

Draft Act of the Federal Government

Draft Act amending the Explosives Act and other Acts

A. Problem and objective

Over the last ten years, cases of improper use of explosive substances causing an explosion have more than doubled. In particular, there has been a significant increase in the blowing up of ATMs. Nationwide, such cases rose by 26.5 % from 2021 to 2022. This represents a new high since figures started to be recorded in 2005. Despite the security measures agreed with the German banking industry, which led to a slight decline in the number of cases in 2023, these remain at a high level. These acts not only pose a significant risk to passers-by in the immediate vicinity of ATMs, but also to emergency services. The acts are also often characterised by reckless conduct during escape using high-powered vehicles. At the same time, such explosions cause considerable losses to the finance and insurance industry. In 2022, total losses in Germany were well into nine figures (<https://www.gdv.de/gdv/medien/medieninformationen/ueber-100-millionen-euro-schaeden-durch-gesprengte-geldautomaten-157758>). In light of this, the penal provision for causing an explosion (Section 308 of the Criminal Code (StGB)) as currently worded does not sufficiently reflect the degree of wrongdoing specifically involved in blowing up ATMs in order to commit theft by causing an explosion.

A significant increase in the number of (other) offences under the Explosives Act has also been recorded in recent years. At the same time, the ancillary criminal law provisions of the Explosives Act do not sufficiently cover certain cases of conduct that are worthy of and deserve punishment within the sphere of unauthorised handling of explosive substances and their acquisition. This applies, on the one hand, to the attempted unauthorised acquisition, attempted unauthorised import, transit or movement of, and attempted unauthorised handling of explosive substances, which are currently not punishable. There are also gaps in the criminal liability provisions with regard to organised crime and explosives. For example, there is no commercial or gang-based aggravating element for offences under the Explosives Act. Furthermore, the fight against organised crime involving explosives can only be effective if, alongside appropriate penalties based on relevant facts, the law enforcement authorities have the investigative options open to them that are necessary for successful prosecution. Such options are currently lacking since, under the law as it stands, offences under the Explosives Act are not included in the list of offences for telecommunications surveillance. Furthermore, criminal law in practice has shown that there are still appreciable gaps in the criminal liability provisions with regard to the unauthorised operation of a non-commercial warehouse of explosive substances and with regard to the unauthorised non-commercial movement of explosive substances.

In this respect, there is an urgent need to supplement the (ancillary) criminal law and criminal procedure provisions.

B. Solution

For the effective punishment and prevention of criminal offences in connection with explosive substances, the draft essentially provides for amendments to the Explosives Act (SprengG), the Criminal Code (StGB), the Code of Criminal Procedure (StPO) and the Precursors Act (AusgStG).

In order to effectively fight organised crime involving explosives, an aggravating element for offences that are gang-related and commercial is being created in the Explosives Act. To enable successful prosecution in these cases, the list of offences for telecommunications surveillance in the Code of Criminal Procedure is also being moderately expanded. At the same time, the draft introduces criminal liability for the attempt with respect to certain offences under the Explosives Act. An aggravating element that adequately reflects the degree of wrongdoing specifically involved in explosions for the purpose of committing theft is being added to Section 308 of the Criminal Code. In addition, the penal provisions on the unauthorised storage, movement and provision of explosive substances are being extended to include the non-commercial sphere. A provision on the confiscation of explosives precursors is being added to the Precursors Act.

C. Alternatives

None.

D. Budgetary expenditure exclusive of compliance costs

At federal level, no appreciable additional costs of a material or staff-related nature are to be expected.

E. Compliance Costs

E.1 Compliance Costs for Citizens

No compliance costs are incurred by citizens, nor are any compliance costs removed.

E.2 Compliance costs for businesses

No compliance costs are incurred by businesses, nor are any compliance costs removed.

Of which administrative costs arising from obligations to provide information

None.

E.3 Compliance costs for the authorities

Compliance costs incurred by the administration of the Länder will increase slightly; there is no change for federal-level authorities.

F. Other costs

There are no other costs for citizens and businesses. No impact on the level of prices, in particular on consumer price levels is expected. Extending the existing penal provisions is expected to increase the number of criminal proceedings to a limited extent. There will also be an increase in the number and duration of custodial sentences handed down and an additional burden on the courts. This may lead to additional budgetary expenditure by the Länder, which cannot be quantified more accurately, for the law enforcement authorities and the judiciary, which are primarily responsible for conducting criminal proceedings.

However, the additional burden on law enforcement authorities and the courts is justified given the improved protection of legal interests. In addition, to the extent that the consistent prosecution made possible by the regulation has a deterrent effect, costs as well as consequential costs from damage caused by criminal offences in connection with explosive substances would be saved.

DRAFT

Draft Act of the Federal Government

Draft Act amending the Explosives Act and other Acts¹⁾

Dated...

The Bundestag has adopted the following act:

Contents overview

- Article 1 Amendment to the Explosives Act
- Article 2 Amendment to the Criminal Code
- Article 3 Amendment to the Article 10 Act
- Article 4 Amendment to the Courts Constitution Act
- Article 5 Amendment to the Code of Criminal Procedure
- Article 6 Amendment to the Customs Investigation Service Act
- Article 7 Amendment to the Precursors Act
- Article 8 Restriction of fundamental rights
- Article 9 Entry into force

Article 1

Amendment to the Explosives Act

The Explosives Act, in the version published on 10 September 2002 (Federal Law Gazette (BGBl.) I, p. 3518), as last amended by Article 11 of the Act of 2 March 2023 (Federal Law Gazette (BGBl.) 2023 I No. 56), is amended as follows:

1. In the first sentence of Section 15(1), the words 'shall prove that he is authorised to handle explosive substances or to acquire such substances.' are replaced by the words 'must be authorised to handle explosive substances or to acquire such substances; he shall prove such authorisation at the request of the authority designated in accordance with paragraph (5).'
2. In Section 17(1), first sentence, subparagraph 1, a comma is inserted after the word 'purposes'.
3. In the first sentence of Section 28, the reference 'Sections 13, 15(1), (3)' is replaced by the reference 'Sections 13, 15(1), (3), (4)'.
4. Section 40 is amended as follows:
 - a) Paragraph (2) is amended as follows:

¹⁾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).

a%6) Subparagraphs 1 and 2 are worded as follows:

1. ' contrary to
 - a) Section 15 (1), first sentence, first half-sentence or
 - b) Section 28, first sentence in conjunction with Section 15(1), first sentence, first half-sentence

imports, transits or moves explosive substances or arranges for their import, transit or movement by someone else;

 1. operates a warehouse without authorisation pursuant to the first sentence of Section 17(1), including in conjunction with the first sentence of Section 28;'

b%6) Subparagraph 3 is amended as follows:

a%7%7) In point (a), the reference 'Section 22(1), second sentence' is replaced by the words 'Section 22(1), second sentence, including in conjunction with the first sentence of Section 28,'.

b%7%7) In point (c), the reference 'Section 22(2)' is replaced by the words 'Section 22(2), including in conjunction with the first sentence of Section 28,'.

c%7%7) In point (d), the reference 'Section 22(3)' is replaced by the words 'Section 22(3), including in conjunction with the first sentence of Section 28,'.

b) After paragraph (3), the following paragraphs (3a) and (3b) are inserted:

'(3a) Anyone acting, in the cases referred to in paragraph (1) or paragraph (2), commercially or as a member of a gang formed for the continued commission of such acts, shall be sentenced to imprisonment of six months to five years.

(3b) In the cases referred to in paragraph (1), in paragraph (2) subparagraph 1, subparagraph 3 point (a), (c) or (d), in paragraph (3) or in paragraph (3a), the attempt shall be punishable.'

c) In the first sentence of paragraph (5), the words 'paragraph (2) subparagraph 3' are replaced by the words 'paragraph (2) subparagraph 1 point (b) or subparagraph 3'.

5. Section 41 is amended as follows:

a) Paragraph (1) is amended as follows:

a%6) Subparagraph 4a is worded as follows:

'4a. contrary to

- a) Section 15 (1), first sentence, second half-sentence, including in conjunction with the first sentence of Section 28, or
- b) Section 15 (1), second sentence, first half-sentence in conjunction with an ordinance issued pursuant to Section 25 subparagraph 5

fails to provide proof or fails to do so in good time.'

b%6) In subparagraph 7, the reference 'Section 17(1)' is replaced by the words 'Section 17(1), including in conjunction with the first sentence of Section 28.'

b) In paragraph (1a), the words 'paragraph (2) subparagraph 3' are replaced by the words 'paragraph (2) subparagraph 1 point (b) or subparagraph 3'.

Article 2

Amendment to the Criminal Code

The Criminal Code, in the version published on 13 November 1998 (BGBl. I p. 3322), as last amended by Article 12 of the Act of 27 March 2024 (Federal Law Gazette (BGBl.) 2024 I No. 109), is amended as follows:

6. In Section 6 subparagraph 2, the reference '308(1) to (4)' is replaced by the words '308(1) to (5)'.
7. In Section 89c(1), first sentence, subparagraph 3, the words '308(1) to (4)' are replaced by the words '308(1) to (5)'.
8. In Section 126(1) subparagraph 7, the reference '308(1) to (3)' is replaced by the words '308(1) to (4)'.
9. In Section 129a(2) subparagraph 2, the reference '308(1) to (4)' is replaced by the words '308(1) to (5)'.
10. In Section 138(1) subparagraph 8, the reference '308(1) to (4)' is replaced by the words '308(1) to (5)'.
11. Section 308 is amended as follows:
 - a) After paragraph (2), the following paragraph (3) is inserted:

(1) ' Anyone who causes the explosion in order to commit theft (Section 242), gang theft (Section 244(1) subparagraph 2) or grievous gang theft (Section 244a) shall, in the cases referred to in paragraph (1), be sentenced to imprisonment of not less than two years and, in the cases referred to in paragraph (2), to imprisonment of not less than five years.'
 - b) The current paragraph (3) becomes paragraph (4).
 - c) The current paragraph (4) becomes paragraph (5) and the words 'under paragraph (2)' are replaced by the words 'under paragraphs (2) and (3)'.
 - d) Paragraphs (5) and (6) become paragraphs (6) and (7).
12. In Section 313(2), the reference '308(2) to (6)' is replaced by the words '308(2) and (4) to (7)'.
13. In Section 314(2), the reference '308(2) to (4)' is replaced by the words '308(2), (4) and (5)'.
14. § 314a is amended as follows:

- a) Paragraph (2) subparagraph 2 is amended as follows:
 - a%6) In point (b), the reference '**(1) and (5)**' is replaced by the words '**(1) and (6)**'.
 - b%6) In point (f), the reference '**(5)**' is replaced by the reference '**(6)**'.
- b) Paragraph (3) subparagraph 1 is amended as follows:
 - a%6) In point (b), the reference '**(6)**' is replaced by the reference '**(7)**'.
 - b%6) In point (e), the reference '**(6)**' is replaced by the reference '**(7)**'.

15. In Section 321, the reference '**308(1) to (3)**' is replaced by the words '**308(1) to (4)**'.

Article 3

Amendment to the Article 10 Act

In Section 3(2), first sentence, subparagraph 6, point (b) of the Article 10 Act of 26 June 2001 (BGBI. I p. 1254, 2298; 2017 I p. 154), as last amended by Article 4 of the Act of 22 December 2023 (BGBI. 2023 I No 413), the reference '**308(1) to (3)**' is replaced by the words '**308(1) to (4)**'.

Article 4

Amendment to the Courts Constitution Act

The Courts Constitution Act, in the version published on 9 May 1975 (BGBI. I p. 1077), as last amended by Article 4 of the Act of 30 July 2024 (BGBI. 2024 I No. 255), is amended as follows:

16. Section 74 (2), first sentence, is amended as follows:

- a) In subparagraph 17, the reference '**(3)**' is replaced by the reference '**(4)**'.
- b) In subparagraph 20, the reference '**(3)**' is replaced by the reference '**(4)**'.
- c) In subparagraph 21, the reference '**(3)**' is replaced by the reference '**(4)**'.

17. In Section 120(2), first sentence, subparagraph 3, in the part of the sentence before point (a), the reference '**Section 308(1) to (3)**' is replaced by the words '**Section 308(1) to (4)**' and each instance of the reference '**Section 308(2) and (3)**' is replaced by the words '**Section 308(2) and (4)**'.

Article 5

Amendment to the Code of Criminal Procedure

The Code of Criminal Procedure, in the version published on 7 April 1987 (BGBI. I p. 1074, 1319), as last amended by Article 3 of the Act of 30 July 2024 (BGBI. 2024 I No. 255), is amended as follows:

18. Section 100a(2) is amended as follows:
 - a) In subparagraph 1 point (u), the reference '308(1) to (3)' is replaced by the words '308(1) to (4)'.
 - b) In subparagraph 5a, the reference '(3)' is replaced by the reference '(2)'.
 - c) After subparagraph 9a, the following subparagraph 9b is inserted:

'9b. from the Explosives Act:
offences pursuant to Section 40(3a).'
19. In Section 100g(2), second sentence, subparagraph 1, point (i), the words '308(1) to (3)' are replaced by the words 'Section 308(1) to (4)'.
20. In Section 112(3), the reference '308(1) to (3)' is replaced by the words '308(1) to (4)'.

Article 6

Amendment to the Customs Investigation Service Act

In Section 76(1) subparagraph 1 of the Customs Investigation Service Act of 30 March 2021 (BGBI. I p. 402), as last amended by Article 26 of the Act of 6 May 2024 (BGBI. 2024 I No. 149), the words '308(1) to (4)' are replaced by the words '308(1) to (5)'.

Article 7

Amendment to the Precursors Act

The Precursors Act of 3 December 2020 (BGBI. I S. 2678) is amended as follows:

21. Section 13 is amended as follows:
 - a) After paragraph (1), the following paragraph (2) is inserted:

(1) ' Anyone acting, in the cases referred to in paragraph (1), commercially or as a member of a gang formed for the continued commission of such acts, shall be sentenced to imprisonment of six months to five years.'
 - b) The current paragraph (2) becomes paragraph (3).

c) The current paragraph (3) is repealed.

22. After § 14, the following § 15 is inserted:

'Section 15

Confiscation

Objects to which a criminal offence pursuant to Section 13 relates may be confiscated. Section 74a of the Criminal Code shall apply.'

23. The current Section 15 becomes Section 16.

Article 8

Restriction of fundamental rights

Article 1 subparagraph 3 restricts the fundamental right to secrecy of correspondence and postal services (Article 10 of the Basic Law). Articles 3 and 5 restrict the fundamental right to telecommunications secrecy (Article 10 of the Basic Law).

Article 9

Entry into force

This Act shall come into force on the day after its promulgation.

Justification

A. General Part

I. Objective of and Need for the Provisions

Over the last ten years, cases of improper use of explosive substances by causing an explosion (Section 308 of the Criminal Code – StGB) have more than doubled, from 871 cases in 2012 to 1,934 cases in 2023 (Police-recorded Crime Statistics 2023, T01 Basic table – Cases from 1987 (V1.0), available at https://www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PolizeilicheKriminalstatistik/PKS2023/PKSTabellen/Zeitreihen/zeitreihen_node.html).

In particular, there has been a significant increase in the blowing up of ATMs. Nationwide, such cases rose by 26.5 % from 2021 to 2022 alone. This represents a new high since figures started to be recorded in 2005. Despite the security measures agreed with the German banking industry, which led to a slight decline in the number of cases in 2023, these remain at a high level. In recent years, cases of ATMs being blown up having largely involved solid explosives (e.g. pyrotechnic compositions and homemade explosives). The increased use of solid explosives poses an increased risk to passers-by in the immediate vicinity of ATMs, as perpetrators are often unable to fully control them. In addition, emergency services are put at significant risk in the event of attempted explosions, as the potential risk of explosion continues. The acts are also often characterised by reckless conduct during escape using high-powered vehicles. This, too, poses a significant risk to third parties (Federal Criminal Police Office, Attacks on ATMs, Bundeslagebild Report 2022, p. 5). At the same time, such explosions cause considerable losses to the finance and insurance industry. In 2022, total losses in Germany were well into nine figures (<https://www.gdv.de/gdv/medien/medieninformationen/ueber-100-millionen-euro-schaeden-durch-gesprengte-geldautomaten--157758>). In light of this, the penal provision in Section 308 of the Criminal Code as currently worded does not sufficiently reflect the degree of wrongdoing specifically involved in blowing up ATMs in order to commit theft by causing an explosion.

The (other) offences under the Explosives Act (Sections 40 and 42 SprengG) have also recently increased significantly again (from 4,012 cases in 2022 to 4,431 cases in 2023). At the same time, the ancillary criminal law provisions of the Explosives Act do not sufficiently cover certain cases of conduct that are worthy of and deserve punishment within the sphere of unauthorised handling of explosive substances and their acquisition. This applies, on the one hand, to the attempted unauthorised acquisition, attempted unauthorised import, transit or movement of, and attempted unauthorised handling of explosive substances, including the attempted production of explosives. Such conduct has not been punishable to date under the SprengG, as no criminal liability for attempt has been specified (see Section 23(1) of the Criminal Code in conjunction with Section 12(2) of the Criminal Code). This stands in contrast to the danger that is posed by unauthorised acts involving explosive substances.

There are also gaps in the criminal liability provisions with regard to organised crime and explosives. To date, there has been no commercial or gang-based aggravating element of offences under the SprengG, which would correspond to the comparable provisions of the Precursors Act or the Weapons Act.

Furthermore, the fight against organised crime involving explosives can only be effective if, alongside appropriate penalties based on relevant facts, the law enforcement authorities have the investigative options open to them that are necessary for successful prose-

cution. Such options are currently lacking since, under the law as it stands, offences under the Explosives Act are not included in the list of offences for telecommunications surveillance (Section 100a(2) Code of Criminal Procedure). Practice has shown that the investigation of gang-related and commercial crime involving explosives without the criminal procedure instrument of telecommunications surveillance is, in many cases, hopeless or significantly more difficult. This is particularly true given that, according to experience in the field of gang-related and commercial crime involving explosives, telecommunications are largely used to initiate and carry out criminal trade in explosive substances.

Furthermore, criminal law in practice has shown that there are still appreciable gaps in the criminal liability provisions with regard to the unauthorised operation of a non-commercial warehouse of explosive substances and with regard to the unauthorised non-commercial movement of explosive substances.

In addition, under the law as it stands, the AusgStG lacks a specific confiscation provision within the meaning of Section 74(2) of the Criminal Code. This means that, where offences under Section 13 AusgStG are committed (prohibited provision, movement, possession or use of an explosives precursor restricted under the EU Explosives Precursors Regulation), the confiscation of such precursors is not possible if they are 'mere' objects of crime that were neither produced by the offence (products of crime) nor used or intended for its commission or preparation (means of crime).

In this respect, there is an urgent need to supplement the (ancillary) criminal law and criminal procedure provisions.

II. Main content of the draft

In order to effectively punish and prevent criminal offences in connection with explosive substances, the Explosives Act, the Criminal Code, the Code of Criminal Procedure and the Precursors Act are being amended. Consequential changes resulting from this are necessary in the Article 10 Act, the Courts Constitution Act and the Customs Investigation Service Act.

1. Amendment to the Explosives Act (SprengG)

In future, the attempted unauthorised handling of and the attempted unauthorised trade in explosive substances as well as the attempted acquisition (Section 40(1) subparagraphs 1 to 3 SprengG) and the attempted unauthorised import, transit or movement (Section 40(2) subparagraph 1) of explosive substances will be punishable (Section 40(3b) (new) SprengG).

Section 40(3a) (new) SprengG introduces a new aggravating element, attracting a higher penalty, to offences committed under Section 40(1) or (2) SprengG, namely commission on a commercial or gang-related basis.

Criminal liability for the unauthorised operation of a warehouse of explosive substances, which has been expressly laid down to date only in the commercial sphere, is being extended to the non-commercial sphere, since it makes no difference to the hazardous nature of the unauthorised storage of these substances whether it is carried out for commercial or non-commercial purposes (Section 40(2) subparagraph 2 SprengG). For the same reason, the regulatory offence of the unauthorised establishment of a warehouse under Section 41(1) subparagraph 7 is also being extended to the non-commercial sphere.

In future, criminal liability for import, transit and movement under Section 40(2) subparagraph 1 SprengG will be linked to the lack of authorisation to handle or acquire explosive substances and will no longer be linked to the breach of the obligation to prove such authorisation. Criminal liability for the unauthorised import, transit and movement of explo-

sive substances is being extended to the non-commercial sphere (Section 40(2) subparagraph 1 point (b) (new) SprengG). However, in order to avoid contradictions with cases of unauthorised non-commercial handling and acquisition (Section 40(1) subparagraph 3 SprengG), this is only to apply to explosives, category F4 fireworks and pyrotechnic articles that are not conformity-assessed or otherwise approved. The unauthorised non-commercial movement of conformity-assessed pyrotechnic articles (except category F4) will in future be penalised as a regulatory offence in tandem with unauthorised non-commercial handling or acquisition (Section 41(1a) SprengG in conjunction with Section 40(5) SprengG). Breaches of the obligation to prove, to the competent body, authorisation for the movement of explosive substances prior to the movement operation will in future be punished as a regulatory offence (Section 41(1) subparagraph 4a SprengG). Criminal liability for the unauthorised provision of explosive substances to unauthorised persons is also being extended to the non-commercial sphere (Section 40(2) subparagraph 3 points (a), (c) and (d) SprengG).

2. Amendment to the Criminal Code (StGB)

In order to adequately punish the degree of wrongdoing specifically involved in explosions for the purpose of committing theft (Section 242 StGB), gang theft (Section 244(1) subparagraph 2 StGB) or grievous gang theft (Section 244a StGB), an aggravating element is being added to Section 308 StGB. Imprisonment of two to 15 years is envisaged. If, as a result of the offence, the offender seriously injures another person or injures a large number of people, the offender is liable to imprisonment from five to 15 years.

3. Amendment to the Code of Criminal Procedure (StPO)

In addition to the introduction of a new aggravating element for commercial and gang-related offences under the Explosives Act, effective options for the investigation of corresponding offences are to be created at the same time. For this purpose, the commercial and gang-related commission of offences under the Explosives Act (Section 40(3a) SprengG) is to be included in the list of offences for telecommunications surveillance (Section 100a(2) subparagraph 9b (new) StPO).

4. Amendment to the Precursors Act (AusgStG)

In future, the AusgStG will criminalise not only the attempted commission of offences under Section 13(1), but include the attempted aggravating element, namely attempted commercial or gang-based commission of such offences. Furthermore, a provision on the confiscation of explosives precursors is being added (Section 15 (new) AusgStG).

III. Alternatives

None.

IV. Legislative powers

The power of the federal government to enact the amendments to Sections 15 and 17 of the Explosives Act provided for in Article 1 derives from Article 73(1) subparagraph 12 of the Basic Law (GG). With regard to the envisaged amendments to provisions of the Explosives Act, the Criminal Code and the Precursors Act relating to criminal law and regulatory offences, power to legislate derives from Article 74(1) subparagraph 1 (criminal law) of the Basic Law. The other amendments are consequential changes.

V. Compatibility with European Union act and international treaties

The draft is compatible with the act of the European Union and international treaties concluded by the Federal Republic of Germany.

VI. Impact of the legislation

1. Legal and administrative simplification

Aspects of legal and administrative simplification are not affected by the draft.

2. Sustainability aspects

The regulations help to reduce the danger to the population from the improper use of explosive substances. The impact of the draft is therefore consistent with the federal government's guiding principles regarding sustainable development under the German Sustainability Strategy. The indicators of the National Sustainability Strategy have also been taken into account.

3. Budgetary expenditure exclusive of compliance costs

At federal level, no appreciable additional costs of a material or staff-related nature are to be expected.

4. Compliance costs

4.1 Compliance costs for citizens

Citizens will not incur any compliance costs.

4.2 Compliance costs for businesses

Businesses will not incur any compliance costs.

4.3 Compliance costs for the authorities

The addition of Section 15(4) SprengG in the first sentence of Section 28 SprengG will cause no compliance costs to be incurred by the customs authorities. This amendment is for legal clarity and certainty only.

The amendment to Section 41(1) subparagraph 4a and subparagraph 7 and Section 41(1a) SprengG introduces new regulatory offences. This may result in additional costs for Land-level budgets, the amount of which will depend on the actual caseload. Since the number of cases depends on the intensity of control operations of the respective authorities and the number of previous proceedings under Section 41(1) and (1a) SprengG has not been statistically recorded nationwide, this can only be estimated. The Federal Statistical Office estimates that the legal changes will increase the number of proceedings by ten per cent.

For simple regulatory offence proceedings, it can be assumed that all proceedings initially involve an average case-related effort of around 50 minutes (cf. Guide, Annex 8, Standard activities 1, 5, 11, 13 and 14, simple complexity). In cases where fines are imposed and enforced in addition to the written hearing, the case-related effort is increased by a further 25 minutes (cf. Standard activities 6, 7 and 12, simple to medium complexity), to a total of 75 minutes per proceeding. At a wage rate of EUR 44.60 per hour (cf. Guide, Annex 9, Municipalities, *gehobener Dienst* payscale), the cost for the first-mentioned proceedings is

around EUR 40 per case and that of the second-mentioned proceedings is around EUR 55 per case. For slightly more complex regulatory offence proceedings, it can be assumed that all proceedings initially involve an average case-related effort of around 12 hours (cf. Guide, Annex 8, Standard activities 1, 5, 8, 11, 13 and 14, medium to high complexity). In cases where fines are imposed and enforced in addition to the written hearing, the case-related effort is increased by a further four hours (cf. Standard activities 6, 7, 8 and 12, medium complexity), to a total of 16 hours per proceeding. At a wage rate of EUR 44.60 per hour (cf. Guide, Annex 9, Municipalities, *gehobener Dienst* payscale), the cost for the first-mentioned proceedings is around EUR 535 per case and that of the second-mentioned proceedings is around EUR 715 per case.

5. Other costs

There are no other costs for citizens and businesses. No impact on the level of prices, in particular on consumer price levels is expected.

A moderate increase in proceedings can be expected as a result of extending the offences under Section 40 SprengG to the non-commercial sphere. However, this cannot be quantified as no data is available. The tightening of the SprengG envisaged by the draft (in particular extending the offences under Section 40 SprengG to the non-commercial sphere and introducing new aggravating elements), the tightening of the StGB, and extending the investigative options are expected to bring about additional costs for the law enforcement authorities and the criminal courts in the Länder.

The introduction of new offence elements may lead to additional budgetary expenditure by the Länder, which cannot be quantified more accurately, for the law enforcement authorities and the judiciary, which are primarily responsible for conducting criminal proceedings. However, the corresponding additional burden on law enforcement authorities and the courts is justified given the improved protection of legal interests. In addition, to the extent that the consistent prosecution made possible by the regulation has a deterrent effect, costs as well as consequential costs from damage caused by criminal offences in connection with explosive substances would be saved.

Finally, moderately increased costs will be incurred as a result of adding offences under Section 40(3a) (new) SprengG committed commercially and on a gang-related basis to the list of offences in Section 100a of the Code of Criminal Procedure. In the event of telecommunications surveillance, in accordance with point 100 of Annex 3 to Section 23(1) of the Judicial Remuneration and Compensation Act (JVEG), costs of EUR 100 are incurred for each new instance of telecommunications surveillance per identifier, and EUR 35 for each extension in accordance with point 101 of Annex 3 to Section 23(1) JVEG. The number of instances in which telecommunications surveillance will take place because of an offence pursuant to Section 40(3a) (new) SprengG cannot currently be predicted, as this is an aggravating element being newly introduced in the SprengG by means of this amending Act.

6. Other impacts of the legislation

The provisions have no impact on consumers. They are gender-neutral and affect men and women in the same way. Similarly, no demographic impacts are expected.

VII. Time Limit; Evaluation

No time limit for the provisions is envisaged. No evaluation is currently foreseen.

B. Specific part

Article 1 (Amendment to the Explosives Act)

Subparagraph 1 (Section 15)

This editorial amendment clarifies that only persons who are authorised to handle explosive substances or to acquire them may import, transit or move explosive substances or arrange for their import, transit or movement by someone else (first half-sentence) and that such persons must prove this authorisation at the request of the authority designated in accordance with paragraph (5) (second half-sentence).

Subparagraph 2 (Section 17)

This editorial amendment clarifies that the authorisation requirement relates to the establishment and operation of warehouses in which explosive substances are to be stored either for commercial purposes or as part of an economic enterprise, an agricultural or forestry operation or in the employment of workers. The wording now matches Section 7(1) of the Act (that provision being in relation to permission to handle and trade in explosive substances).

Subparagraph 3 (Section 28)

The addition of Section 15(4) SprengG to the first sentence of Section 28 removes an existing ambiguity in the law to date: As the law stands, the reference provision in the first sentence of Section 28 SprengG, stipulating that certain provisions from the section on the commercial handling and trade in explosive substances are also applicable to the non-commercial sphere, cites Section 15(1) and Section 15(3) SprengG. This means that the proof and notification obligations and the competence of the authorities designated in Section 15(5) also apply in the non-commercial sphere. However, under the law as it stands, there is no reference to the corresponding control powers of the competent authorities under Section 15(4) SprengG in order to check whether the provisions applicable to the non-commercial import, transit and movement (including dangerous goods regulations) have been complied with. By adding Section 15(4) to Section 28, the powers of the authorities designated under paragraph (5) are now clarified. The provision is proportionate. This is because it makes no difference to the hazardous nature of the unauthorised movement of these explosive substances whether the movement is carried out for commercial or non-commercial purposes.

Subparagraph 4 (Section 40)

Point (a) (Section 40(2))

Point (aa) (Section 40(2) subparagraph 1 and subparagraph 2 SprengG)

Section 40 (2) subparagraph 1 point (a)

The amendment means that, in future, criminal liability for commercial import, transit or movement, ancillary to the referenced administrative provision in the first sentence of Section 15(1) SprengG, will be linked to the lack of authorisation to handle or acquire explosive substances and will no longer be linked to the breach of the obligation to prove such authorisation. Licence holders within the meaning of Section 7 SprengG and permit holders within the meaning of Section 20 SprengG are fundamentally authorised to commercially handle or acquire explosive substances. Also authorised are those who, under Section 4 subparagraph 2 in conjunction with Sections 1, 2 and 4 of the First Ordinance on the Explosives Act (1st SprengV), do not require a licence for certain pyrotechnic articles and activities (e.g. for the movement of airbag or belt tensioner units permanently installed in vehicles or vehicle parts, Section 4(3) of the 1st SprengV). Failure to comply with the

obligation to prove authorisation to the competent authority will in future only be punished as a regulatory offence and no longer as a criminal offence (cf. explanatory notes for Article 1 subparagraph 4 point (a)). The amendments take into account the requirement of certainty and the principle of proportionality.

Section 40 (2) subparagraph 1 point (b)

The amendment means that criminal liability is also expressly laid down for non-commercial import, transit or movement without the authorisation required under Section 15(1) in conjunction with the first sentence of Section 28 SprengG to handle or acquire explosive substances. The provision removes an ambiguity under the law as it stands, which casts doubt on whether criminal liability for unauthorised movement under Section 40(2) subparagraph 1 (old) SprengG also applies to the non-commercial sphere. This is because Section 15 SprengG, to which the penalty provided for in Section 40(2) subparagraph 1 SprengG is linked, refers, on the one hand, in paragraphs (3) and (6) thereof to the non-commercial licence provided for in Section 27 SprengG. On the other hand, Section 15 SprengG is located in the section 'Handling and trading in the commercial sector' of the Act and declares the reference provision in Section 28 to be applicable, mutatis mutandis, in cases of non-commercial handling in Section 15(1), (3) and (6). However, the reference provision in Section 28 SprengG has not yet been included in Section 40(2) subparagraph 1 SprengG (suggesting against criminal liability according to Erbs, in Kohlhaas/Lutz (ed.), 250th EL December 2024, SprengG Section 40 paragraph 13; Heinrich, in MüKoStGB, 4th ed. 2022, SprengG Section 40 paragraphs 75–78).

Licence holders within the meaning of Section 27 SprengG and those who – given the nature of the explosive substance – do not require a licence for handling or acquisition under Section 4 subparagraph 2 of the Act in conjunction with the provisions of the 1st SprengV are fundamentally authorised to non-commercially handle or acquire explosive substances. This applies, for example, to the import, transit and movement of category F1 fireworks that are conformity-assessed under Section 5(1) subparagraph 1 SprengG or approved under Section 47(2) or (4) SprengG for persons aged 12 years and over, and category F2 fireworks for persons aged 18 years and over.

The provision is proportionate. It makes no difference to the hazardous nature of the unauthorised movement of these explosive substances whether the movement is carried out for commercial or non-commercial purposes. In addition, in accordance with the assessments of Directive 2013/29/EU (Pyrotechnics Directive), the exemption from penalties provided for in Section 40(5) (new) SprengG rules out criminal liability for acts under paragraph (2) subparagraph 1 point (b) (as well as for acts under paragraph (1) subparagraph 3 and paragraph (2) subparagraph 3) of the Act for conformity-assessed or approved pyrotechnic articles with the exception of category F4 pyrotechnic articles (cf. draft 4th Act amending the Explosives Act, Bundestag document 16/12597, p. 43 and draft 5th Act amending the Explosives Act, Bundestag document 18/10455, p. 71). Pursuant to Section 40(2) subparagraph 1(b) (new) SprengG, the unauthorised non-commercial movement of explosives, category F4 fireworks and pyrotechnic articles that have not been conformity-assessed or otherwise approved is therefore punishable. The unauthorised non-commercial movement of conformity-assessed pyrotechnic articles (except category F4) will in future be penalised as a regulatory offence in tandem with unauthorised non-commercial handling or acquisition (Section 41(1a) in conjunction with Section 40(5) SprengG). In addition, the penalty framework (imprisonment for up to three years or a fine) also offers sufficient scope to adequately penalise acts that can also be classified as a less serious offence, taking into account, for example, the nature of the explosive substance.

Section 40 (2), subparagraph 2

The inclusion of the reference provision of the first sentence of Section 28 SprengG in Section 40(2) subparagraph 2 SprengG removes an ambiguity under the law as it stands, which casts doubt on whether criminal liability for unauthorised operation of a warehouse under Section 40(2) subparagraph 2 SprengG also applies to the non-commercial sphere. As it is worded, Section 17 SprengG, to which the criminal liability under Section 40(2) subparagraph 2 is linked, applies directly only to cases of commercial storage, but is to be applied, mutatis mutandis, to cases of non-commercial storage by virtue of the reference provision in Section 28 SprengG. However, the reference provision of Section 28 has not yet been included in Section 40(2) subparagraph 2 SprengG. The inclusion of the first sentence of Section 28 in Section 40(2) subparagraph 2 SprengG, as provided for by the draft, expressly lays down criminal liability for operating a non-commercial warehouse without the authorisation required under the SprengG.

The provision is proportionate. It makes no difference to the hazardous nature of the unauthorised operation of a warehouse for explosive substances whether the storage is carried out for commercial or non-commercial purposes. Stockpiles of explosive substances, which require authorisation, are by their nature sources of danger and are generally operated over longer periods of time. Against this background, there is an overriding public interest in minimising the safety risk associated with access to explosive substances (Mannheim Administrative Court, ruling of 20 February 2008 – Ref. 1 S 2814/07). Also, the storage of small quantities of explosive substances, which is permitted without authorisation under Section 17 SprengG and which, if packaged and stored appropriately, usually poses significantly lower risks in the event of an explosive reaction, remains exempt from criminal liability. Under the conditions set out in Section 18 subparagraph 1 SprengG in conjunction with Section 6 of the Second Ordinance on the Explosives Act (2nd SprengV) and point 4 of the Appendix and Annex 7 to the 2nd SprengV, the storage of small quantities of explosive substances, which alongside explosives also includes, for example, classic New Year's Eve fireworks (category F2 pyrotechnic articles), is permitted without a licence in the non-commercial sphere (for consumers) and is therefore not punishable. In addition, the penalty framework (imprisonment for up to three years or a fine) offers sufficient scope to adequately penalise acts that can also be classified as a less serious offence, taking into account, for example, the nature of the explosive substance.

The other amendments are editorial in nature. As a result of the continuing link with the first sentence of Section 17(1), operation of a warehouse without authorisation pursuant to Section 17(1), first sentence, subparagraph 1 SprengG and the operation of a warehouse after a major modification without authorisation pursuant to Section 17(1), first sentence, subparagraph 2 SprengG will continue to be punishable.

Point (bb) (Section 40(2) subparagraph 3)

In the cases referred to in Section 40(2) subparagraph 3 points (a), (c) and (d) SprengG, the amendment also lays down criminal liability for the non-commercial unauthorised provision of explosive substances to unauthorised persons. This is because it makes no difference to the hazardous nature of the unauthorised provision of explosive substances to unauthorised persons who, in particular, do not have the necessary specialist knowledge, personal suitability or reliability, whether the movement is carried out for commercial or non-commercial purposes. In addition, as a result of the exemption from penalties provided for in Section 40(5) SprengG, criminal liability continues to be ruled out for the provision of conformity-assessed or approved pyrotechnic articles, with the exception of category F4 pyrotechnic articles. The reader is also referred to the explanatory noted on Article 1 subparagraph 4 point (a) (aa) and (bb).

Point (b)(Section 40(3))

Section 40 (3a)

In order to properly reflect the increased degree of criminal wrongdoing in cases of commercial or gang-related commission of offences under Section 40(1) or (2) SprengG, paragraph (3a) (new) provides for a new aggravating element. If the punishable acts covered by Section 40(1) or (2) SprengG are carried out commercially, i.e. with the intention of obtaining a continuous source of income of some duration and some extent through repeated commission of the offence, the duration and scope of the activity usually increase. In addition, the internal attitude of the offender indicates a significantly increased criminal appetite. Not every trader who commits breaches within the meaning of Section 40(1) subparagraphs 1 or 2 or Section 40(2) subparagraphs 1 or 2 and acts without the licence required under Section 7 or Section 17 SprengG is acting commercially within the meaning of Section 40(3a) (new) SprengG. Such conduct, without the additional intention of obtaining a continuous source of income specifically through repeated offences under Section 40(1) or (2) SprengG, normally constitutes only the basic offence referred to in Section 40(1) or (2) SprengG. Where offences are committed on a gang-related basis, the increased criminal appetite associated with the gang understanding and the increased dangerousness brought about by the consolidated structure, which exists when several parties come together to form a gang, must be taken into account. This is because the coming together of several people harbours the risk of more intensive breaches of the law, inter alia due to the possibility of dividing tasks associated with the act and action in specifically assigned areas of responsibility. All this must be adequately taken into account when it comes to the possible penalty. Paragraph (3a) (new) thus provides the adjudicating courts with the appropriate tools in order to be able to determine an appropriate level of punishment, given involvement and blame, for these cases as well. In addition, paragraph (3a) (new) makes it clear that such conduct is fundamentally to be classified as a particularly serious offence. The penal framework for the aggravating element is based on the design of comparable provisions, such as Section 13(3) (old version) AusgStG or Section 260(1) subparagraph 1 StGB, which envisage a penalty ranging from six months to five years' imprisonment for the commission of offences on a commercial basis. Because of the particular gravity of the adverse effect on public safety and order resulting from acts committed under Section 40(1) or (2) SprengG on a commercial or gang-related basis, such a penalty framework is also required. At the same time, the penalty framework of imprisonment of six months to five years offers sufficient scope to adequately penalise different types of acts that can also be classified as less serious or medium offences, taking into account, for example, the nature of the explosive substance.

Section 40 Paragraph 3b

The mere attempted unauthorised acquisition of explosive substances, the attempted unauthorised trade and the attempted unauthorised handling of these substances, the attempted unauthorised import, transit or movement as well as the unauthorised provision of these substances to unauthorised persons have not yet been punishable under the Explosives Act as no criminal liability for attempt has been specified (cf. Section 23(1) StGB in conjunction with Section 12(2) StGB).

This constitutes a gap in the legislation with regard to conduct that is worthy of and deserves punishment. On the one hand, this lack of criminal liability stands in contrast to the considerable dangers for the general public that are associated with the attempted unauthorised handling, trade, movement and provision of explosive substances. On the other hand, cases of ineffectual attempt (for example, those in which the acquisition of explosive substances fails because undercover police officers pose as sellers to the offender) are in any case accompanied by a threat to legal interests that is imminent from the offender's point of view. The use of such investigative methods is of high practical relevance in Internet investigations. This concerns, for example, recent cases in which the investigating authorities receive information about persons who have enquired on social media or on the darknet about the acquisition of pyrotechnics and other explosive substances with the intention of wanting to blow up ATMs. In cases where the acquisition of explosive substances fails due to the deployment of undercover police officers or investigators (who

pose as sellers to the offender), criminal liability for this conduct has so far been ruled out as no criminal liability for attempt has been specified in statute for the cases referred to in Section 40(1) subparagraph 3 SprengG.

This gap in the legislation is being closed with the introduction of criminal liability for attempt, for the acts referred to in Section 40(1), Section 40(2) subparagraph 1 (new) and Section 40(2) subparagraph 3 points (a), (c) and (d), Section 40(3) and Section 40(3a) SprengG.

The provision is proportionate. The introduction of criminal liability for attempt makes it possible to fully reflect the degree of wrongdoing associated with such acts, which in cases of ineffectual attempt are, in any case, accompanied by a threat to legal interests that is imminent from the offender's point of view. In addition, the offences under Section 40(1), Section 40(2) subparagraph 1 (new), Section 40(2) subparagraph 3 points (a), (c) or (d), Section 40(3) and Section 40(3a) SprengG are offences that are comparable in terms of their seriousness and dangerousness to offences under the AusgStG or the Chemicals Act (ChemG). The latter are punishable by the same penalty (imprisonment of up to three years or a fine), have similar risk potential and – unlike the Explosives Act – penalise the attempt to commit them (Section 13(2) (old version) AusgStG and Section 27(3) ChemG). In addition, the exemption from penalties provided for in Section 40(5) SprengG rules out criminal liability for the attempted – non-commercial – unauthorised handling of conformity-assessed or approved pyrotechnic articles and their unauthorised acquisition, import, transit or movement and unauthorised provision to unauthorised persons (with the exception of category F4 pyrotechnic articles).

Point (c) (Section 40(5))

The provision adds non-commercial unauthorised import, transit or movement of conformity-assessed or approved pyrotechnic articles to the list of acts that are excluded from criminal liability under Section 40(5) SprengG (cf. draft 4th Act amending the Explosives Act, Bundestag document 16/12597, p. 43 and draft 5th Act amending the Explosives Act, Bundestag document 18/10455, p. 71). The synchronisation with Section 40(1) subparagraph 3 SprengG avoids contradictions that would arise if the non-commercial unauthorised acquisition of certain pyrotechnic articles was exempted from criminal liability, but not their non-commercial movement (e.g. transport from the point of sale).

The amendment also constitutes an editorial consequential change.

Subparagraph 5(Section 41)

Point (a)

Point (aa) (Section 41(1) subparagraph 4a)

This is a consequential amendment due to Article 1 subparagraph 4 point (a)(aa). Failure to comply with the obligation to prove, to the competent authority under Section 15(1) second half-sentence SprengG, authorisation to handle explosive substances prior to their import, transit or movement will be punished in future as a regulatory offence. The amendment fits into the regulatory structure of Section 41(1) subparagraph 5a SprengG, which also designates failure to comply with the obligation to submit a movement permit (in good time) pursuant to Section 15(6) SprengG as a regulatory offence (and not as a criminal offence) and which is comparable, in terms of the seriousness of the breach, to cases of failure to prove authorisation. At the same time, penalisation as a regulatory offence ensures effective monitoring, in which the competent authority can impose a fine of up to EUR 50,000 (cf. Section 41(2) SprengG).

Point (bb) (Section 41(1) subparagraph 7)

This is a consequential amendment due to Article 1 subparagraph 4 point (a)(aa). The unauthorised establishment or major modification of a non-commercial warehouse contrary to Section 17(1) in conjunction with the first sentence of Section 28 SprengG is to be punished as a regulatory offence, like the cases of commercial breaches of Section 17(1) SprengG. It makes no difference to the degree of the penalty that should be attached to the unauthorised establishment or unauthorised major modification of a warehouse whether the establishment or modification of the warehouse is for commercial or non-commercial purposes. Establishment is understood to mean construction and setting up in its entire technical-structural condition (see draft Act harmonising explosives law, Bundestag document 7/4824, p. 21).

Point (b) (Section 41(1a))

This is a consequential amendment due to Article 1 subparagraph 4 point (c). In synchronisation with Section 41(1a) in conjunction with Section 40(1) subparagraph 3 SprengG, acts for which the grounds for exclusion of criminal liability under Section 40(5) SprengG apply, i.e. cases of non-commercial unauthorised import, transit or movement of conformity-assessed or approved pyrotechnic articles (with the exception of those of category F4), will in future be punished as a regulatory offence.

Article 2 (Amendment to the Criminal Code)

Subparagraph 1 (Section 6 subparagraph 2)

This is a consequential amendment due to Article 2 subparagraph 6 point (a).

Subparagraph 2 (Section 89c(1), first sentence, subparagraph 3)

This is a consequential amendment due to Article 2 subparagraph 6 point (a).

Subparagraph 3 (Section 126(1) subparagraph 7)

This is a consequential amendment due to Article 2 subparagraph 6 point (a).

Subparagraph 4 (Section 129a(2) subparagraph 2)

This is a consequential amendment due to Article 2 subparagraph 6 point (a).

Subparagraph 5 (Section 138(1) subparagraph 8)

This is a consequential amendment due to Article 2 subparagraph 6 point (a).

Re subparagraph 6 (§ 308)

Point (a)(Section 308(3) new)

The draft adds a further aggravating element to Section 308 StGB (causing an explosion) in order to adequately reflect the degree of wrongdoing specifically involved in explosions for the purpose of committing theft (Section 242 StGB), gang theft (Section 244(1) subparagraph 2 StGB) or grievous gang theft (Section 244a StGB). These acts are characterised by a particularly high criminal appetite, since the way in which the offence is committed creates uncontrollable risks with the intention of unlawfully appropriating third-party movable property.

The new Section 308(3) StGB envisages imprisonment of two to 15 years for acts such as the blowing up of an ATM to commit cash theft. If, as a result of the offence, the offender

seriously injures another person or injures a large number of people, the offender is liable to imprisonment from five to 15 years. This adequately reflects the particularly reprehensible combination of property offence and public-endangering offence.

Point (b) (Section 308(4))

This is a consequential amendment due to Article 2 subparagraph 6 point (a).

Point (c) (Section 308(5))

The provision for less serious cases in Section 308(4) of the Criminal Code becomes paragraph (5) and also extends to the new aggravating element of paragraph (3).

Point (d) (Section 308(6) and (7))

This is a consequential amendment due to Article 2 subparagraph 6 point (a).

Subparagraph 7 (Section 313(2))

This is a consequential amendment due to Article 2 subparagraph 6 point (a).

Subparagraph 8 (Section 314(2))

This is a consequential amendment due to Article 2 subparagraph 6 point (a).

Re subparagraph 9 (§ 314a)

Point (a)

Point (aa) (Section 314a(2) subparagraph 2 point (b))

This is a consequential amendment due to Article 2 subparagraph 6 point (a).

Point (bb) (Section 314a(2) subparagraph 2 point (f))

This is a consequential amendment due to Article 2 subparagraph 6 point (a).

Point (b)

Point (aa) (Section 314a(3) subparagraph 1 point (b))

This is a consequential amendment due to Article 2 subparagraph 6 point (a).

Point (bb) (Section 314a(3) subparagraph 1 point (e))

This is a consequential amendment due to Article 2 subparagraph 6 point (a).

Subparagraph 10 (Section 321)

This is a consequential amendment due to Article 2 subparagraph 6 point (a).

Article 3 (Amendment to the Article 10 Act)

This is a consequential amendment due to Article 2 subparagraph 6 point (a).

Article 4 (Amendment to the Courts Constitution Act)

Re subparagraph 1 (§ 74)

Point (a) (Section 74(2) first sentence subparagraph 17)

This is a consequential amendment due to Article 2 subparagraph 6 point (a).

Point (b) (Section 74(2) first sentence subparagraph 20)

This is a consequential amendment due to Article 2 subparagraph 6 point (a).

Point (c) (Section 74(2) first sentence subparagraph 21)

This is a consequential amendment due to Article 2 subparagraph 6 point (a).

Subparagraph 2 (Section 120(2) first sentence subparagraph 3)

This is a consequential amendment due to Article 2 subparagraph 6 point (a).

Article 5 (Amendment to the Code of Criminal Procedure)

Subparagraph 1 (Section 100a)

Point (a) (Section 100a(2) subparagraph 1 point (u))

This is a consequential amendment due to Article 2 subparagraph 6 point (a).

Point (b) (Section 100a(2) subparagraph 5a)

This is a consequential amendment due to Article 7 subparagraph 1 point (a).

Point (b) (Section 100a(2) subparagraph 9b new)

The list in Section 100a(2) of the Code of Criminal Procedure (telecommunications surveillance) is to be moderately expanded and thus adapted to needs in practice. The moderate extension of the list of offences in Section 100a(2) of the Code of Criminal Procedure to include cases of commercial or gang-related breaches of Section 40 SprengG is necessary, as it has been shown in practice that the investigation of gang-related and commercial crimes involving explosives without the criminal procedural instrument of telecommunications surveillance is, in many cases, hopeless or significantly more difficult. This is particularly true given that, according to experience in the field of gang-related and commercial crime involving explosives, telecommunications are largely used to initiate and carry out criminal trade in explosive substances. According to experience in this field, gang-related and commercial crime using explosives is characterised, among other things, by international, cross-border action and conspiratorial (tele)communications. Examination and investigation of relevant facts are therefore usually only possible with the help of covert measures. In order to successfully prosecute acts committed by means of telecommunications, it is often necessary to understand the communication channels of the parties involved. Other investigative methods fail to uncover the crime structures, which are formed without real contact between any participants in the analogue world. Previous findings from investigations show that suspects who use explosions to blow up ATMs on a commercial or gang-related basis are regularly organised and act on a task-sharing basis in the execution of the crime. Suspects who actually blow up the ATM are not usually tasked with the procurement of means of the crime (explosives). Conversely, suspects who procure or produce explosives are not necessarily involved in the blowing up of the ATM, but play a logistical role. Often, means of the crime are procured, produced and held by third parties well before the execution of the offence. These people are

often not involved in the further planning and execution of the crime. For communication with each other, the participants regularly use telephones and other technical means or are in contact with each other via intermediaries. In order to investigate such commercial or gang-related structures in situations where there is insufficient indication of acts under Section 308 StGB, but of other acts of organised crime involving explosives, it would be necessary to order the surveillance of telecommunications, which is not possible under the law as it stands.

The moderate expansion of the list of offences in Section 100a(2) of the Code of Criminal Procedure also eliminates existing inconsistencies in relation to the commercial or gang-based operation of criminal trading platforms on the Internet (Section 127(3) StGB) and the commercial or gang-based unauthorised handling and trade in explosives precursors (Section 13(3) (old version) AusgStG).

Thus, the offence under Section 127(1), (3) of the Criminal Code, which Section 40(1) to (3) SprengG specifies as a list offence, has been included in the list of offences in Section 100a(2) of the Code of Criminal Procedure, even though this does not currently apply to the list offences referred to. Under the law as it stands, this means that the telecommunications of the commercial operator of an illegal trading platform may be monitored, but not of a person who is suspected of (commercially) unlawfully distributing explosives and pyrotechnics of category F4 via other (telecommunications) channels. This makes no sense in view of the comparable unlawfulness of the acts.

The inclusion of Section 40(3a) (new) SprengG in the list of Section 100a(2) StPO further closes the current regulatory gap which means that although the ordering of telecommunications surveillance in the event of suspicion of commercial or gang-related criminal handling and trade in explosives precursors pursuant to Section 13(3) (old version) AusgStG has been possible, in the absence of associated powers, no corresponding investigative measures have been available with respect to the criminal handling or trade in explosives produced from these precursors as end products. It has therefore been possible to order telecommunications surveillance in the case of prohibited gang-related trade in ammonium nitrate, which is a precursor to explosives, but not in the case of prohibited gang-related trade in the explosive manufactured from ammonium nitrate. In individual cases, this may mean that telecommunications surveillance loses its legal basis in an investigation related to breaches of the AusgStG as soon as the explosive produced from the precursors is provided to another person or the investigation reveals that there is a suspicion of a crime not with regard to the AusgStG, but with regard to the SprengG.

The inclusion of Section 40(3a) (new) SprengG in the list of Section 100a(2) of the Code of Criminal Procedure is also appropriate in view of the increased criminal intensity of commercial or gang-related offences under the SprengG and the particular gravity of the adverse effect on public safety and order resulting therefrom. Also in terms of the penalty framework (six months to five years), the aggravating element of the offence under Section 40(4) (new) SprengG is one whose severity is comparable to other offences in the list of Section 100a(2) StPO (cf. Section 100a(2) subparagraph 5a in conjunction with Section 13(3) (old version) AusgStG, Section 100a(2) subparagraph 1 point (u) in conjunction with Section 310(2) StGB). In light of this, too, the moderate extension of the list of serious criminal offences in Section 100a of the Code of Criminal Procedure to include the aggravating element of Section 40(3a) (new) SprengG and the associated encroachment on telecommunications secrecy that is thus made possible is justified.

Subparagraph 2 (Section 100g(2) second sentence subparagraph 1 point (i))

This is a consequential amendment due to Article 2 subparagraph 6 point (a).

Subparagraph 3 (Section 112(3))

This is a consequential amendment due to Article 2 subparagraph 6 point (a).

Article 6(Amendment to the Customs Investigation Service Act)

This is a consequential amendment due to Article 2 subparagraph 6 point (a).

Article 7(Amendment to the Precursors Act)

Subparagraph 1 (Section 13)

In future, the AusgStG will criminalise not only the attempted commission of offences under Section 13(1), but also, in synchronisation with Section 40(3a) (new) SprengG, the attempted aggravating element, namely the attempt to commit such acts on a commercial or gang-related basis.

Subparagraph 2 (Section 15)

Currently, confiscation of precursors for the production of explosives in the case of established offences under the AusgStG is only possible if the precursors concerned are objects within the meaning of Section 74(1) of the Criminal Code, i.e. those which have been produced by an intentional act (products of crime) or have been used or intended for the commission or preparation thereof (means of crime). This is because, under Section 74(2) StGB, objects to which a criminal offence relates (objects of crime) are only subject to confiscation if this is regulated specifically in statute. However, unlike the Explosives Act (see Section 43 SprengG), the AusgStG does not contain a corresponding confiscation provision. In the case of offences under Section 13 AusgStG in which the precursors are not products of crime and – in the absence of a demonstrable intention to use them – are also not means of crime for the commission of further offences, confiscation is not possible under the law as it stands, because there is no special statutory provision within the meaning of Section 74(2) StGB. In the past, this has meant that seized precursors had to be returned to the accused as soon as they were no longer needed for evidence purposes in the criminal proceedings. The absence of the ability to confiscate explosives precursors which are objects of crime for offences under the AusgStG cannot be accepted, given the significant risks for the general public that are associated with the unlawful possession, trade or use of these objects, which can be misused for the illegal production of explosives for criminal, in particular terrorist purposes. The amendment envisaged in Article 7 closes this gap in the legislation and creates the legal basis for the ability to confiscate such objects. At the same time, the provision is also directed against organised crime by making it possible to remove from circulation precursors that are possessed or traded contrary to the prohibition, so that no further illegal revenue can be generated with them.

Subparagraph 3 (Section 16)

This is a consequential editorial amendment due to Article 7 subparagraph 1.

Article 8 (Restriction of fundamental rights)

Article 1 subparagraph 3 restricts the fundamental right to secrecy of correspondence and postal services (Article 10 of the Basic Law). Articles 3 and 5 restrict the fundamental right to telecommunications secrecy (Article 10 of the Basic Law). The provision takes into account the citation requirement contained in the second sentence of Article 19(1) of the Basic Law.

Article 9 (Entry into force)

This provision regulates entry into force.