**

Artikel 4 provides in Absatz 1 that the date of entry into force of the Act is, in principle, the day after promulgation.

##### **Re Absatz 2**

Absatz 2 provides for an exception for the - related to Regulation (EU) 2023/1543 - §§ 7 bis 17, Article 18(2) and (3) point (1)(b) and point (2) as well as paragraphs (4) to (7) and (8) point (2) and § 19 in Artikel 1, which enter into force on 18 August 2026. The same applies to Artikel 3. This ensures that the implementing provisions of the Regulation do not apply before the Regulation itself has entered into force.