

INCEPTION IMPACT ASSESSMENT

Inception Impact Assessments aim to inform citizens and stakeholders about the Commission's plans in order to allow them to provide feedback on the intended initiative and to participate effectively in future consultation activities. Citizens and stakeholders are in particular invited to provide views on the Commission's understanding of the problem and possible solutions and to make available any relevant information that they may have, including on possible impacts of the different options.

TITLE OF THE INITIATIVE	Review of the Design Directive and Community Design Regulation
LEAD DG (RESPONSIBLE UNIT)	DG GROW.F3 Intellectual property
LIKELY TYPE OF INITIATIVE	Legislative proposals
INDICATIVE PLANNING	Q4 2021
ADDITIONAL INFORMATION	https://ec.europa.eu/growth/industry/policy/intellectual-property/industrial-design/protection_en

The Inception Impact Assessment is provided for information purposes only. It does not prejudice the final decision of the Commission on whether this initiative will be pursued or on its final content. All elements of the initiative described by the Inception impact assessment, including its timing, are subject to change.

A. Context, Problem definition and Subsidiarity Check

Context

Design rights protect the appearance of a product, which results from attributes such as its shape, colours or materials. Design is what makes a product appealing. Visual appeal is one of the key factors that influence consumers' choice of preferring one product to another. Well-designed products create an important competitive advantage for producers. Design-intensive industries substantially contribute to the EU's economy: during the period 2014-2016 they represented almost 16% of EU GDP and of 14 % of all jobs.

Introducing EU legislation on design protection aimed at removing barriers to the free movement of goods embodying designs on the single market. The EU intervened on two levels: by harmonising the national laws through the Design Directive and by creating unitary protection titles (the unregistered Community design right – 'UCD', and the registered Community design right – 'RCD', covering the territory of the whole EU) through the Community Design Regulation.

The envisaged review of both the [Design Directive](#)¹ and the [Community Design Regulation](#)² follows from an exhaustive [evaluation of EU legislation on design protection](#). This evaluation was included in the Adjusted Commission Work Programme 2020³, and its results were published in September 2020⁴. This Inception Impact Assessment is published as part of the European Commission's new policy strategy on intellectual property ('IP') – the IP Action Plan⁵, announcing i.a. the Commission's intention to propose a revision of EU legislation on design protection.

The evaluation results show that EU legislation on design protection is still largely fit for purpose. This is especially true for the basic foundations and principles of the EU design law. However, the evaluation has also revealed a number of important shortcomings (see section on problem below), which need to be addressed to modernise the legal framework, and make it fit to support the twin digital and green transitions. The EU legislation on design protection would benefit from an upgrade, to become more accessible and efficient for design-intensive industries, SMEs and individual designers.

Problem the initiative aims to tackle

While the design protection system in the EU is considered to be working well overall, the recent evaluation has

¹ Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs.

² Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.

³ COM(2020) 440 final, Annex II: REFIT initiatives, No. 32.

⁴ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1846-Evaluation-of-EU-legislation-on-design-protection>.

⁵ <https://ec.europa.eu/docsroom/documents/43845>.

identified several important shortcomings:

- a) **Design protection both at Union and national level is not yet fully adapted to the digital age and lacks clarity and robustness in terms of eligible subject-matter, scope of rights and limitations:** as to the subject-matter of protection there are uncertainties as regards the possibility to protect digital graphical user interfaces or icons as designs, as well as e.g. sets of articles or interior design; the scope of design rights raises doubts in the context of 3D printing (including for private use) and does not cover protection against counterfeit goods transiting through the EU (e.g. currently seizure of counterfeit design goods is only possible when they are put on the EU market, while seizure of counterfeit design goods in transit is not allowed); in relation to the broad scope of protection the limited set of permissible uses within the list of limitations appears to be unbalanced to effectively strike the right balance between the interests of designers and design users, and the interaction between design law and copyright law is unclear.
- b) **Some Community design procedures are outdated or involve unnecessary administrative burden,** in particular the procedural requirements for the representation of a design in the application (e.g. dynamic 3D representations or video filings are currently not possible which makes the application for movement designs, or designs with different forms of appearance or assembly very difficult), or the regime for filing multiple design applications.
- c) **Community design fee levels and fee structure are sub-optimal:** it appears that the filing and renewal requirements for multiple applications are too restrictive for applicants to fully profit from the bulk discount obtained by combining multiple designs in one application; it also appears that at least the amount of the renewal fees is too high compared to the application fee and that certain other fees (e.g. for recording the transfer of an application for a Community design) are not justified any more.
- d) **The procedural rules lack coherence:** lack of harmonisation of procedural rules resulted in inconsistencies both between the Member States' design laws and in relation to the Community Design Regulation, negatively impacting the interoperability of the design protection system in the EU (e.g. rules on deferment of publication⁶). In addition, the recent trade mark reform, while bringing important simplification and modernisation of procedures for trade marks, has also significantly increased the level of incoherence with the EU legislation on design protection (e.g. as to the obligation to provide for administrative invalidity proceedings).
- e) **Fragmentation of the single market for spare parts:** in consequence of non-harmonisation of provisions on design protection for component parts used for the repair of complex products (e.g. car body parts or windscreen), the economically important spare parts market continues to be strongly fragmented, causing considerable legal uncertainty and severely distorting competition while adding costs for consumers.

Basis for EU intervention (legal basis and subsidiarity check)

Given the limited degree of harmonisation of national design laws brought by the Design Directive, covering key aspects of substantive design law only, with the exception of common rules on design protection for spare parts, the review of the Directive shall aim at increasing coherence between national laws and in relation to the Community design system. It will enhance the level playing field for businesses, SMEs and individual designers, and strengthen the complementarity and interoperability of the design protection systems in the EU. A potential future proposal could be based on Article 114 TFEU.

To the extent that there is need to amend the Community Design Regulation, its review will aim at modernising, improving and streamlining the autonomous protection regime for unitary titles, providing uniform protection valid across the EU. A potential future proposal could be based on Article 118 TFEU.

B. Objectives and Policy options

The reform of EU legislation on design protection aims to promote design excellence, innovation and competitiveness in the EU by ensuring that the design protection system is fit for purpose in the digital age, becomes substantially more accessible and efficient for individual designers, design intensive industries and SMEs, and contributes to objectives of the green transition and circular economy. In order to deliver on those general objectives and based on the evaluation results, the Commission services are considering the following tentative set of specific objectives and associated solutions/options and seek stakeholders input to refine them both during the feedback period and public consultation process.

Specific objectives and policy options:

- a) **To modernise, clarify and strengthen design protection,** e.g. by clarifying in the existing legislation what can be protected as a design (e.g. the protectability of digital graphical user interfaces or interior design), broadening the scope of design rights conferred (e.g. to better fight against counterfeit goods in transit) and the list of limitations (e.g. in line with the more robust catalogue of limitations in EU trade mark law), as well as

⁶ The applicant for a registered Community design may request that the publication of the registered Community design be deferred for a period of 30 months.

clarifying the interlink between design and copyright protection;

b) **To improve accessibility and affordability of design protection in the EU**, by streamlining and simplifying procedures (e.g. updating the filing requirements to facilitate the simple filing of all designs types, including in multiple form, and so increasing the uptake of protection; aligning Community design procedures with those for the EU trade mark), and adjusting fee levels and structure for the Community design rights;

c) **To ensure enhanced interoperability of design protection systems in the EU** through greater harmonisation between national laws and between national laws and the Community Design Regulation, in particular in the area of procedures (e.g. aligning standards for the examination of designs before they are granted and procedures for the invalidation of registrations);

d) **To complete the single market for repair spare parts** through further harmonisation of rules on their protectability, and in particular full liberalisation of that aftermarket through the introduction of a repair clause into the Design Directive (such as contained already in the Community Design Regulation). The latter option could allow for fair and effective competition, strengthen the competitiveness of the independent repair spare parts sector and bring greater choice and lower prices for consumers⁷; in addition, it would contribute to the objectives and development of circular economy.

The Commission will reflect on the best way to achieve the specific objectives, taking into consideration a variety of options. For each objective, the impact assessment will consider different relevant options. These may include (i) strengthening the cooperation between the European Union Intellectual Property Office ('EUIPO') and national intellectual property offices to further converge their practices, (ii) providing further guidance, and/ or (iii) legislative intervention taking into account the principles of proportionality and subsidiarity and the results of the further public debate. Where most objectives will require adapting the existing EU design legislation, harmonisation of practices, such as the alignment of examination practices of national offices and the EUIPO, may also be achieved through enhanced cooperation, common guidance and the use of common tools.

C. Preliminary Assessment of Expected Impacts

The further harmonisation of rules would make the overall design protection system in the EU more coherent and increase legal certainty and predictability to the benefit of its users. It would also contribute to establishing a level playing field for companies, especially SMEs, help to increase efficiency and reduce costs, facilitate access to the design system, thereby enhancing their and Europe's competitiveness. Further harmonisation of design protection, and in particular of spare parts rules, will support the EU's work on the green transition. Liberalisation of the spare parts market would bring greater choice and lower prices for consumers and, therefore, facilitate the right to repair and the development of the circular economy.

A greater harmonisation of rules would also offer larger potential to boost and extend cooperation between the EUIPO and the National IP Offices with a view to deepening convergence of practices and the development of common tools in the area of designs, thereby potentiating the efficiency gains for users of the system.

Likely economic impacts

The review of EU legislation on design protection should increase the uptake of design protection, and contribute to design excellence, the development of new products and innovation. It should also further improve the economic situation and competitiveness of designers and design users, by making it easier and cheaper for them to use design rights to protect the innovative design of their products. Greater clarity of the law and streamlined and simplified procedures together with enhanced interoperability of protection systems will lead to reducing costs and administrative burdens, making the EU design protection system more accessible and efficient in particular for individual designers, design-intensive industries and SMEs from both the EU and abroad. Modernising the designs framework will also contribute to the digital transformation. Finally, strengthened design rights will allow to better fight counterfeiting (e.g. in the context of counterfeit goods transiting through the EU).

Increased uptake of design protection translates into increased competitiveness of EU companies and EU overall. Already today, design-intensive industries substantially contribute to the EU's economy: overall, during the period 2014-2016 almost 16% of EU GDP and EUR 67 billion of EU trade surplus is generated in design-intensive industries⁸.

Increasing volumes of Community design registrations also testify to the increasing economic impact of design protection. RCD filings grew by 6.5% annually between 2003 and 2019. More than 813 000 RCDs were in force on 1 January 2020, covering low-tech areas such as furnishing and clothing and, more and more, high-tech areas. Regarding the latter, it was noted that RCD filings for high-tech products falling into Class 14 of the Locarno Classification, encompassing recording, telecommunication or data processing equipment, had the highest

⁷ Using information published by Insurance Europe in *Spare Parts Price Survey(s)*, Herz & Mejer (2020) (see <https://mpr.ub.uni-muenchen.de/104137/>) show that design protection increases the prices of visible spare parts by about 5–8% on average. Based on these estimates, they calculate that an EU-wide repair clause would save EU consumers between EURO 450 and 720 million annually on the purchase of visible automotive spare parts alone.

⁸ *"IPR-intensive industries and economic performance in the European Union"*, EPO and EUIPO, September 2019.

average annual growth rate amongst the top 10 classes according to recent EUIPO data, evidencing also the growing importance of digital designs (e.g. graphical user interfaces and icons).
Likely social impacts
The review of EU legislation on design protection aims to contribute to EU's excellence in designs, stimulating creativity and innovation, protecting and promoting European design, and facilitating access to design products. Design-intensive industries heavily contribute to EU's employment: they have generated 14 % of all jobs in the EU during the period 2014-2016 (direct contribution)⁹. This means that over 30 million Europeans were employed by design-intensive industries in the examined period. These industries also offer a higher average weekly wage¹⁰. Further facilitating uptake of design protection could have a positive impact on such design-intensive industries, including their contribution to employment.
Likely environmental impacts
One of the objectives of the review of EU legislation on design protection is to enable further digitalisation of the EU and national protection systems, moving registration processes and communication with IP offices to digital and online tools, where possible ('paperless administration'). Further harmonisation of rules on protection of spare parts used for repair purposes will contribute to the work on the EU's green transition, in line with the initiatives announced in the European Green Deal and the Circular Economy Action Plan.
Likely impacts on fundamental rights
The initiative should improve the possibilities for designers to protect their rights, bringing a positive impact on the fundamental rights such as the right to property and the right to an effective remedy. With a view to making the design protection system in the EU more balanced, it should also provide for a more robust catalogue of limitations of the design rights, taking account of fairness- and competition-based considerations.
Likely impacts on simplification and/or administrative burden
Simplification of procedures and reduction of administrative burden are among the main objectives of the review of EU legislation on design protection (please see section on objectives and policy options above). Streamlining procedures and increasing interoperability of protection systems through further harmonisation will lead to reducing costs and administrative burdens, both for the design protection users and public administrations (EUIPO and National IP Offices). The unitary registration system for the RCD has yielded clear and substantial benefits in terms of lower registration costs, less complexity and delay, and greater transparency and predictability. However, as revealed by the recent evaluation, certain elements of the registration system (e.g. outdated requirements for the design representation, the unity of class requirement for multiple applications, or sub-optimal fee structure for RCD) still seem to create unnecessary administrative burdens and costs for both design system users and administrations managing design registrations, and thus reduce the system's efficiency. The future work on the review of EU legislation on design protection will focus i.a. on further assessing and quantifying these administrative costs and burdens, as well as potential for their reduction.
D. Evidence Base, Data collection and Better Regulation Instruments
Impact assessment
An impact assessment will be prepared (Q3 2021).
Evidence base and data collection
The review of EU legislation on design protection will be based on the conclusions presented in the evaluation report and feedback received at the evaluation stage, in particular: • studies prepared by external contractors, including Economic Review, Legal Review and 3D Printing Study; • studies and reports prepared by the EUIPO and the European Observatory on infringements of IPR; • feedback received from stakeholders on the Evaluation Roadmap and subsequent public consultations; • collaborative efforts of the EUIPO and national IP offices in the framework of liaison meetings and convergence projects; • discussions with Member States representatives in the Commission Expert Group on Industrial Property Policy; • other potential studies, including internal ones, with focus in particular on price comparison for repair spare

⁹ ["IPR-intensive industries and economic performance in the European Union"](#), EPO and EUIPO, September 2019.

¹⁰ *Ibidem*. An average weekly wage in IPR-intensive industries is EUR 801, compared with EUR 544 in non-IPR-intensive industries. This "wage premium" is 40% in design-intensive industries, where the average weekly wage amounts to EUR 761.

parts and design fees levels and structures.

Consultation of citizens and stakeholders

Additional stakeholders consultations will feed the work on this review, including:

- feedback received on this Inception Impact Assessment;
- public consultation on the specific options considered in view of the potential reform of EU legislation on design protection.

The public consultation will run for a minimum period of 12 weeks, and will be launched in Q1 2021, with replies possible in all 23 EU languages. The main communication channel will be the "[Have your say](#)" portal on the Europa website.

DG GROW also considers organising targeted events (workshops or conferences) to discuss aspects of the main policy options in more detail.

Further discussion with Member States representatives will take place both in the context of the Council Working Party on IP and at the meetings of the Commission Expert Group on General IP Policy.

Will an Implementation plan be established?

The need for the preparation of an implementation plan will be assessed in the light of the outcome of the Impact Assessment and the decision about which policy options to retain.