Brussels, 6 October 2025

Statement by the European Justice Forum (EJF)

on the

draft law on the modernisation of product liability law, specifically here the

Act on Liability for Defective Products (ProdHaftG)

I. No further burden on Germany as a manufacturing location by promoting the litigation industry, but rather regulation of third-party financing of legal disputes and strengthening of regulatory enforcement

In line with numerous trade associations, EJF already pointed out at European level in October 2023 the dangers that far-reaching changes in the rules on the burden of proof and the obligation to disclose production and trade secrets could pose to European competitiveness and production costs in the European Union.[1] After all, it is precisely such regulations in the USA that have contributed significantly to the emergence of a litigation industry that primarily serves the profit interests of representatives of the legal profession and investors into this industry and only secondarily – if at all – the interests of the injured parties used as vehicles for this purpose. Such effects have been illustrated in detail in studies by the Brussels-based think tank ECIPE[2] .

In order to rule out such unintended economic effects, comprehensive regulation of third-party funding of legal disputes is required, which could also be undertaken in national legislation – even without a European directive on the matter – in order to prevent the constitutionally required equality of arms between the disputing parties from being unfairly shifted in favour of plaintiffs through excessive financing options that do not select on the basis of ensuring that justice be done where required in the public interest. Proposals to this effect were submitted this summer in the German Journal of International Business Law IWRZ 3 and 4 2025 and could be implemented in Germany in a way that fits in with current political efforts to increase productivity and competitiveness without neglecting aspects of justice required by law and the welfare state .[3]

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[1] Product Liability Directive: European industry calls for a major rethink, 20 October 2023, e.g. at: https://www.businesseurope.eu/publications/product-liability-directive-european-industry-calls-for-a-major-rethink/ .

[2] European Centre for International Political Economy (ECIPE), Occasional Paper No. 3, March 2025, The Impact of Increased Mass Litigation in Europe, by Fredrik Erixon Oscar Guinea Dyuti Pandya Vanika Sharma Elena Sisto Oscar du Roy Renata Zilli Philipp Lamprecht, https://ecipe.org/publications/impact-of-increased-mass-litigation-in-europe/ - Download at https://ecipe.org/wp-content/uploads/2025/02/ECI_OccasionalPaper_03-2025_LY07.pdf ; and specifically on the implementing law of the Product Liability Directive for the Netherlands: https://ecipe.org/wp-content/uploads/2025/05/WorkingPaper_01_2025_LY04_collective_actions_Netherlands.pdf .

[3] H. Woopen, Litigation Funding in Search of Competition, Journal of International Business Law (IWRZ) 2025, pages 112-119 and 174-180 (Part 1 in Issue 3 May/June and Part 2 in Issue 4 July/August).

Such regulation could also pay due respect to an aim of the new Product Liability Directive which it shares with its older version, namely "**to address the potential risk of litigation in an excessive number of cases**" (recital 22). While the old Directive 85/374/EEC did this primarily in the form of a "deductible" of ECU (= EUR) 500 (Art. 9 and ninth recital), both directives remain united in this objective in the aforementioned recitals, insofar as they only want to allow *natural persons* access to compensation and exclude damage to property that is (now) used **exclusively for professional purposes** (previously: property used mainly for private purposes rather than mainly for professional purposes). The regrettable absence of such deductible for the injured party in the new directive encourages the litigation industry to preferentially assert "minor and scattered damages". An example of this is the lawsuit against MasterCard in the United Kingdom, which has proven to be extremely lucrative for the litigation industry and of questionable value for the alleged injured parties.[4] This threat should be compensated for by the aforementioned comprehensive and consistent regulation of third-party funding of litigation across all litigation models and thus be channelled into solutions that are beneficial to the German economy and the economy of the justice system.

In a similar vein, it should be emphasised here that the new Product Liability Directive in Recital 28 provides not only for the judicial enforcement of damages, but also, when assessed reasonably, for the avoidance of unnecessary court proceedings, as "Member States shall take into account existing obligations for **cooperation between national authorities responsible for the enforcement of consumer protection law,** in particular those under **Regulation (EU) 2017/2394** ... and **shall cooperate closely with market surveillance authorities**." This cooperation is indeed highly desirable in order to give clear preference to the traditional European model of enforcement by the state, i.e. **"public** enforcement", over the model of **"private** enforcement" prevailing in Anglo-Saxon legal systems, which makes the state a henchman of private profit interests of intermediaries. Instead, the state should primarily fulfil its duty to enforce the law uniformly with the aim of creating justice as a main goal of democratic and constitutional communities.[5]

II. Evidence gathering, evaluation of evidence, standard of proof and burden of proof

That said, EJF sees the possibility of making a few minor adjustments to the current proposal by the German Ministry of Justice of 11 September 2025 for the implementation

[4] https://www.bbc.com/news/articles/c14kkjyrk20o – The amount claimed was GBP 14 billion, settlement took place at 1.4% of this, namely GBP 200 million, half of which was for the injured parties, which for an estimated 2.5 million active claimants among the 44 million alleged claimants is likely to amount to GBP 40 to 50 per person. after nine years of legal proceedings with costs amounting to the same amount as the compensation; the litigation financier Innsworth even sued the claimant Walter Merricks for high damages because he had settled the case too early in that funder's view preventing the funder to make more money of the case.

[5] See also the fundamental comments in the above-mentioned ECIPE study "The Impact of Increased Mass Litigation in Europe", pp. 12-15.

of the new Product Liability Directive[6] , which would also reduce within the new ProdHaftG itself the aforementioned risks fort he German economy and justice system. The existing concept of product liability at EU level has not been fundamentally changed:

Like the previous Directive 85/374/EEC (Art. 4), the new Directive (EU) 2024/2853 of 23 October 2024 (Art. 5 I) assumes that the injured party must prove the **damage**, the **defect** and the **causal link** between the defect and the damage.

Of course, the directive cannot extend the EU's legislative competence and therefore expressly respects the rules of evidence applicable in national law (recital 42: "... [the claimant] should bear the burden of proof for the damage, the defectiveness of a product and the causal link between the two, **in accordance with the standard of proof under national law**"). Against the background of national procedural autonomy, which has also always been recognised by the ECJ[7], there has rightly been no European harmonisation of law to date that interferes with these areas of national procedural autonomy.

1. Basic principles of German evidence law

In order to properly contextualise the following proposals, we will begin by outlining the conceptual and normative framework within which our statement operates.

The task of the courts in Germany is not only to apply the law to an indisputably established set of facts, but also to determine the underlying facts from the factual assertions presented by the parties, which are usually controversial. This clarification of the facts is carried out through judicial evaluation of evidence, which is based on the judge's conviction.

The **assessment of evidence** refers to the process by which the judge compares the evidence with the subject matter of the evidence to determine whether the evidence is sufficient, i.e. whether he may consider a particular factual assertion to be proven in the specific legal dispute. Only if this is not the case (*non liquet)* does the objective **burden of proof** come into play, with the help of which the judge then decides the legal dispute. While the assessment of evidence is limited to examining whether the evidence has been provided in the specific case, the standard of proof generally indicates when evidence has been successfully provided. It assigns a more precise content to the judge's conviction and determines what the judge must be convinced of. Unlike the specific assessment of evidence as a question of fact, the **standard of proof** is regulated normatively in Section 286 (1) of the German Code of Civil Procedure (ZPO). According to this, the judge's conviction depends on "whether a factual assertion is to be regarded as true or not true":[8]

[6] https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/2025_Produkthaftung.html.

[7] Established case law, see, for example, on product liability, ECJ, 9 February 2006 – C 127/04 , O'Byrne, para. 34.

[8] Katzenmeier/Voigt, The law of evidence in product liability under European influence, in Liber Amicorum for Herbert Roth, 2021, pp. 947, 959-960. Musielak/Voit/Foerste, 22nd ed. 2025, ZPO § 286 Rn. 17 : "The standard of proof determines whether the court must consider the assertion to be true with *prevailing*, *high* or *maximum* probability or even *with scientific certainty*. In this respect, the standard of proof can also be regarded as an object of judicial conviction. Whether this is based on the truth or only on a probability (however measured) is already a preliminary question of the legal standard of proof: although

Code of Civil Procedure
Section 286 Free assessment of evidence

(1) Taking into account the entire content of the proceedings and the results of any evidence taken, the court shall decide according to its free conviction whether a factual assertion is to be regarded as true or untrue. The judgment shall state the reasons that led to the judge's conviction.
(2) The court is bound by statutory rules of evidence only in the cases specified by this Act.

Code of Civil Procedure
Section 292 Legal presumptions

If the law presumes the existence of a fact, proof to the contrary is admissible unless the law prescribes otherwise. This proof may also be provided by requesting the examination of parties pursuant to Section 445.

Against this background, it should be made clear that there is currently no rule such as Section 292 ZPO in European law. Consequently, European law also lacks the distinction common in German procedural law between **legal presumptions,** which reverse the burden of proof under Section 292 ZPO, and **factual presumptions,** which influence the judicial **assessment of evidence** under Section 286 et seq. ZPO, **but not the distribution of the burden of proof**.

In German evidence law, a distinction must be made between **presumptions** and **circumstantial evidence** and their respective relationship to **the burden of proof**. Circumstantial evidence, in which the judge may, on the basis of conclusive auxiliary facts (chain of circumstantial evidence), be convinced of the existence of a main fact constituting an offence (e.g. the causation of the injury by a vaccine in the ECJ case C-621/15 – Sanofi-Pasteur MSD SNC) – does not affect **the standard of proof** and **the burden of proof**, but rather concerns the **assessment of evidence** as a question of fact – it is therefore not even a relaxation of the burden of proof.[9]

German courts sometimes also draw on **factual presumptions** that either influence the distribution of the burden of proof or can be classified as **prima facie evidence** in the context of the assessment of evidence: Similar to circumstantial evidence**, prima facie evidence** allows the judge, in the case of a typical sequence of events, to be convinced, based on general life experience, of the existence of a constituent element of an offence, such as a proven event on its causality for the outcome that occurred or, conversely – of an outcome that has occurred to a specific event as the cause.[10]

The situation is different in the case of **legal presumptions of fact**, where the existence of an element of the offence must be inferred *ex lege* from circumstances unrelated to the offence. Such presumptions change the **distribution of the burden of proof** because the presumed fact does not require proof, but rather the opponent must provide evidence to the contrary in order to rebut the presumption (Section 292 (1) ZPO). In the absence of a procedural provision such as Section 292 ZPO, however, **the ECJ is unable to distinguish between legal and factual presumptions and their different implications for the distribution of the burden of proof**. [11]

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human knowledge is regularly limited to probabilities, the law requires in principle that the court be convinced of the truth available to us as a particularly high probability."

[9] Ibid., pp. 961-962.

[10] Ibid., p. 962, footnote 88.

[11] Ibid., p. 962.

If German readers disregard the preconception created by the heading "Burden of proof" in Article 10 of the new Product Liability Directive, they will recognise that Article 10(2)-(4) of the Directive **does not necessarily** contain **reversals of the burden of proof** in favour of the injured party. In the context of German understanding of procedural notions they should rather be qualified as **a factual presumption** in the context of existing procedural law. This is also indicated by **recital 46**, insofar as it refers to **the presentation of evidence and not** to **the burden of proof**. Recital 48, sentence 4, also expressly points out that Article 10(4) of the Directive is **not** intended to involve **a reversal of the burden of proof**. However, since paragraph 5 covers all the provisions in paragraphs 2–4 ("The defendant shall have the right to rebut any of the presumptions and assumptions referred to in paragraphs 2, 3 and 4.") and the opposing party is granted the right to rebut all these presumptions and assumptions uniformly in Recital 48, sentence 10, there is much to be said for classifying the provisions as **factual presumptions** according to the German understanding and not as reversals of the burden of proof.[12]

In this respect, the provisions are comparable to Section 84(2) of the German Medicines Act (AMG), which establishes a presumption of causality for the causation of injury by a medicinal product if, according to the circumstances of the individual case, it was capable of causing the damage. According to national understanding, this provision is widely regarded as a reversal of the burden of proof against the background of Section 292 of the German Code of Civil Procedure (ZPO)[13] , whereas at European level, in view of the ECJ case law on the distribution of the burden of proof in the previous Product Liability Directive, it would be more appropriate to classify it as **a factual presumption** without reversal of the burden of proof.[14] The case law of the Federal Court of Justice (BGH) on Section 84 (2) AMG also shows that this easing of the burden of proof or supposed reversal of the burden of proof – which merely requires the suitability of the medication to cause such injury as a basis for presumption – is applied so restrictively due to the presumption *exclusion* contained in the same provision, which allows the presentation of an alternative cause according to the same low standard, that it does not in fact result in a genuine reversal of the burden of proof in favour of the injured party[15]; in this respect, it is structurally similar to prima facie evidence[16] .

After these lengthy preliminaries, the consequences of these classifications are as follows:

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[12] This line of thought, as well as the above reference to the absence of a European provision analogous to Section 292 of the German Code of Civil Procedure (ZPO) and the immediate subsequent closer examination of Section 84 of the German Medicines Act (AMG), is the result of a bilateral exchange with PD Dr. Tobias Voigt, currently at the University of Jena.

[13] This is also the view of the Federal Court of Justice in para. 11 (footnote 15 below), but "... the presumption can not only be rebutted by proof to the contrary under section 292 of the Code of Civil Procedure, but can also be excluded under less stringent conditions."

[14] Katzenmeier/Voigt (fn. 8), p. 967.

[15] See Federal Court of Justice judgment of 26 March 2013 – VI ZR 109/12, NJW 2013, 2901-2906, marginal nos. 9-25 and 43; Franzki/Vogel, Grenzen der Kausalitätsvermutung und des Auskunftsanspruchs im Arzneimittelhaftungsrecht [Limits of the presumption of causality and the right to information in pharmaceutical liability law], NJW 2013, 2862-2864.

[16] Ibid. para. 13.

2. Proposal to amend Section 20 (3) No. 1 ProdHaftG-E

Particularly in light of the unsatisfactory resolution in the draft law of the issue of how to deal with trade and business secrets in the context of the obligation to disclose evidence (see below VI.), with the drastic consequence of the presumption of a product defect in Section 20(1) No. 1 ProdHaftG-E and the even more far-reaching presumption in § 20 (3) despite disclosure, care must be taken to ensure that defects and causality for legal violations and damage are not assumed in a manner that is overly favourable to the plaintiff without the manufacturer being able to defend itself effectively against this. In this sense, Piovano and Hess point out that the scope of application of Section 20 (3) should in practice be anyway rather small after disclosure pursuant to Section 19[17], and it seems reasonable to recognise the very vague criterion of "**excessive difficulty due to technical or scientific complexity**" in proving the defect *after such disclosure of evidence* only after surmounting a significant threshold. Exclusions need to apply to **manufacturing defects** ('outliers', where only the deviation of the individual defective product from the faultless series needs to be proven) or **instruction errors**, which would not prove any technical/scientific complexity of the evidence[18]. The authors therefore propose that the proof of excessive complexity should, only in cases where the picture presented by the disclosed documents is unclear and if there is insufficient other evidence of the difficulty, be made operational and specified by stipulating that **at least two expert opinions of high quality with *diverging* views** exemplify the proclaimed technical or scientific complexity[19].

3. Proposal to amend Section 20(3) No. 2 of the ProdHaftG-E

As already explained above, the new Directive expressly confirms in Recital 48, sentence 4, that in cases where it is difficult to prove defectiveness due to technical or scientific complexity and despite the disclosure of information by the defendant, a fair distribution of risk **WITHOUT reversal of the burden of proof**[20] should (solely) be made possible by the claimant proving that it is **probable** that the product was **defective** or that the defectiveness of the product is a **probable cause** of the damage. With this requirement, the Directive, by its own admission (Recital 48, sentence 3), lags behind national legal systems, which in such situations "often require a **high degree of probability**" as a standard of proof[21].

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[17] Piovano/Hess, More obligations, more rights: How the new EU Product Liability Directive changes the rules for economic operators and consumers, Part 1 (IWRZ 5/2024, 206-212) and Part 2 (IWRZ 6/2024, 272-278), at p. 278.

[18] Foerste/Graf v. Westphalen ProdHaft-HdB, 4. Aufl. 2024, § 55 Rn. 47.

[19] Piovano/Hess (Fn. 17), S. 278.

[20] The statement by Wendehorst in GPR 2024, 148, 155 para. 46 is therefore incorrect: "... Article 10(4) provides that, under certain circumstances, national courts may reverse **the burden of proof** even further."

[21] Contrary to the wording of the Directive, Wendehorst also seems to consider this **high** probability to be the correct standard of requirement when she writes in GPR 2024, 148, 156 marginal note 57: "... according to the exception in paragraph 4, in cases of exceptional complexity and **high** probability," with reference to the passage from her essay cited in the previous footnote (unless she wrote this written by mistake).

The word "should" in recital 48, sentence 4 expresses the justified hesitation of the EU legislator that this could (and, in our opinion, does indeed) exceed its legislative powers by interfering too strongly with the prerogatives of the Member States in their civil procedure law. This circumstance must be taken into account in an appropriate manner in a national implementing law by treating this **mere "advice"** from the EU legislator to the Member States with restraint.

Unfortunately, the current draft of the German Product Liability Act does not meet this expectation because it also settles for mere simple probability. This falls short of the leeway existing for national civil procedure law and should be replaced by a higher degree of probability, namely **"very likely**".

A less stringent formulation, such as "that it is **prevailingly** probable[22] that the product is defective", would not do justice to the need for the judge‘s conviction of the truth of the alleged facts and of the legitimate expectations of the legal community under the rule of German law of civil procedure;[23] because, as shown above, the provisions of the Directive at issue here do not involve a reversal of the burden of proof, but constitute a factual assumption and thus facilitate proof without lowering the standard of proof . The judge may and must be satisfied with "a degree of certainty that is sufficient for practical purposes, which silences any doubts without completely ruling them out"[24] .

If, against this background, the legislator does not opt for the two highest standards of judicial conviction[25] , i.e. if the judge does not have to consider the fact to be proven to be true with "scientific certainty" or even with "the highest probability", but only with "high probability", then the intentions of both the Directive and the autonomy of German civil procedure law are taken into account with a sense of proportion. However, the „mere probability" contained in the current German draft law does not do justice to this tension, nor does the somewhat more demanding next level of "prevailing probability", and should therefore not be retained in the implementing law but be replaced by „high probability“.

4. Summary proposal for amendment of Section 20(3) ProdHaftG-E

Consolidated, we therefore propose that the draft be amended as follows:

> **Section 20 (3)**
> The defect in the product, the causal link between the defect and the infringement of a right or legal interest within the meaning of Section 1 (1) Nos. 1 to 3, or both, shall be presumed if, despite the disclosure of evidence pursuant to Section 19 and taking into account all relevant circumstances

[22] Such as the "övervikt principle" in Swedish law or the "preponderance of evidence" requiring slightly more than 51% in the USA.
[23] According to Schack, International Civil Procedure Law, 7th edition 2017, paras. 773-777, the aforementioned concepts have rightly not been adopted in German legislation.
[24] Established case law, e.g. BGH NJW 2018, 150 margin note 14 and Musielak/Voit/Foerste, 22nd edition 2025, ZPO § 286 margin notes 18, 19.
[25] See above, footnote 8.

1. it is excessively difficult for the claimant to prove the defect in the product, the causal link between the defect and the infringement, or both, in particular due to the technical or scientific complexity ***demonstrated by conflicting expert opinions***, and
2. the claimant proves that it is ***highly*** probable that the product is defective or that there is a causal link between the defect and the injury, or both."

III. Significant changes to the product

It is striking that, in defining a product that may give rise to liability, section 2(1) of the ProdHaftG-E in no. 3 distinguishes between whether software is developed or provided outside of a business activity or not, whereas no such distinction is made in the immediately following Section 2 (1) ProdHaftG-E in No. 4, even though it is expressly mentioned in Recital 16.

Against this background, the following addition to Section 2(1) ProdHaftG-E in No. 4 is recommended:

Section 2 (1)
Products are
1. …
2. …
3. …
4. digital versions or digital templates of a movable item that contain the functional information necessary for the manufacture of the item because they enable the automatic control of machines or tools (digital design documents) ***and were manufactured in the course of a business activity***.

IV. Significant changes to the product

Against the background of *'De minimis non curat praetor'*, it would be consistent to clarify, despite Recital 39 of the Product Liability Directive with its reference to Art. 13(3)(b) of Directive 2023/988, in **Section 5(2) No. 2 of the ProdHaftG-E** that a significant change in accordance with the catch-all solution in sentence 2 only exists if the changes themselves are also significant in the three cases of No. 2, thus it should better read:

"... a change to the product is to be regarded as significant if
1. which ... and
2. as a result of which the nature of the hazard changes ***significantly***, a ***significantly*** new hazard arises or the level of risk increases ***significantly***."

V. Product safety law (Section 20 (1) No. 2), Obvious malfunction of the product (Section 20 (1) No. 3), Exclusion of liability due to compliance with legal requirements (Section 9 (1) No. 2), Non-detectability of the defect according to the state of the art (Section 9 (1) No. 3), Time of assessment in the case of ongoing monitoring by the manufacturer (Section 8 (2) No. 2)

In light of, in particular, the product safety standards of *EU Regulation (!)* 2024/1689 of 13 June 2024 (144 pages) laying down harmonised rules for **artificial intelligence,** which will essentially apply from 2 August 2026[26] (in particular its Art. 8 – 15, 16 – 27 on high-risk systems and the administrative apparatus yet to be established for this purpose throughout the EU) as well as ongoing monitoring obligations for their providers and operators and, in addition, the assessment date for product liability in the case of ongoing monitoring, which has been made more dynamic in accordance with Section 8 of the Product Liability Act (ProdHaftG-E), such a degree of confusion and unpredictability of interactions from regulations seems to have been reached that a general ***Caveat*** regarding the effects of this regulatory thicket would be advisable:
Videant legislatores ne quid res publica europaea detrimenti capiat !

The new presumptions introduced by the recast of the Product Liability Directive go far beyond the scope of an extension to include questions of technical innovation; they also concern very classic difficulties of proof in the case of analogue products and **thus significantly increase the litigation risk for manufacturers**. They are based on the highly questionable premise in Recital 46, sentence 6[27] , that products can be equipped with devices that can record information about the use of the product. Under this premise, the actual implementation of which would result in **total surveillance of all areas of life involving contact with products**, manufacturers are to fulfil a comprehensive duty to provide information on the specific circumstances of product use. However**, product use** is **precisely in the sphere of the injured party,** whom traditional evidence law seeks to protect from excessive surveillance. It is not clear **why all consumers should have to pay the price of extensive surveillance** in order to increase the chances of successful litigation by injured parties in cases of product defects. It remains unclear why the directive appears to interfere significantly with the traditional procedural autonomy of Member States without demonstrating a genuine need for action in relation to the current legal situation and the structure of legislative competences.[28]

It will not only be up to the courts to handle the presumptions, which at first glance appear to favour the injured party, in such a way that there is no excessive liability and de facto

[26] Gerhard Wagner, EU Product Liability 2.0, VersR 2025, 129-144 (137) describes the vast majority of product safety law standards as very general standards that have no greater determinative power than the concept of defect in product liability law, so that the determination of a product defect also means non-compliance with the requirements of product safety law – this applies in particular to the "extremely soft" standards of the AI Regulation 2024/1689, for example.
[27] Presumption of defectiveness: "This includes cases where a product is not equipped with a device that can record information about the use of the product in accordance with Union law or national law," beyond the 51-page new Regulation on Product Safety of 10 May 2023 (EU) 2023/988.
[28] Sincere thanks to Dr Tobias Voigt for his bilateral exchange of ideas for this analysis.

"strict liability merely from having been one cause *(condition sine qua non)*" for manufacturers, but it is first and foremost the task of the national legislator implementing laws to nip such excessive tendencies in the bud.

Against this background, we propose the following additions:

Section 9 (1) No. 2 ProdHaftG-E

(1) The manufacturer's liability for damages is excluded if

1. ...,
2. the defect that caused the infringement of a right or legal interest within the meaning of Section 1 (1) Nos. 1-3 is attributable to the fact that the product complies with legal requirements ***or that these could not be recognised by the manufacturer due to their complexity or other circumstances through no fault of the manufacturer***,
3. ...

§ 7 No. 5 ProdHaftG-E

A product is defective if it does not offer the safety required by German law or European Union law or that may be expected. When assessing defectiveness, all circumstances must be taken into account, including:

1. ...
2. ...
3. ...
4. ...
5. the relevant product safety requirements, including safety-related cybersecurity requirements, ***but from the monitoring of records of the use of the product in operation (recital 46, sentence 6) only insofar as such monitoring is required by law and each person affected by it has consented to such monitoring vis-à-vis the current product user***,
6. ...
7. ... , and
8. ...

VI. Obligation of the manufacturer to disclose evidence – Art. 8(1)-(3) Directive / Section 19 ProdHaftG-E and effective protection of trade and business secrets

1. Specification of the application pursuant to Section 19(3) ProdHaftG-E

It has been suggested several times in the literature that the right to request disclosure of evidence should be modelled on Section 33g(3) GWB (German Act against Restraints of Competition)[29] , especially since the Directive itself does not regulate this in detail and

[29] von Westphalen, Neue Beweistechnische und beweisrechtliche Herausforderungen des EU-Rechts (New challenges in evidence and evidence law under EU law), IWRZ 2024, 9, 16, but he at the same time refers to recital 31 and considers it sufficient for an injured consumer to request the disclosure of all relevant development and design drawings of the product that allegedly caused their injury.

the wording of the request is not covered by the Directive's requirement for full harmonisation[30] . Section 33g(3) GWB reads as follows:

(3) The disclosure of evidence pursuant to paragraphs 1 and 2 is excluded if it is disproportionate, taking into account the legitimate interests of the parties involved. When weighing up the interests, particular consideration shall be given to:
1. the extent to which the application is based on accessible information and evidence,
2. the scope of the evidence and the costs of disclosure, in particular if the evidence is requested from a third party,
3. the exclusion of the investigation of facts that are not relevant to the claim under Section 33a(1) or to the defence against this claim,
4. the binding effect of decisions pursuant to Section 33b,
5. the effectiveness of public enforcement of antitrust law, and
6. the protection of trade and business secrets and other confidential information and what precautions exist to protect them.

Section 19(3) of the ProdHaftG-E does not take all of these elements into account, but it does take into account the restriction to the "necessary and proportionate extent" and the consideration of "the legitimate interests of all parties involved, including third parties, in particular with regard to the protection of confidential information and trade secrets when weighing up the interests involved (= section 19(3) sentence 2).

It is suggested here that the costs of disclosure should also be explicitly mentioned in the wording of the law, as well as options for public enforcement that alleviate the burden for civil courts which leeds tot he following suggestion for

Section 19(3) sentence 1 ProdHaftG-E

(3) The disclosure of evidence shall ***also*** be limited to the necessary and proportionate extent ***with regard to the scope of work and costs and with respect to a public authority's ability to solve the conflict or provide the evidence required***. The legitimate interests of all parties ... (see above).

(4) .... (5) ....

2. In camera proceedings

It is difficult to understand why the Product Liability Modernisation Act does not include a further article creating the "ex parte" or "in camera" proceedings that have long been rightly called for in legal literature, as these proceedings would make it possible to adequately protect trade and business secrets in the first place. This was already specifically requested in spring 2024 for the upcoming implementation of the Product Liability Directive in order to achieve the protection of trade and business secrets while still granting the plaintiff effective legal protection[31], as this cannot realistically be achieved through confidentiality agreements signed by all parties involved in the proceedings.

[30] Piovano/Hess, More obligations, more rights: How the new EU Product Liability Directive changes the rules for economic operators and consumers, Part 1 (IWRZ 5/2024, 206-212) and Part 2 (IWRZ 6/2024, 272-278), on p. 274.

[31] von Westphalen, Neue Beweistechnische und beweisrechtliche Herausforderungen des EU-Rechts (New challenges in evidence and evidence law under EU law), IWRZ 2024, 9, 15-16 and 20, with reference to the general proposal on this by Stadler, see below. See also Piovano/Hess (above footnote 30), p. 275.

Digression:
In a comparable case under the Representative Actions Directive (RAD), Austria has regulated the submission of litigation financing agreements with external financiers that are sensitive in terms of litigation strategy by involving the Federal Cartel Attorney as a trustee of the court, as follows:

Section 6 (4) Austrian Qualified Institutions Act[32] : "If the qualified institution makes use of third-party financing for a specific class action, it must notify the court of this fact and the name of the third-party financier. However, it is not required to submit or disclose the litigation financing agreement itself or its contents to the court, but only in accordance with the court's orders in the proceedings before the Federal Cartel Prosecutor."

This solution could also be recommended for German law, which contains a provision on this point in Section 4 (3) VDuG that – in addition to the non-dynamic limitation of a litigation financier's profit interest[33] – is likely to have the effect that representative actions will be used much less frequently in Germany than the well-established assignment models with unlimited profit opportunities for third-party financiers. Section 4 (3) VDuG reads:
(3) When filing a lawsuit, the entity entitled to sue must disclose to the court the origin of the funds used to finance the lawsuit. If the lawsuit is financed by a third party, the agreements made with the financing third party must also be disclosed. This also applies in cases where the lawsuit is financed after it has been filed.

Criticism of the approach taken by the ProdHaftG-E

The draft ProdHaftG attempts in Section 19(4) to implement the requirement of Article 9(5) of the ProdHaftRL by ordering the analogous application of Sections 16 to 20 of the Act on the Protection of Trade Secrets (GeschGehG). However, this attempt must be regarded as unsuitable because, on the one hand, according to Section 19 (1) sentence 3 GeschGehG, at least one natural person from each party and their legal representatives or other representatives must still be granted access to the unredacted documents and the oral proceedings and their minutes. On the other hand, in view of trade secrets, which are often valued at many millions of euros, the sanctions imposed by Section 17 GeschGehG for violations by persons with full access to trade secrets are disproportionately low and, moreover, in cases of doubt, often unenforceable against the persons involved, even in their currently low dimension: the court can impose a maximum fine of €100,000 or a maximum of six months' imprisonment. Therefore, the approach chosen in the German draft law for the transposition of the Product Liability Directive to protect the confidentiality interests of manufacturers is simply unsuitable.

Enacting the ProdHaftG as implementation law for the Product Liability Directive as it currently stands without adding a new sector-specific *in camera* procedure therefore raises serious constitutional concerns, as the defendant's right to a fair hearing is structurally violated because they are often unable to comply with a claim for disclosure against them under the rules of the GeschGehG without jeopardising their own existence. Conversely, conducting part of the proceedings without any involvement of the other

[32] https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2024_I_85/BGBLA_2024_I_85.pdfsig#:~:text=Mit%20der%20Verbandsklagen%2DRichtlinie%2DUmsetzungs,%2F22%2FEG%2C%20ABl.
[33] The solution to this is provided in the essay cited in footnote 3 above.

party does also raise constitutional concerns under Article 103 of the Basic Law (right to a fair hearing).

Proposed solution

In the ***in camera*** **proceedings** proposed by Stadler[34], the submission of documents is not waived, but initially only the court itself or an expert may inspect them and weigh up the need for protection of the documents against the need for legal protection of the party bearing the burden of proof. If the documents are deemed to be worthy of protection, it should also be possible for the court to use the content of the confidential documents for the purpose of reaching a judgement without making it public in detail or accessible to the opposing party. In this way, it would be possible to strike a fair balance between the conflicting interests of the parties (protection of confidentiality on the one hand, effective legal protection on the other), and the restriction of the opposing party's right to a fair hearing should be accepted in return. The Federal Constitutional Court has now rightly dispelled constitutional concerns about such *in camera* proceedings in principle[35] . However, a legal basis is required, which in the case decided by the Federal Constitutional Court exists in the form of Section 99 (2) sentence 8 VwGO, but only for interim proceedings and not a final judgement before an administrative court. This exeption for interim proceedings obviously did not require an amendment to the Basic Law. Rather, the restriction of the right of the parties to the proceedings to inspect files pursuant to Section 100 (1) VwGO was considered to be compatible with Article 103 (1) GG because it was only through this restriction that the effective legal protection required by Article 19 (4) GG could be made possible. Similarly, the introduction of the "*in camera* proceedings" proposed in the literature should also be possible without amending the Basic Law, because only this would ensure effective legal protection in critical cases under Section 19 (4) ProdHaftG-E, which is in the interest of both parties.

If, on the other hand, an amendment to the Basic Law were necessary for the introduction of *in camera* proceedings, a two-thirds majority in the Bundestag and Bundesrat would be required (Article 79(2) of the Basic Law), but this would also be sufficient, as Article 103 of the Basic Law is not subject to the "eternity clause" of Article 79(3) of the Basic Law.

Continuing the legislative process fort he ProdHaftG without incorporating a draft of the necessary rules of civil procedure for a new *in camera* procedure raises verry serious constitutional concerns.

[34] Musielak/Voit/Stadler, ZPO, 20th ed. 2023, § 142 margin note 7a.
[35] BVerfGE 115, 205 ff. margin note 112-113 with reference to BVerGE 101, 106 (margin note 74. 97, 101); https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2006/03/rs20060314_1bvr208703.html.