

PROTECTION OF HUMAN RIGHTS IN THE BUSINESS SECTOR

COMPLIANCE INTERFACE IN THE SUPPLY CHAIN ACT AND MONEY LAUNDERING ACT

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ABSTRACT

This article analyses compliance interfaces between the German Supply Chain Act (short: LkSG), Money Laundering Act (short: GwG) and German Criminal Code (short: StGB) in connection with human rights risks. The authors conclude that remedies taken only in accordance with the LkSG after a human rights risk has been identified may still constitute a compliance violation within the meaning of the GwG or even a criminal liability under Section 261 StGB.

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I. INTRODUCTION

Global enterprises benefit from the ongoing globalization of production processes. At the same time, there is a social consensus in Europe and Germany that there must be no pursuit of profit at any price - especially not at the cost of human rights. Based on this consensus, enterprises design their corporate culture using buzzwords such as "sustainability", "responsibility" and "integrity". This reflects not only the company's commitment to comply with the law, but even beyond the law to more stringent self-imposed ethical principles.

Despite these corporate assurances, the German legislator felt compelled to pass the LkSG in 2021.

First, this article describes the extent to which the LkSG, Section 261 of the German Criminal Code and the GwG protect human rights.

Second, we describe which enterprises are covered by the LkSG and the GwG, what compliance requirements the respective laws impose and what consequences enterprises and employees face in the event of compliance violations.

Third, we present the individual steps that companies can and should take in cases of verified or suspected human rights violations.

This article discusses the current legal situation. Please note that the European Union published its' three-part legislative package to strengthen anti-money laundering rules in the Official Journal of the European Union on June 19th, 2024: (i) The Anti-Money Laundering Regulation, which will replace the German GwG, will come into effect on July 10th, 2027;¹ (ii) the new European Anti-Money Laundering Authority is scheduled to begin operations on July 1st, 2025;² (iii) Member States must implement the requirements of the 6th Anti-Money Laundering Directive into national law by July 10th, 2027.³

II. SCOPE OF THE LEGAL PROTECTION OF HUMAN RIGHTS

A. The Supply Chain Act

The Supply Chain Act has been in force since January 1st, 2023.⁴ According to the law's reasoning, this law

¹Regulation (EU) 2024/1624 of the European Parliament and of the Council of 31 May 2024 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, Article 90.

²Regulation (EU) 2024/1624 of the European Parliament and of the Council of 31 May 2024 establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010, Article 108.

³Directive (EU) 2024/1640 of the European Parliament and of the Council of 31 May 2024 on the mechanisms to be put in place by Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Directive (EU) 2019/1937, and amending and repealing Directive (EU) 2015/849, Article 78.

⁴BGBI. 2021 I 2959, Article 5 Subsection 1.

"serves to improve the international human rights situation by laying down requirements for the responsible management of supply chains for certain companies."⁵

The Supply Chain Act was passed to protect human rights. According to Section 2 Subsection 1 and its annex, the Act's scope of protection includes several important international conventions for the protection of human rights.⁶

B. Section 261 of the German Criminal Code

Section 261 Subsection 1 1st Sentence and Subsection 2 describe criminal acts as follows:

"Whoever, in respect of an object derived from an unlawful act,

1. hides it
2. exchanges, transfers or takes it with the intent of preventing it being found, confiscated or its origin being investigated,
3. procures it for themselves or a third party or
4. keeps or uses it for themselves or a third party if they were aware of its origin at the time of obtaining possession of it incurs a penalty of imprisonment for a term not exceeding five years or a fine."

Subsection 2:

"Whoever hides or conceals facts which may be of relevance to an object as referred to in subsection (1) being found, confiscated or its origin being investigated incurs the same penalty."⁷

"Object" of Section 261 StGB are all legal objects that have an asset value;⁸ including intangible objects such as claims and rights.⁹ This object must derive from an unlawful act of any kind (so-called "All-Crimes-Approach").¹⁰

It is particularly important for companies to recognize that an economic perspective is decisive here: objects are to be regarded as tainted if (i) they can be traced back to the predicate offense by means of a causal connection¹¹ and (ii) are not essentially based on the conduct of a third party.¹² Further, once

⁵ BT-Drs. 19/28649, p 2, free translation.

⁶ e. g.: Convention No. 29 of the International Labour Organization "Forced Labour Convention", 1930 and its 2014 Protocol; Convention No. 182 of the International Labour Organization "Worst Forms of Child Labour Convention", 1999. The environmental protection pursued by the LkSG is not considered in this article.

⁷ Criminal Code in the version published on 13 November 1998 (Federal Law Gazette I, p. 3322), as last amended by Article 2 of the Act of 22 November 2021 (Federal Law Gazette I, p. 4906); Translation provided by Prof. Dr. Michael Bohlander. Translation completely revised and regularly updated by Ute Reusch (Aug. 14, 2024, 03:07 PM), https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p2435.

⁸ BT-Drs. 12/989, p 27; Ruhmannseder, BeckOK StGB, Section 261, mn 9 (v. Heintschel-Heinegg et al eds., 62nd ed. 2024).

⁹ El-Ghazi, Geldwäschegesetz, Section 261, mn 48 (Herzog, 5th ed. 2023).

¹⁰ BT-Drs. 19/24180, p 42; Ruhmannseder, BeckOK StGB, Section 261, mn10 (v. Heintschel-Heinegg et al eds., 62nd ed. 2024).

¹¹ German Federal Court of Justice, Resolution of Feb. 18th, 2009 – 1 StR 4/09 and Resolution of Nov. 26th 2009 – 5 StR 91/09; BT-Drs. 19/24180, p 29.

¹² BT-Drs. 12/3533, p 12; German Federal Court of Justice, Judgement of Aug. 15th, 2018 – 5 StR 100/18.

tainted, an asset cannot be rectified by simply mixing it with other legal financial resources.¹³ According to the German Federal Court of Justice, exceptions may apply if the share of the predicate offenses is completely insignificant from an economic point of view.¹⁴ Thus, also an indirect chain of conduct is covered by Section 261 StGB.¹⁵

Section 261 Subsection 9 StGB recognizes the geographical scope of companies' activities, typically spanning across multiple jurisdictions: acts committed abroad can also be suitable predicate offenses for money laundering.¹⁶ Subsection 9 equates objects that originate from an offense committed abroad with an object within the meaning of Section 261 Subsection 1 StGB, if the offense – had it been committed within the German jurisdiction – would also be an illegal act under German criminal law.¹⁷ In addition, the offense must be punishable at the place where it was committed (Subsection 9 No. 1.) or – so an examination of the respective national criminal law is unnecessary – it must be punishable under one of the European Union provisions mentioned in Subsection 9 No. 2.¹⁸

The German legislator has at least indirectly¹⁹ taken the protection of human rights into account by referring to European regulations and conventions in Section 261 Subsection 9 No. 2 StGB. In some cases, these European standards were expressly adopted to protect human rights. This applies to the frameworks mentioned in Section 261 Subsection 9 No. 2 lit. b) (protection of the right to asylum)²⁰, lit. f) (combating human trafficking and forced labor)²¹, lit. g) (combating the sexual exploitation of children)²² and lit. h) (combating terrorism).²³

Furthermore, when assessing the suspect's intent, Subsection 6 1st Sentence must be considered:

“Whoever, in the cases under subsections (1) or (2), is recklessly unaware of the fact that the object is one as referred to in subsection (1) incurs a penalty of imprisonment for a term not exceeding two years or a fine.”²⁴

¹³ BT-Drs. 19/24180, p 20.

¹⁴ German Federal Court of Justice, Resolution of May 20th, 2015– 1 StR 33/15; BT-Drs. 19/24180, p 29.

¹⁵ Ruhmannseder, BeckOK StGB, Section 261, mn 15 (v. Heintschel-Heinegg et al eds., 62nd ed. 2024).

¹⁶ BT-Drs. 13/8651, p 12; El-Ghazi, Geldwäschegesetz, Section 261, mn 61 (Herzog, 5th ed. 2023).

¹⁷ Altenhain, Strafgesetzbuch, Section 261, mn 21 (Kindhäuser et al eds., 6th ed. 2023).

¹⁸ Altenhain, Strafgesetzbuch, Section 261, mn 23 (Kindhäuser et al eds., 6th ed. 2023).

¹⁹ However, the protection of human rights was not the legislator's motive for amending Section 261 StGB, but rather Directive 2018/1673/EU gave rise to the amendment; see Altenhain, Strafgesetzbuch, Section 261, mn 4 (Kindhäuser et al eds., 6th ed. 2023).

²⁰ 2002/946/JHA: Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, see Article 6.

²¹ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, see Reasons 7 and 14.

²² Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, see Reason 1 and 50.

²³ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and mending Council Decision 2005/671/JHA, see Reason 1, 2 and 35.

²⁴ Criminal Code in the version published on 13 November 1998 (Federal Law Gazette I, p. 3322), as last amended by Article 2 of the Act of 22 November 2021 (Federal Law Gazette I, p. 4906); Translation provided by Prof. Dr. Michael Bohlander. Translation completely revised and regularly updated by Ute Reusch (Aug. 14, 2024, 04:36 PM), https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p2435.

“The offender acts recklessly if he disregards the obvious possibility that the object originates from an unlawful act due to particular indifference or gross carelessness.”²⁵

Section 261 Subsection 7 states:

“Whoever is liable on account of participation in a prior offence incurs a penalty under subsections (1) to (6) only if they put the object into circulation and thereby hide its unlawful origin.”²⁶

Circulation covers all acts that result in the offender releasing the incriminated object from his actual power of disposal and a third party acquiring actual power of disposal; this includes depositing illegally obtained cash into a bank account or selling valuables.²⁷

Hiding its unlawful origin covers all acts,

“which aim to give an object the appearance of a different (legal) origin or at least to conceal its true origin.”²⁸

Participation in a prior offence must be assessed, if the company produces objects under circumstances that violate human rights. If, for example, the company sells these objects with a “fair trade” claim, it may no longer be a non-punishable self-money laundering and the persons acting on behalf of the company must expect to be accused of money laundering.

C. The Money Laundering Act

The protection of human rights did not play a distinct role in the first introduction of the GwG²⁹ in 1993. The main aim of the law was to combat organized crime.³⁰ The law obliged

“in particular banks and other traders to identify their customers and to record and store the identification details.”³¹

A link to human rights can now be established via the aforementioned amendment to Section 261 StGB. By defining money laundering as a criminal offense pursuant to Section 261 StGB (Section 1 Subsection 1 GwG), the provisions of European law on the protection of human rights are indirectly applied in the Money Laundering Act (Section 261 Subsection 9 StGB).

²⁵ Altenhain, *Strafgesetzbuch*, Section 261, mn 93 (Kindhäuser et al eds., 6th ed. 2023).

²⁶ *Criminal Code in the version published on 13 November 1998 (Federal Law Gazette I, p. 3322), as last amended by Article 2 of the Act of 22 November 2021 (Federal Law Gazette I, p. 4906)*; Translation provided by Prof. Dr. Michael Bohlander. Translation completely revised and regularly updated by Ute Reusch (Aug. 14, 2024, 05:36 PM), https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p2435.

²⁷ BT-Drs. 18/6389, p 14.

²⁸ BT-Drs. 18/6389, p 14, free translation; German Federal Court of Justice, Judgment of July 17th, 2016 – 2 StR 451/15.

²⁹ Introduced as “Profit Tracing Act” in 1993, since August 2008 known as “Money Laundering Act”, see BGBl. 2008 I 1690.

³⁰ BT-Drs. 12/2704, p 1.

³¹ BT-Drs. 12/2704, p 1, free translation.

III. COMPLIANCE DUTIES IN CONNECTION WITH HUMAN RIGHTS ISSUES

A. The Supply Chain Act

1. Scope of Application

Since January 1st, 2024, the LkSG³² has been applicable to enterprises, regardless of their legal form, which employ at least 1,000 employees in Germany and have either their central administration, their principal place of business, their administrative headquarters, their statutory seat or a domestic branch office in Germany (Section 1 Subsection 1). Section 1 Subsection 2 regulates the calculation of the threshold value when using temporary workers; Subsection 3 is applicable for affiliated enterprises.³³ However, the LkSG can affect any company regardless of the threshold value if certain requirements are met.³⁴ As soon as a smaller company provides services or products to another company that is subject to the obligations of the LkSG, it is considered a “direct supplier”. As such, the smaller company is included in the risk analysis and, if necessary, in preventive measures and remedial action.³⁵

2. Due Diligence Obligations

Section 3 Subsection 1 lists the due diligence obligations of enterprises subject to Section 1.³⁶ These include, among others:

- Conducting appropriate risk analyses (Section 5),
- Issuing a policy on its human rights strategy (Section 6 Subsection 2),
- Taking appropriate preventive measures in its own area of business (Section 6 Subsection 1 and 3) and vis-à-vis their direct suppliers (Section 6 Subsection 4),
- Taking appropriate remedial action (Section 7 Subsection 1 to 3),
- Ensuring an appropriate internal complaints procedure (Section 8),
- Documentation and reporting (Section 10).

According to Section 4 Subsection 1 1st Sentence enterprises must establish an appropriate and effective risk management system to comply with these due diligence obligations. The enterprise must ensure somebody within the enterprise is responsible for monitoring the risk management, for example by appointing a human rights officer (Section 4 Subsection 3).

³² The German Federal Ministry of Labour and Social Affairs published an English version of the LkSG available at <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/supply-chain-act.html> (Aug. 28th, 2024, 10:10 AM).

³³ With the adoption of the EU Corporate Sustainability Due Diligence Directive (CSDDD) in June 2024, further changes are expected in this area of supply chains. Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859.

³⁴ Prof. Dr. Michael Nietsch et al eds., Adressatenkreis und sachlicher Anwendungsbereich des neuen Lieferkettensorgfaltspflichtengesetz, Neue Juristische Wochenschrift, 1, 3 (2022).

³⁵ Federal Office for Economic Affairs and Export Control, Häufige Fragen zum Thema Lieferkettensorgfaltspflichtengesetz, https://www.bafa.de/DE/Lieferketten/FAQ/_functions/faq_table_lieferketten.html?nn=1469838 (Aug. 28th, 2024, 11:45 AM).

³⁶ Companies not subject to Section 1 LkSG do not have to fulfill these obligations, see Federal Office for Economic Affairs and Export Control, Häufige Fragen zum Thema Lieferkettensorgfaltspflichtengesetz, https://www.bafa.de/DE/Lieferketten/FAQ/_functions/faq_table_lieferketten.html?nn=1469838 (Aug. 28th, 2024, 11:50 AM).

Next, the actual human rights risks are determined in the risk analysis (Section 5).³⁷ Such a risk analysis is carried out annually. Furthermore, a risk analysis must be carried out ad hoc

“if the enterprise must expect a significantly changed or significantly expanded risk situation in the supply chain, for example due to the introduction of new products, projects or a new business field.”³⁸

According to the LkSG, the risk analysis can come to three conclusions a) there is no human rights risk, b) there is a human rights risk or c) a violation of human rights has occurred or is imminent.

If an enterprise identifies a risk, it must take appropriate preventive measures without undue delay (Section 6 Subsection 1). These include issuing a policy statement on its human rights strategy (Section 6 Subsection 2) and laying down appropriate preventive measures in its own area of business and vis-à-vis their direct suppliers (Section 6 Subsection 1 and 3).

If the enterprise discovers that a violation of a human right has already occurred or is imminent, it must, without undue delay, take appropriate action to prevent, end or minimize the extent of this violation, Section 7 Subsection 1.

The termination of a business relationship is only required (“ultima ratio”),³⁹ if

1. the violation of a protected legal position [...] is assessed as very serious,
2. the implementation of the measures developed in the concept does not remedy the situation after the time specified in the concept has elapsed,
3. the enterprise has no other less severe means at its disposal and increasing the ability to exert influence has no prospect of success.”⁴⁰

3. Non-Compliance⁴¹

The Federal Office of Economics and Export Control acts as the competent authority (Section 19 LkSG) either ex officio (Section 14 Subsection 1 No. 1 LkSG) or upon request (Section 14 Subsection 1 No. 2 LkSG). The authority has extensive rights of action – they are authorized to: (i) summon people (Section 15 No. 1 LkSG), (ii) enter and inspect the enterprise’s premises (Section 16 No. 1 LkSG) and (iii) inspect and examine the enterprises’ documents and records (Section 16 No. 2 LkSG). Enterprises and persons summoned are obliged to provide the competent authority with the information and documents requested by the authority (Sections 17 and 18).

³⁷ The German Federal Office for Economic Affairs and Export Control published a Guidance on conducting a risk analysis as required by the LkSG on their website https://www.bafa.de/SharedDocs/Downloads/EN/Supply_Chain_Act/guidance_risk_analysis.html (Aug. 28th., 2024, 12:05 PM).

³⁸ see English version of the LkSG provided by the German Federal Ministry of Labour and Social Affairs.

³⁹ BT.Drs. 19/28649, p 49.

⁴⁰ see English version of the LkSG provided by the German Federal Ministry of Labour and Social Affairs.

⁴¹ A more detailed overview provides Dr. Burchardi, LL.M., Lieferkettensorgfaltspflichten: Risiken für die Unternehmensleitung, Neue Zeitschrift für Gesellschaftsrecht, 1467-1473 (2022).

If a breach of the due diligence obligations has been identified, fines between EUR 100,000 and EUR 800,000 may be imposed at company level (Section 24 Subsection 2). If a company has an average annual turnover of more than EUR 400 million, certain breaches of duty can be punished with a fine of up to 2 percent of the average annual turnover (Section 24 Subsection 3).

The LkSG does not provide for individual criminal law consequences such as imprisonment.

B. The Money Laundering Act

1. Scope of Application

Unlike the LkSG, the GwG's⁴² scope of application is not linked to enterprises above a certain employee-threshold but is aimed at financial service providers in the broadest sense, as well as at individuals such as lawyers, retailers and art brokers (Section 2 Subsection 1). Particularly, the addressees of both laws are banks and enterprises active in the manufacturing industry.

2. Due Diligence Obligations

The GwG is structured similarly to the LkSG, whereby the stipulated due diligence obligations apply to combating money laundering and terrorist financing (Section 5 Subsection 1 GwG).

The GwG also provides for the establishment of an appropriate risk management system (Section 4 GwG) and risk analyses (Section 5 GwG). Based on these analyses, further internal security measures must be enacted (Section 6 GwG). Due diligence obligations must also be complied with in relation to contractual partners – so-called “customers” in the GwG and “direct suppliers” in the LkSG (Section 10 - 17 GwG).

As the GwG defines money laundering as everything that fulfills the requirements of Section 261 StGB (“All-Crimes-Approach”; protection of human rights with a foreign connection),⁴³ the human rights risks and findings identified by the analyses of the LkSG are also relevant in the GwG. In this context, particular attention must be paid to the existing reporting obligation under Section 43.⁴⁴

In the case of human rights risks, the reporting obligation pursuant to Section 43 Subsection 1 No. 1 GwG must be considered,

“if facts indicate that that an asset associated with a business relationship, brokerage or transaction originates from a criminal offense that could constitute a predicate offense to money laundering” so

⁴² The German Federal Financial Supervisory Authority published an (not up-to date) English Version of the GwG available at https://www.bafin.de/SharedDocs/Downloads/EN/Aufsichtsrecht/dl_gwg_en.html (Sep. 29th, 2020).

⁴³ see II. B. and C. of this article.

⁴⁴ Dr. Tobias Eggers et al eds., Lieferkettencompliance und Geldwäsche, Deutscher AnwaltSpiegel, <https://www.deutscheranwaltspiegel.de/compliancebusiness/compliance/lieferkettencompliance-und-geldwaesche-33370/> (Dec. 12th, 2023).

“the obliged entity is to report this matter, irrespective of the value of the asset in question or the amount of the transaction involved, to the German Financial Intelligence Unit without delay.”⁴⁵

Section 43 GwG does not specify the degree of suspicion required for the reporting obligation.⁴⁶ However, the German Federal Financial Supervisory Authority states the following in its interpretation and application notes on the Money Laundering Act:⁴⁷

“The obliged entity and the employees acting on its behalf do not have to be certain that a corresponding asset originates from a predicate offense under Section 261 StGB or relates to terrorist financing. [...] In case of doubt, a report must therefore be submitted in accordance with Section 43 Subsection 1 GwG.”⁴⁸
[Emphasis by authors]

The obliged entity does not have to fully clarify the facts, nor is a legal assessment necessary. Rather, the facts must be assessed based on general experience.⁴⁹ However, a report without sufficient evidence remains inadmissible.⁵⁰

The reduced degree of suspicion required by law and the obligation to report “without undue delay” make it difficult to distinguish between a valid report and an inadmissible report.⁵¹ The consultation version of the interpretation and application notes presented by the German Federal Financial Supervisory Authority in July 2024 does not remedy this situation.⁵² The assessment of the facts may be subsequently reviewed by the responsible supervisory authority.⁵³ Therefore, a clear documentation of the decision-making process and its outcome is advisable for the obligated party.⁵⁴

In case of human rights issues within supply chains, i.e., if a *human rights risk* is already identified as part of an annual or ad hoc risk analysis pursuant to the LkSG, a review of the reporting obligation under Section 43 GwG must always be carried out, whereby a report *may* be made in “*in case of doubt*”.

⁴⁵ Free translation of Section 43 Subsection 1 No. 1 GwG.

⁴⁶ The degree of suspicion was controversial for some time. An overview of the past dispute provides da Rose, Geldwäschegesetz, Section 43, mn 16 (Herzog, 5th ed. 2023).

⁴⁷ The German Version is available at https://www.bafin.de/SharedDocs/Downloads/DE/Auslegungsentscheidung/dl_ae_auas_gw.html (Aug. 29th, 2024, 01:13 pm).

⁴⁸ Federal Financial Supervisory Authority, Auslegungs- und Anwendungshinweise zum Geldwäschegesetz, Oct. 2021, p 73; free translation.

⁴⁹ Federal Financial Supervisory Authority, Auslegungs- und Anwendungshinweise zum Geldwäschegesetz, Oct. 2021, p 73.

⁵⁰ BT-Drs. 17/6804, p. 35, 36.

⁵¹ da Rose, Geldwäschegesetz, Section 43, mn 20 (Herzog, 5th ed. 2023).

⁵² The German Version is available at https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Konsultation/2024/kon_06_24_Konsultation_AuA_AT.html (July 9th, 2024).

⁵³ Federal Financial Supervisory Authority, Auslegungs- und Anwendungshinweise zum Geldwäschegesetz, Oct. 2021, p 75.

⁵⁴ da Rose, Geldwäschegesetz, Section 43, mn 21 (Herzog, 5th ed. 2023).

If the risk analysis identifies that the risk has materialized into a *human rights violation*, a report *must* be made in accordance with Section 43 GwG. At the same time, the “All-Crimes-Approach” and Section 261 Subsection 9 StGB as well as the reduced subjective requirements of Section 261 Subsection 6 StGB suggest a realisation of Section 261 StGB.

However, Section 261 Subsection 8 StGB allows leniency following voluntary disclosure. In this case, the perpetrator or participant must inform the competent authority⁵⁵ of all known circumstances of the unlawful act committed; this also includes the known circumstances of the predicate offense.⁵⁶ If the company’s own money laundering officer or head of department reports the offense, the perpetrator or participant may only benefit from the leniency application, if he or she has prompted the money laundering officer or head of department.⁵⁷ However, the report must be made at a time when the money laundering has not been fully or partially “discovered” by the authorities.

This poses an increased risk, particularly for employees of companies that work in larger teams, of not being able to benefit from the voluntary disclosure. If, for example, only one employee has disclosed the facts of the case to the money laundering officer and the latter has made a voluntary disclosure immediately afterwards, the offense is now “discovered” within the meaning of Subsection 8 and the other team members involved are cut off from the possibility of impunity. However, impunity can be achieved if, between the first knowledge of the money laundering officer and his report, other parties involved disclose themselves to him, even if this only happens at the request of the officer.⁵⁸

In addition, a suspicious activity report in accordance with Section 43 GwG only results in an obligation to terminate the business relationship in exceptional cases.⁵⁹

3. Non-Compliance⁶⁰

Pursuant to Section 56 Subsection 1 1st Sentence 1 No. 69 GwG, anyone who fails to submit a report or submits it incorrectly, incompletely or untimely according to Section 43 Subsection 1 GwG is in breach of the regulations. The impending amount of the fine depends on the type of offense (level of intent) and the type of the entity (natural or legal person/financial sector). Based on these distinctions, fines between EUR 100,000 and EUR 5,000,000 can be imposed. The fine may amount up to 10 percent of the total turnover achieved by a legal entity in the financial year preceding the administrative decision.

In addition, criminal liability for money laundering under Section 261 StGB, aiding and abetting money laundering or obstruction of prosecution or punishment (Section 258 StGB) may also be considered.⁶¹

⁵⁵ pursuant to Section 158 Subsection 1 of the German Code of Criminal Procedure these authorities are the public prosecution office, the police authorities and police officers and local courts; pursuant to Section 27 Subsection 1 of the Money Laundering Act the German Financial Intelligence Unit can also be informed.

⁵⁶ Altenhain, *Strafgesetzbuch*, Section 261, mn 124 (Kindhäuser et al eds., 6th ed. 2023).

⁵⁷ Altenhain, *Strafgesetzbuch*, Section 261, mn 125 (Kindhäuser et al eds., 6th ed. 2023).

⁵⁸ Concerning this group of cases see Altenhain, *Strafgesetzbuch*, Section 261, mn 125 (Kindhäuser et al eds., 6th ed. 2023).

⁵⁹ Federal Financial Supervisory Authority, *Auslegungs- und Anwendungshinweise zum Geldwäschegesetz*, Oct. 2021, p 79, 80.

⁶⁰ A more detailed overview provides da Rose, *Geldwäschegesetz*, Section 56, mn 106a (Herzog, 5th ed. 2023).

⁶¹ da Rose, *Geldwäschegesetz*, Section 56, mn 18 (Herzog, 5th ed. 2023).

In individual cases, the obliged entity may also be involved in the criminal offense of financing terrorism (Section 89c StGB).⁶²

IV. CONCLUSION

The identification of possible human rights violations does not only play a role in the scope of application of the Supply Chain Act. Due to the broad scope of application of Section 261 StGB - which in turn also takes human rights violations into account - the Money Laundering Act, particularly its reporting obligation under Section 43 GwG, also becomes relevant.

Consequently, violations of due diligence obligations of the LkSG can also have consequences under the Money Laundering Act and criminal law. Therefore, it is essential for the *obligated parties of both laws* to establish communication channels between LkSG compliance-departments and GwG compliance-departments. However, if a reliable exchange process is established, it is possible that GwG compliance-departments will not have to identify any human rights violations along the supply chain themselves.

If a *human rights risk* has been identified as part of a risk analysis of the LkSG, a report in accordance with Section 43 GwG must also be examined and submitted in case of doubt. If a *human rights violation* has been identified along the supply chain, in addition to a report in accordance with Section 43 GwG, a voluntary disclosure may also be made in accordance with Section 261 Subsection 8 of the Criminal Code.

However, human rights risks also trigger obligations for companies that are *only obliged under the GwG*. In this case, the obligation to report under Section 43 GwG and the examination of a voluntary disclosure under Section 261 Subsection 8 StGB remains in place.

One welcome development is that some parties will no longer be bound by anti-money laundering obligations when the Anti-Money Laundering Regulation comes into force in 2027. Under current German law, persons trading in goods, are obliged to file a report in accordance with Section 43 of the GwG, irrespective of a cash limit. This obligation will no longer apply.⁶³ However, this has no effect on the scope of application of Section 261 StGB. Corporate officers may still be liable to prosecution if they intentionally accept funds that originate from a criminal source. In order to counter these risks, internal reporting systems for financial anomalies must be maintained.

⁶² Federal Financial Supervisory Authority, Auslegungs- und Anwendungshinweise zum Geldwäschegesetz, Oct. 2021, p 72.

⁶³ Regulation (EU) 2024/1624 of the European Parliament and of the Council of 31 May 2024 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, reason 18.