OPEN DECLARATION CALLING FOR FREQUENTLY ASKED QUESTIONS TO GUIDE INTERPRETATION OF THE PRODUCT LIABILITY DIRECTIVE

We, the undersigned organisations, support the proposal for the European Commission to issue Frequently Asked Questions for the EU Member States as they implement the updated Product Liability Directive and for courts to apply the directive consistently as from January 2027.

Guidance is crucial as the PLD contains vague, open-ended terminology that must be clarified for the benefit of the Member States and for courts and judges across the EU. The issues caused by the PLD's ambiguous terms are evident in the fact that EU Member States are implementing the Directive in ways that will create substantial legal uncertainty and confusion.

Our associations are strongly committed to fair civil justice systems that enable the effective enforcement of claimants' rights, whilst respecting the rights of defendants and preserving judicial independence and the integrity of the courts. Without EU guidance in FAQs, wide and problematic divergences in interpretation and application by courts will undermine the PLD's aim of achieving a high and uniform level of protection for consumers, whilst introducing legal uncertainty that will discourage investment in R&D and the commercialisation of innovative products and services in Europe.

The revised Directive presumes that consumers are systematically at a disadvantage in cases against producers. However, it fails to account for the increasing role of litigation funders, often offshore entities that provide substantial resources and sophisticated litigation support for mass product liability cases. By making it easier to win even meritless product liability claims, the PLD unintentionally delivers a windfall to professional funders, incentivising them to promote more mass litigation.

Under the revised PLD, even products that fully comply with European safety and quality regulations can, through the reverse burden of proof provisions, be presumed to be defective and to cause harm in a range of easily met circumstances. Novel and unclear concepts in the PLD will impose additional administrative, insurance and litigation risks and costs on businesses – costs that will ultimately lead to more expensive goods in the EU and potentially decisions not to bring innovative products to market in the EU. Another concern is the lack of specificity regarding how Member States should require their courts to protect trade secrets and other business confidential information in litigation, which the PLD only addresses in general terms.

Lack of clarity of some of the PLD's provisions is exacerbated by the manner in which it is being implemented by Member States. Key PLD terms, including the criteria for reversing the burden of proof in product liability cases, are defined differently in the proposed implementing legislation so far. This will create a complex patchwork of varying legal standards that will hold back cross-EU trade and investment.

As the PLD is a directive, Member States have some room for manoeuvre in the implementation, meaning they might adopt even broader and vaguer terms and legal standards than those found in the directive itself. This will result in widely divergent rulings in future product liability cases, forum shopping and fragmentation of the internal market.

Commission guidance in the form of Frequently Asked Questions is essential to clarify the ambiguous terms and legal standards within the PLD. Such FAQs would provide national judges with clear guidelines that will provide consistency in court decisions across the EU.

In conclusion, we emphasise our concern that inconsistent PLD implementation and divergent court decisions in product liability cases will undermine internal market objectives and deter innovation in Europe, particularly within high-technology sectors, as well as the PLD's own goals. Without clear guidance in FAQs, the PLD risks bringing further fragmentation and legal uncertainty to the European business environment at a time when the Commission is aiming to streamline regulations and attract investment in innovation and manufacturing.

Please see the annex for further examples of provisions in the Directive that require clarification.

Annex – Examples and selected concerns with the PLD in national implementation

For example:

- Under the PLD, a product is considered defective if it either fails to comply with mandatory safety regulations or does not meet the level of safety that consumers are reasonably entitled to expect. However, the Swedish and French draft laws omit the first part of this test and instead propose to define a defect solely by reference to whether the product meets consumers' reasonable safety expectations. The Dutch draft takes a different approach again, also lowering the threshold, by referring to the level of safety that "may be expected," rather than what consumers are reasonably entitled to expect.

- A key trigger condition to reverse the burden of proof with respect to defectiveness and causation of harm is where the claimant faces difficulty in proving said defectiveness and causation. The PLD uses the vague term "excessive difficulty" to define the nature of difficulties the claimant must demonstrate, and notes that this must be due to "technical or scientific complexity". Under the proposed draft Swedish national law, the terms "excessive" and "scientific and technical complexity" were removed, thereby reducing the trigger condition to one of mere "difficulty". The Swedish draft law would thus reverse the burden of proof whenever the claimant's case is hard to prove, for any reason. This is not an isolated case in the proposed implementing laws so far.

Provision in PLD	**Summary of concerns in implementing legislation**
Article 10(1) of the PLD reflects the accepted apportionment of the burden of proof in legal proceedings. However, Articles 10(2)-(4) then provide that the defectiveness of a product, and the causal link between defectiveness and damage, "shall be presumed" in many circumstances.	• The use of the term "shall" appears to mandate a national court judge to apply a presumption in favour of a claimant where certain trigger conditions are met. A shift of such importance must be based on clear conditions. Unfortunately, the PLD conditions do not meet this basic standard. The PLD fails to set out procedurally how the trigger conditions should be established and the procedural consequences that inevitably follow. In practice, the result is that the PLD is likely to be applied inconsistently across the Member States, leading to fragmentation of the market and forum shopping.

	• It remains unclear, for example, what process a judge must follow to find that the trigger conditions for the presumption have been met; what evidentiary rules and standards should apply to that process; and what ruling a judge should make during proceedings to inform the parties, in due time, of the evidentiary standards that apply to defectiveness, causation and harm. • The legal weight of the presumption in favour of a claimant is unclear, including how the presumption relates to the traditional burden of proof (given Article 10(1)). It is also unclear what weight of evidence will be needed to overturn the presumption (e.g., if the evidence otherwise appears to favour the Defendant, or is in equipoise, which party benefits from the doubt?). Without clear guidance from the Commission, it is extremely likely that the Member States and their judges will answer these questions differently.
The circumstances in which a presumption of defectiveness and/or causation arise are found in Article 10. Key trigger conditions are set out below: a. "[T]he defendant fails to disclose **relevant** evidence" (Article 10(2)(a)); b. "[T]he claimant demonstrates that the damage was caused by an **obvious malfunction** of the product during **reasonably foreseeable use** or under **ordinary circumstances**" (Article 10(2)(c));	• The precise meaning and intended operation of the terms in bold are unclear, as demonstrated by the divergent draft national legislations available so far. • In addition, it is also unclear what the difference is between the evidentiary standard of proof resulting from the word "likely" as compared with the evidentiary standard that applies to a complainant under the usual burden of proof referenced. • Different EU Member States are already adopting different approaches to implementation; and it is unclear if and how the EU

c. "[T]he damage caused is of a kind **typically consistent** with the defect in question" (Article 10(3)); d. "[T]he claimant faces **excessive difficulties**, in particular due to **technical or scientific complexity**, in proving the defectiveness of the product or the causal link between its defectiveness and the damage, or both" (Article 10(4)(a)); e. "[T]he claimant demonstrates that it is **likely** that the product is defective or that there is a causal link between the defectiveness of the product and the damage" (Article 10(4)(b)).	envisages ensuring that 27 EU Member States and their courts will adhere consistently to a common understanding of these terms. • For example, the Swedish bill omits the term "excessive difficulties" and "scientific and technical difficulties" that the PLD and other EU Member States use, which is one of the criteria following which a presumption can be made under these provisions. Therefore, under the Swedish draft, the criteria to reverse the burden of proof is much broader in scope than in other EU Member States.
Article 10(2)(b) provides that a presumption of defectiveness applies where "*the claimant demonstrates that the product does not comply with mandatory product safety requirements laid down in Union or national law*".	It is unclear from the Directive what weight (if any) courts can and would place on positive conformity with mandatory product safety requirements in Union or national law – for instance, if a product has satisfied all applicable safety requirements. While in general terms this must be 'taken into account', the fact that a presumption of defectiveness may nonetheless apply is likely to lead to material uncertainty and confusion in national court settings. Commission guidance would be of material assistance.
Under Article 10(4), a double shift in the burden of proof occurs (for alleged defectiveness and causation to damage), when a claimant faces "excessive difficulties" due to "technical or scientific complexity".	This provision in particular will have a targeted impact on innovative products that are inherently complex, and already subject to rigorous health and safety standards in the EU and under national law. Complainants with disputes related to these types of products will certainly have inherent difficulties in proving defect and causation. This trigger condition will result in an effectively automatic shift in the burden of proof for innovative and other inherently

	complex products. Without undermining the Directive's provisions or goals, the Commission should issue guidance to assist Member States and courts with a detailed explanation of the concepts (such as 'excessive difficulties' or 'complexity').