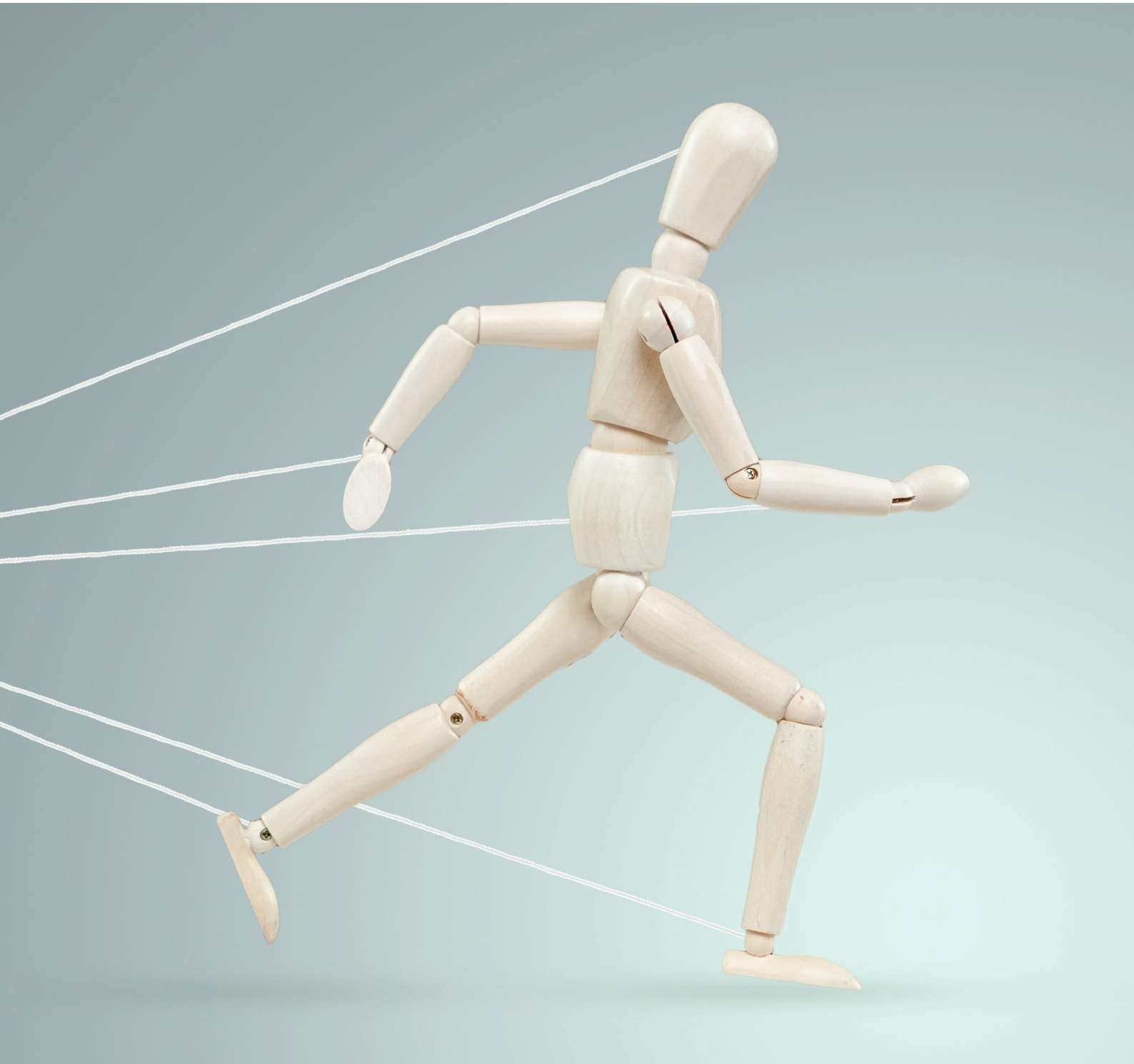
Foundation for
Family Businesses

Implementational governance as a tool of political steering over entrepreneurial freedom

A constitutional analysis using current ESG regulations as a case study

Key Findings



Publication Details

Published by:

Foundation for Family Businesses

Foundation for Family Businesses
Prinzregentenstraße 50
80538 Munich
Germany
Phone: +49 (0) 89 / 12 76 400 02
Fax: +49 (0) 89 / 12 76 400 09
E-mail: info@familienunternehmen.de
www.familienunternehmen.de

Prepared by:

Univ.-Prof. Dr. Dr. Udo Di Fabio

For the full study in German: "Implementative Steuerung als politische Lenkung der Unternehmerfreiheit – Eine verfassungsrechtliche Analyse am Beispiel aktueller ESG-Regulierungen"

Cover picture: Marko Aliaksandr | Shutterstock

Summary of Key Findings

The study's core findings can be summarized in the following key theses:

1. Through compliance and ESG requirements, both European and German legislators increasingly aim to embed public interest objectives into corporate decision-making structures and operational logic. This is primarily achieved via the introduction of novel due diligence obligations or as part of mandated risk assessment processes.
2. This implementation strategy is intrinsically linked to the notion of sustainable development. It seeks to promote long-term objectives – such as climate neutrality, resource conservation, the preservation of natural foundations of life, and the protection of human rights – not solely through traditional regulatory instruments but also by inducing behavioral change within companies themselves. These behavioral shifts are monitored by the state and supported by the mobilization of civil society actors.
3. The implementational governance approach gives rise to significant doctrinal and legal-methodological challenges if the constitutionally required standard of protection is to be upheld. By grounding behavioral obligations and sanctions in broadly accepted public interest goals, the legal system risks replacing precise legal standards with moral imperatives, thereby undermining the clarity of classical legal protections.
4. Voluntary measures undertaken by companies to integrate compliance mechanisms in light of increasing regulatory density remain largely unproblematic from a constitutional perspective. Integrity, honesty, and business ethics form integral parts of such compliance systems, including instruments like corporate governance codes.
5. Public opinion often regards this expanded statutory approach as an intelligent and minimally invasive path toward corporate sustainability. It is assumed that public interest goals can be implemented in corporate strategy without significantly curtailing entrepreneurial discretion. However, the growing complexity of legal requirements – such as those under supply chain legislation or the CSR Directive – has led to mounting bureaucratic burdens and legal uncertainty, placing increasing constraints on constitutionally protected economic and professional freedoms.
6. Article 12 of the German Basic Law and Article 16 of the EU Charter of Fundamental Rights safeguard the freedom to engage in commercial activity, including the right to dispose of a business's economic, technical, and financial resources within a framework of clear legal boundaries.

7. A restriction of professional and entrepreneurial freedom arises when legal norms impose binding requirements on the "whether" and "how" of specific professional or commercial conduct. This is clearly the case with compliance obligations that mandate monitoring systems, reporting duties, or internal organizational measures. The claim that such obligations merely codify self-evident corporate due diligence is unpersuasive, as every legal prescription concerning conduct necessarily narrows entrepreneurial discretion and thus constitutes an interference with fundamental rights.

8. In assessing the severity of such interferences, the cumulative effect of multiple, often poorly coordinated, documentation, reporting, and organizational obligations must be considered.

9. Also to be treated as a constitutional interference is the statutory imposition of a cooperation requirement with civil society actors, as seen in supply chain legislation. This includes the de facto mandatory cooperation with NGOs and trade unions, explicitly intended by the European legislator and practically unavoidable in practice. This encompasses non-statutory rule-making by international civil society actors aiming to further develop social and environmental standards.

10. Evaluating the effectiveness of due diligence frameworks using conventional constitutional reasoning proves difficult. The EU legislator's assumption that such frameworks significantly advance climate neutrality is difficult to substantiate, let alone predict empirically. This is largely due to the fact that these regimes impose obligations of effort rather than obligations of result. Empirical experience suggests that the human rights situation tends to improve with regional economic development, meaning that terminating business relationships may be not only ineffective but counterproductive.

11. Overregulation at the European or German level – especially under shifting geopolitical conditions – may prove not only inadequate for achieving the legislator's legitimate objectives, but also detrimental to the international competitiveness of affected companies. This risk is amplified by the EU's diminishing technological and infrastructural advantages relative to global competitors, with a considerable likelihood of materializing.

12. In assessing proportionality in the narrow sense (suitability and reasonableness), it must be recognized that due diligence, transparency, and sustainability reporting obligations are likely to become disproportionately burdensome for small and medium-sized enterprises compared to large corporations or globally dominant market players.

13. Exempting small and medium-sized enterprises (SMEs) from certain reporting and system maintenance obligations does not adequately reflect the reality of complex, interlinked economic structures. Notably, the "shadow effect" of the CSR Directive and the German Supply Chain Act – or the "trickle-down effect" in accounting parlance – must be taken into account.

14. The intensity of interference is already significant when measured against the threat of sanctions – such as those under the Supply Chain Act – which include substantial administrative fines or civil liability. When such liabilities are tied to broadly defined due diligence duties with potentially unlimited scope, the result is an environment of legal indeterminacy and preemptive self-restriction, undermining legal certainty.

15. The more indeterminate a statutory requirement, the less it may be associated with punitive moral judgments or severe sanctions. Moral standards must not lead directly to corporate or individual liability or serious material consequences without first being clearly codified in law.

16. The European Corporate Sustainability Due Diligence Directive (CSDDD), contrary to expectations, does not reduce legal indeterminacy when compared to the German Supply Chain Act – it increases it.

17. The legal uncertainty stemming from vague due diligence requirements fuels a tendency toward self-regulatory bureaucracy. This, in turn, may stifle entrepreneurial initiative, especially in light of liability and criminal risks, effectively restricting economic and professional freedom in a legally undefined and unpredictable manner.

18. It raises constitutional concerns when the responsibility for clear legal norm-setting is shifted from the state to a vague amalgam of NGOs, consultants, and businesses – or when reference is made to indeterminate "standards" of unclear origin and binding force. Guidelines from the UN or human rights catalogs annexed to the CSDDD do not suffice to eliminate this uncertainty.

19. Legal indeterminacy has particularly serious consequences when sanctions are imposed retroactively for breaches of duty. For companies, such sanctions entail financial risks, including reputational damage, civil liability, exclusion from public procurement, and administrative fines. All of these are explicitly embedded within both German and EU supply chain regimes and form a central pillar of the broader implementational strategy.

20. The implementational steering model embedded in compliance and ESG systems – especially under the German Supply Chain Act and the CSDDD – risks developing into an untenable restriction on entrepreneurial freedom from a constitutional and rule-of-law standpoint.

21. Both the German and European legislators are under a constitutional obligation to mitigate the restrictive impact of this approach – either through meaningful reduction of sanctions or their complete removal – unless they are prepared to abandon the current model in favor of a more precise and legally predictable alternative.

22. The new EU Commission has announced an "omnibus package" aimed at restoring proportionality in implementational obligations. This package would amend several secondary legal acts analyzed in this study in light of the recognized weakening of corporate competitiveness in the EU. Whether this marks a genuine reversal or merely a hesitant response to growing criticism remains to be seen.