EJF Recommendations for PLD Implementation in the EU Member States with a special focus on Germany

As shown during discussions at the Legal Committee of the Bundestag on 13 April 2026, there is considerable room for manoeuvre for national legislators in several areas of PLD implementation. PLD adds increased costs on to the heavy burden already imposed on producers in the EU, with heightened risks for innovative companies. Member States should mitigate these risks in the PLD implementation process by addressing the issues below, in particular. Member States should:

(1) **Regulate third-party funding** of collective litigation

(2) Reinforce cross-border cooperation between **market surveillance authorities**

(3) Ensure consistency with the **EU's Product Safety Regulation**

(4) Consider **contradictory or opaque rules** in product safety regulations as non-binding for purposes of Article 10 in PLD

(5) Limit PLD's sovereignty **overreach** into national rules of civil procedure

(6) Ensure that **constant monitoring** of product use as required by PLD must be subject to explicit legal provisions that include surveillance of users specifically for that product or with their consent

(7) Take steps to limit the increased **workload, complexity and costs for defendant companies** due to PLD's far-reaching new disclosure provisions

(8) Transposition of the disclosure provisions will only be compliant with the German Constitution if a new ***in-camera*-procedure** is introduced at the same time

(9) **FAQs** should be drafted taking care of the previous concerns (1) to (8) to ensure more consistent implementation and application by national courts

Recommendations in more detail

(1) Member States should **introduce national rules to regulate litigation funding** not only for representative actions as is the case in Germany but also for assignment models and other models of collective action as in France and as proposed by this author in his piece on "Litigation funding in search of competition" (Woopen IWRZ 2025).

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EU Transparency Register identification number: 651492324629-52

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(2) Member States should prioritise **public enforcement and redress** and co-operation between market surveillance authorities in the EU in order to solve issues with products, avoiding and pre-empting private enforcement by court-based litigation that is slower, more expensive and benefits only a tiny minority rather than all those concerned.

(3) Member States should ensure **consistency** of the new liability regime under **PLD** with the new EU **Product Safety Regulation**. Member States should work with the EU Commission to clarify the new rules of civil responsibility under the Product Safety Regulation that are **not co-ordinated with other applicable laws such as national rules of prescription** and minimise confusion with PLD (Lenz/Bertram r+s [Recht und Schaden] 2025, 145-155).

(4) PLD recognises that manufacturers can be held liable for a product that fails to **comply with statutory requirements** in other EU safety laws. Member States should ensure that such liability does not arise if those statutory requirements are so **complex or contradictory** that the manufacturer could not understand them.

(5) National legislators should **not accept overreach by the EU legislator or the ECJ** beyond their competence as defined by EU Primary Law. This is a complex issue that requires knowledge about national civil procedure laws:

Let's consider Sec. 20 para 3 no. 2 of the German Draft Law to transpose the PLD. If difficulties arise to prove the defect of the product due to technical or scientific complexity and despite disclosure of information by the defendant, the Directive mandates that it shall be considered sufficient for the claimant to show that it is (only) „likely" that the product was faulty and thus caused the damage. But existing German civil procedure law requires, as the Directive implicitly recognises in recital 48, a „**high probability**" as the threshold that **a judge** must apply. The EU has no competence to interfere with national rules of civil procedure; therefore, the Directive here should just be read as a recommendation („should") and national legislators should retain the „high probability" threshold that is already applied in German product liability cases under current law. There is more to be explored on such issues but insufficient space in this short paper to cover them here.

(6) Recital 46 sentence 6 assumes that the **producer of the product will monitor its use over the whole period of use**. It is not acceptable to require monitoring of all users in order to prevent the reversal of the burden of proof onto the producer. Such total surveillance and reversal of the burden of proof under PLD must be specifically authorised by German law that should also require the consent of all users of the product, taking into account the sensitivities of the German population to surveillance technologies.

(7) As is already the case in other areas of German law, particularly in section 33g paragraph 3 of the German Competition Act (GWB), the transposition of Article 9 of PLD should give due consideration to the **workload and costs involved for the defendant producer**. Therefore, the PLD implementing law should ensure that in a civil product liability procedure the court first uses those **elements of proof that are available from public authorities or through the**

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application of public law procedures instead of through an extensive and expensive court-run discovery process as seen in common law jurisdictions.

(8) In order to make PLD transposition in Germany compliant with the German Constitution it is essential to **introduce** an ***in-camera*-procedure** in **German civil procedure law**, inspired by the Austrian example of the *in-camera* procedure for the disclosure of litigation funding contracts to the Attorney General for Competition (as further developed in Herbert Woopen's previously referenced article "Litigation funding in search of competition"). The wording adopted by the Bundestag on 07 October 2026 falls short of this: It does not fully exclude the claiming party from a new particular proof procedure but still admits its lawyer to take part, a person paid by the claiming party.

(9) The European Commission should urgently issue **Frequently Asked Questions** to clarify the vague and open-ended terminology in PLD while addressing the concerns (1) – (8) above.

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