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COMMISSION STAFF WORKING DOCUMENT

IMPACT ASSESSMENT REPORT

Accompanying the documents to the

Proposal for a
REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending COUNCIL REGULATION (EC) No 6/2002
on Community designs and repealing Commission Regulation (EC) No 2246/2002

and the

Proposal for a
DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the legal protection of designs (recast)

{COM(2022) 666 final} - {COM(2022) 667 final} - {SEC(2022) 422 final} -
{SWD(2022) 367 final} - {SWD(2022) 369 final}

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Glossary

Term or acronym	*Meaning or definition*
CDR	Community Design Regulation (EC) 6/2002
CJEU	Court of Justice of the European Union
DDir	Design Directive 98/71/EC
EUIPN	European Union Intellectual Property Network
EUIPO	European Union Intellectual Property Office
EUTM / EUTMR / TMD	EU Trade Mark /EU Trade Mark Regulation / Trade Mark Directive
IAM	Independent Aftermarket Suppliers
IP	Intellectual property
OEM	Original Equipment Manufacturer
OES	Original Equipment Supplier
MVBER	Motor Vehicle Block Exemption Regulation
RCD	Registered Community Design
SME	Small and Medium-Sized Enterprise
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCD	Unregistered Community Design
VM	Vehicle Manufacturer
WIPO	World Intellectual Property Organisation

See also Annex 12 for definitions.

1. INTRODUCTION

1.1. Importance of industrial designs and available systems of design protection

Design is what makes a product appealing. Visual appeal is one of the key factors that influences consumers' choices and leads them to prefer one product over another. Well-designed products create an important competitive advantage for producers. Companies that invest in design tend to be more profitable and grow faster[1]. Industrial design rights cover the appearance of a product or part of a product. To encourage innovation and the creation of new product design also in the digital age, there is an increasing need for accessible, modern, effective and consistent legal protection of those rights.

The laws of the Member States providing for design protection at domestic level were partially harmonised by the Design Directive 98/71/EC[2] ('the DDir'). As a complement alongside national systems, Community Design Regulation (EC) 6/2002[3] ('the CDR') established autonomous unitary protection for designs in 2003 in the form of the 'unregistered Community design' and, in particular, the 'registered Community design'. Rules implementing the CDR are contained in the Implementing Regulation (EC) No 2245/2002[4], and in the Fees Regulation (EC) No 2246/2002[5].

Corresponding to the territorial nature of industrial designs (guaranteeing protection to their owners only in the territory of the country or countries concerned), different (not mutually exclusive) protection titles are available for designers wishing to protect their designs in the EU.

(a) National designs are registered by the intellectual property (IP) offices of Member States. Currently, there are 24 national offices, and one regional office – the Benelux Office for IP (BOIP)[6]. National designs generally serve users seeking registration in one, or a limited number of countries, as well as users that want to obtain much broader protection in geographical terms but are not able or willing to opt for a Community design.

[1] See Evaluation of EU legislation on design protection, SWD(2020) 264 final, p. 10, referring for research incl. case studies on the relationship between design, innovation and business growth e.g. to UK Design Council (2015), The *Design Economy: The value of design to the UK.* Design Council: UK. Furthermore, on the contribution of design-intensive industries to EU economy, see Study "*IPR-intensive industries and economic performance in the European Union,* EPO and EUIPO, September 2019.

[2] Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs, OJ L 289, 28.10.1998, p. 28.

[3] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, OJ L 3, 5.1.2002, p.1.

[4] Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation (EC) No 6/2002 on Community designs, OJ L 341, 17.12.2002, p. 28.

[5] Commission Regulation (EC) No 2246/2002 of 16 December 2002 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs) in respect of the registration of Community designs, OJ L 341, 17.12.2002, p. 54.

[6] The Benelux countries form since 1975 a regional area of design protection. Designs registered with the Benelux Intellectual Property Office cover the entire Benelux area as supranational right.

(b) Community designs, available in registered (RCD) and unregistered form (UCD), grant their proprietors a unitary IP right with an equal effect throughout the entire EU. While the UCD right simply arises by virtue of first disclosure without registration, the RCD is registered and administered by the European Union Intellectual Property Office (EUIPO)[7]. The RCD does not replace national design systems, but provides an additional legal framework for obtaining a single design registration valid in the territory of all 27 EU Member States.

(c) International design registrations are administered by the World Intellectual Property Organisation (WIPO), and allow their proprietors to secure worldwide protection through the Hague System for the International Registration of Industrial Designs ('Hague System') by designating several countries or regions (e.g. the EU) with a single application.

The national and Community (and international) design systems coexist and are complementary to each other. According to individual business needs which will depend on the territorial scale of economic activity, the design proprietor can therefore either opt for a national or Community-wide (or international) registered design right, or apply for and maintain parallel protection within the same territory through both the national and Community registration systems (as well as the international system).

1.2. Political context

The design protection system in Europe has undergone a significant development over the last 20 years. This process started with the partial harmonisation of national design laws in 1998[8] by the DDir extending to key aspects of substantive design law without covering procedures. It aimed at promoting the internal market and preventing Union-wide competition being distorted by ensuring that the conditions for obtaining registered design rights are identical and that those rights confer upon right holders equivalent protection in all Member States.

The largest sticking point in the negotiations on the DDir was the issue of design protection for spare parts (see further Section 2.1.1). As no agreement could be reached on this point, the DDir includes a so-called freeze-plus clause in Article 14, pursuant to which Member States may retain their existing laws on whether spare parts should benefit from protection until amendments to the DDir are adopted on a proposal from the Commission. They are however permitted to introduce chances to those laws[9] only if the purpose is to liberalise the spare parts market.

The partial harmonisation of national design law was followed by the creation of the Community design in 2001 by the CDR. Since then, the CDR has been amended once in 2006 to give effect to the accession of the Union to the Geneva Act of the Hague System.

A proposal presented by the Commission in 2004[10] to harmonise design protection of visible spare parts through the introduction of a 'repair clause' into the DDir (as already

[7] As decentralised EU Agency, the EUIPO was established in 1994 in Alicante, Spain.
[8] Directive 98/71/EC had to be transposed into national law by 28 October 2001.
[9] For an overview of the currently existing laws in the Member States see Section 2.1.1 and Annex 6.
[10] Proposal for a Directive of the European Parliament and of the Council amending Directive 98/71/EC on the legal protection of designs, COM(2004) 582 (final). It was based on Article 18 DDir whereby the

contained in the transitional Article 110(1) CDR, see further on that in Section 2.1.1) did not receive sufficient support in the Council, despite overwhelming support by the European Parliament[11], and was withdrawn in 2014.

The introduction of the RCD as complement to national design rights has led to a clear and substantial (steady upward trend) net increase in design applications in the EU overall, taking the numbers of RCD filings and national design filings together[12]. While total volumes of national design filings balanced around 120,000 annually in the past ten years, RCD filings grew on average by 3.5% between 2010 and 2019 (with an overall growth rate of 36.2% when comparing the 2019 and 2020 filing volumes), leading to 988,200 individual RCD filings[13], which nevertheless translates only into filing by 13,400 owners in 2020 (1/3 of which are natural persons). In October 2021 there were a total of around 157,000 RCD owners (including 50,700 natural persons). As shown also by the responses to the two open public consultations "Evaluation of design legislation on design protection" ("First Public Consultation")[14] and "Review of EU rules on industrial design" ("Second Public Consultation")[15], businesses increasingly demand more tailored and streamlined design registration systems, which are more consistent, publicly accessible and technologically up-to-date. In addition, the business environment has changed significantly over the past two decades, notably with the expansion of the internet and other electronic business tools. The significance of new technological designs such as graphical user interfaces (GUIs) and icon designs has been growing substantially[16].

Therefore, in line with the Commission's Better Regulation agenda[17] to review EU policies regularly, in 2014 the Commission launched an evaluation of the functioning of the design protection systems in the EU, involving a comprehensive economic and legal assessment, supported by a series of studies. The Council of the European Union adopted on 11 November 2020 conclusions on intellectual property policy and the revision of the industrial designs system in the Union[18]. The Council called on the Commission to present proposals for the revision of, respectively, the CDR, and the DDir, to modernise the EU design protection systems and to make design protection more attractive for individual designers and businesses, especially SMEs.

Based on the final results of the evaluation[19], the Commission announced in its communication of 25 November 2020 entitled 'Making the most of the EU's innovative

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Commission shall propose any changes to the DDir needed for the completion of the internal market in respect of spare parts at latest one year after analysing the consequences of the provisions of the DDir.

[11] European Parliament legislative resolution of 12 December 2007 on the proposal for a directive of the European Parliament and of the Council amending Directive 98/71/EC on the legal protection of designs (COM(2004)0582-C6-0119/2004-2004/0203(COD)).

[12] SWD(2020) 264 final, p. 15.

[13] EUIPO (2020) EUIPO Design Focus 2010 to 2019 Evolution. Retrieved from EUIPO_DS_Focus_Report_2010-2019_Evolution_en.pdf (europa.eu). Based on number of designs.

[14] Public consultation carried out between 18 December 2018 and 30 April 2019 in the context of the "Evaluation of EU legislation on design protection", SWD(2020)264 final, Annex 2.

[15] Public consultation "Review of EU rules on industrial design (Design Directive)" carried out between 29 April 2021 and 22 July 2021. See Annex 2 of this impact assessment report.

[16] *Id* p. 14, 15 and 71.

[17] Communication from the Commission: Better regulation for better results - An EU agenda, COM(2015)215, European Commission, 19 May 2015, p. 4.

[18] Council document 2020/C 379 I/01.

[19] SWD(2020) 264 final.

potential – An intellectual property action plan to support the EU's recovery and resilience'[20] that it will revise the EU legislation on design protection, following the successful reform of the EU trade mark legislation. The Council adopted on 25 June 2021 further conclusions on intellectual property policy[21], urging the Commission to prioritise the timely presentation of a proposal as soon as possible on the revision and modernisation of the legislation on industrial designs. Furthermore, in its supportive Opinion on the IP Action Plan, the European Parliament stressed the need for revision of the design protection system after having been established 20 years ago[22].

2. PROBLEM DEFINITION

2.1. What are the problems?

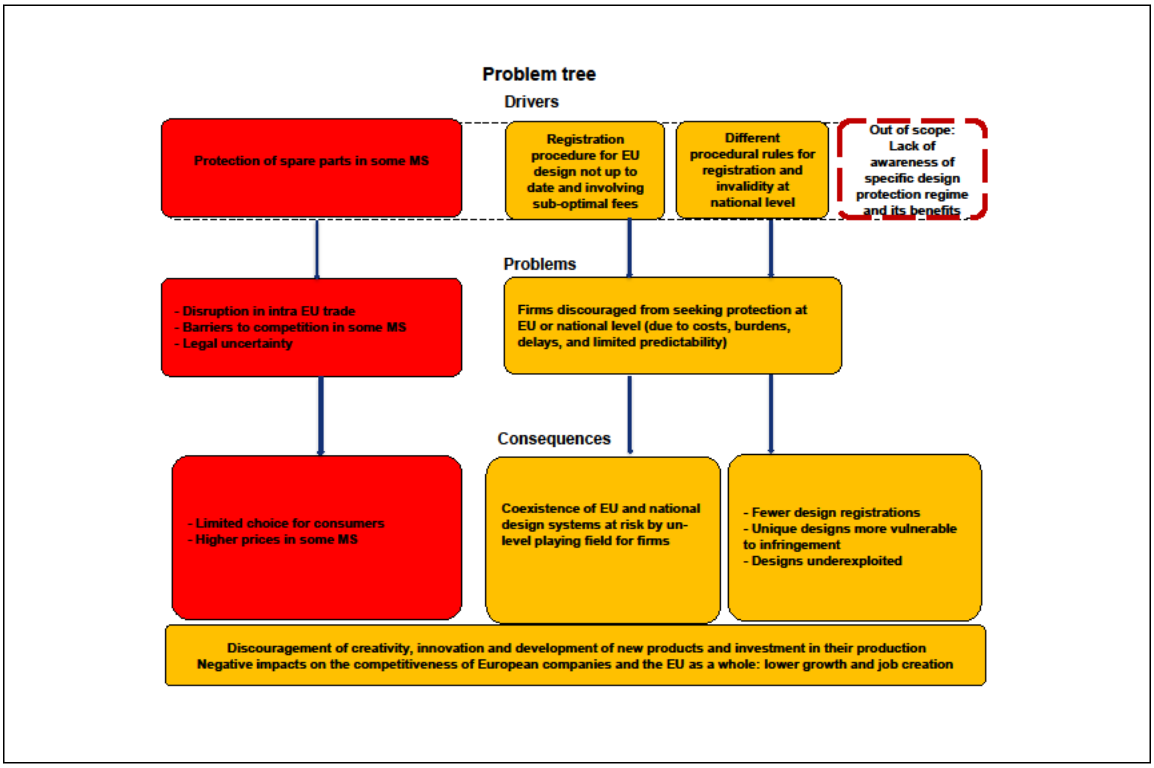
Two main problems were identified in the context of this impact assessment. The first and most important one relates to the disruption in intra EU trade and barriers to competition in some Member States with respect to repair spare parts. The second relates to the discouragement of businesses, in particular, SMEs and individual designers from seeking for registered design protection at EU or national level due to the high costs, burdens and delays in obtaining protection and the limited predictability.

The evaluation addressed a few other shortcomings of the legislation on industrial designs such as in relation to the clarity of the current definition of the eligible subject matter of protection or of the specific provisions on the relationship of design protection to copyright. These other shortcomings are intertwined with part of the second main problem, notably the limited predictability. However, given the rather minor impact as confirmed also by the replies to the Second Public Consultation and the legalistic nature of the questions involved, these shortcomings are covered in the Annexes part to the extent appropriate (see Annex 10 on subject-matter of protection and Annex 11 on the relationship to copyright). In accordance with the principle of proportional analysis, the present impact assessment does not expressly scrutinise a number of envisaged (technical) amendments either which aim at minor adaptations of existing provisions with little, or no practical impact, or that are straightforward and uncontentious such as in relation to the required alignment to the recent trade mark reform. Nevertheless, an overview of the proposals for amending the existing legislation is provided in Annex 5.

As far as the evaluation revealed indications of a possible underuse of design rights due to lack of awareness of the specific design protection regime and its benefits[23], this has remained out of scope of the impact assessment as a very wide range of different awareness raising activities, campaigns and trainings (targeting particularly SMEs) are already carried out or planned by the EUIPO[24], including the EUIPO's Academy and the European Observatory on Infringements of Intellectual Property Rights. In addition, the

[20] COM(2020) 760 final.
[21] Council document 2021/C 247/02.
[22] Report on an intellectual property action plan to support the EU's recovery and resilience, as adopted by the Legal Affairs Committee on 30 September 2021 (A9-0284/2021), para 32.
[23] SWD(2020) 264 final, p. 16, 17 and 71.
[24] For details on ongoing or planned new awareness raising activities see Annex 12 and EUIPO Annual Work Programme 2021, MBBC_20_S10_2.4_Cover note.docx (europa.eu), p. 9, 12, 18, 24. As to related (new) key initiatives to increase knowledge, understanding and successful use of IP by SME's, see also EUIPO Strategic Plan 2025, SP2025_en.pdf (europa.eu), p. 36, 46 and 40.

EU IP Helpdesk offers multiple trainings and materials to help European creators and innovators to make the most out of their IP assets, including designs[25]. To the extent necessary and appropriate, the Commission shall build on existing other initiatives, in particular related to SME support, to further promote the use of design protection and raise awareness about is benefits.



2.1.1. Disruption of trade and competition in the spare parts area

As harmonisation of substantive design law under the DDir does not cover the area of repair spare parts, important national differences remain regarding the eligibility of design protection for visible component parts used for the purpose of repair so as to restore the original appearance of a complex product. A complex product refers to a product made up of multiple components, which can be replaced permitting disassembly and re-assembly of the product[26]. On one hand, at EU level, the CDR excludes in a 'repair clause'[27] such component parts from protection. On the other, as mentioned in Section 1.2, the issue remains not harmonised under the DDir and Member States can choose whether to retain provisions extending protection to those component parts or to exempt them therefrom by means of a repair clause.

As of September 2021, twelve (BE, DE, EL, ES, HU, IE, IT, LV, LT, LU, NL, PL) out of 27 Member States provide for a repair clause exemption and hence have liberalised the

[25] European IP Helpdesk (europa.eu).
[26] Article 1(c) DDir and Article 3(c) CDR.
[27] Article 110(1) CDR reads: "Until such time as amendments to this Regulation enter into force on a proposal from the Commission on this subject, protection as a Community design shall not exist for a design which constitutes a component part of a complex product used within the meaning of Article 19(1) for the purpose of the repair of that complex product so as to restore its original appearance."

spare parts market (see Annex 6 for detailed overview).[28] Most recently, a repair clause was inserted into the German Design Act[29], which entered into force on 2 December 2020 and affects designs applied for registration after that date.[30] In France, a partial and sectorial[31] repair clause was promulgated on 24 August 2021 as part of a new law[32] on combating climate change and strengthening resilience against its effects. As from 1 January 2023, the sale of visible spare parts will be partially opened to competition there. As in Germany, this is going to affect new designs only.

Design protection for repair spare parts conflicts with the essential role and function of design law. The purpose of design law is to protect the appearance, the visible form of a product, not the product itself (granting an exclusive right to a particular shape but no product monopoly)[33]. The objective is to foster innovation in product design while maintaining competition of products. Competitors are therefore encouraged to create new, sufficiently distinguishable designs for their competing products which consumers find appealing. This is achieved without interfering with the competition of products as such. The protection of the design of a watch, for instance, does not hamper competition in the watch market. The huge variety of watch designs can be taken as striking example of how design protection stimulates product competition. Successful designs are those picked by the consumer who prefers for instance the smartly designed car or watch, and exclusive rights allow the designer to be rewarded for that design (i.e. "design premium" is awarded by the market based on consumer preferences). However, in the case of 'must-match' spare parts that need to exactly match the original parts to be replaced, the aftermarket leaves no room for consumers to exercise a choice and to prefer one design to the other. In such a case, the effect of design exclusivity corresponds to that of a product monopoly and is thus an unintended – from the ratio of the design acquis - excessive rent to the manufacturers of the original parts.[34] In other words, the design law awards primary market 'exclusivity' rooted in the look of a vehicle, which is relative – after all, inter-brand competition with other vehicles remains. It is, however, an arguable IPR protection over-reach to extend this into an absolute exclusivity over spare parts.

Design protection for repair spare parts may result in foreclosure of competition and "lock-in" effect. In markets with repair clause independent manufacturers are free to provide competing parts. This is different in markets where no repair clause exemption exists currently (AT, BG, CY, CZ, DK, EE, FI, FR, HR, MT, PT, RO, SE, SI, and SK). The holder of the design right may prevent manufacturing, importing, or selling of similar visible spare parts by potential competitors. This is problematic when the appearance of such parts is dependent on the appearance of the complex product to be

[28] Time.lex, Queen Mary - London, Spark Legal Network & Indiville (April 2016). Legal review on industrial design protection in Europe, 2016, p. 136; Beldiman, D., & Blanke-Roeser, C. (2017*). An International Perspective on Design Protection of Visible Spare Parts*. Springer, p. 41; SWD(2020) 264 final, p. 65.

[29] New Section 40a DesignG.

[30] For more details see Jutta Figge/Nadine Kalberg, Die Ersatzteilklausel im Designrecht – zur aktuellen politischen Lage, GRUR 2020, p. 248 *et seq*.; Josef Drexl, Die Reparaturklausel im Designrecht: Eine wettbewerbs- und immaterialgüterrechtlich gebotene Reform, GRUR 2020, p. 234 *et seq*.

[31] Explicitly confined to the automotive sector only.

[32] Loi n° 2021-1104 du 22 août 2021.

[33] See also the European Parliament in its first reading position adopted on 12 December 2007 on the 2004 proposal to introduce a repair clause (EP-PE_TC1-COD(2004)0203).

[34] Jens Schovbo and Graeme B. Dinwoodie, Design protection for products that are "dictated by function", in: The EU Design Approach, A global appraisal, 2018, p. 156.

repaired so that the exact reproduction is necessary for restoring the complex product's original appearance (so-called "must-match parts"). As the spare part at issue must exactly match the specifications of the original part to be replaced in the context of repair, substitutability by alternative designs is not possible. In the case of cars, a fender, for example, that differs in shape from the original one is useless for the repair of the original vehicle and therefore unmarketable. Any competitor wishing to enter such market needs therefore to be able to imitate the original part. However, that imitation would constitute an infringement of design rights where no repair clause exemption exists. Therefore, right holders are granted a genuine monopoly on the spare parts aftermarket in the Member States concerned. That means that right holders can exclude entry and that repair shops and customers may be "locked" into purchasing such repair parts exclusively from them as original manufacturers or their suppliers. For example, in protected markets, a vehicle owner may not be able to buy the spare parts needed from a source of choice ("freedom to repair") and at prices kept in check by competition but may become a captive consumer[35]. This is all the more valid as existing competition in the primary car market might not outweigh uncompetitive prices in the aftermarket[36]. This would require consumers being able to take an informed decision at the time of purchase of the car as to the need for spare parts over its whole life-cycle. However, this is not the case, as such need does not only depend on the individual intensity of use but in particular on the probability of suffering an accident. Such perfect foresight is impossible for the user.

The DDir applies to any sector where the replacement and repair of visible components of complex products is at stake and which therefore would be affected by an eventual harmonisation at European level. While component parts can be found in virtually all modern products and devices, the largest aftermarket affected is that of the automotive industry. This is also the largest group that responded to the two open public consultations.

There are 319 million vehicles in circulation on EU roads,[37] and given also the low cost of repair compared to the price of a new car, the demand for damage repair is significant. According to Wolk After Sales[38], in 2019, the market value of automotive visible spare parts in the EU was equal to EUR 16.3 billion[39] and represented 17% of the total market value for all automotive spare parts in the EU. Almost 51% of sales (EUR 8.3 billion) took place in countries without a repair clause. This figure covers three segments: body parts (with the market value of EUR 9.7 billion), auto glass (EUR 4.4 billion) and lighting (2.2 billion EUR). These parts, also called crash parts, are typically replaced because of collision and can benefit from design protection in the markets without repair clause.

[35] According to the CJEU in Joined Cases C-397/16 and C-435/16 *Acacia v. Audi AG and Porsche*, paragraph 50, the purpose of the repair clause contained in Article 110(1) CDR is to liberalise the market in replacement parts so as to avoid the creation of captive markets in certain spare parts and to prevent a consumer from being indefinitely tied to the original manufacturer of the goods for the purchase of external parts.

[36] Cf. Josef Drexl, supra note 22, p. 241.

[37] DG Mobility and Transport (European Commission). (2021, September). EU transport in figures - Statistical pocketbook 2021. https://op.europa.eu/s/sJBj

[38] Wolk After Sales (2021, September) Market structure of motor vehicle visible spare parts in the EU.

[39] This amount includes the share of accident repairs, including body work, car glass, lights at retail prices without VAT. Does not include the labour rate, paint job, and other work.

With 69% of total sales, vehicle manufacturers (VM) cover a large segment in the EU visible spare part market. Such market power may be used in Member States without repair clause to the detriment of consumers. Mejer and Herz (2020)[40] estimate economic impact of design protection on the prices of visible spare parts in automotive aftermarket. They rely on information published by Insurance Europe in Spare Parts Price Survey(s) that contains the pre-tax prices of 12 types of spare parts (including lighting, auto glass and body parts) for 60 car models from 2001 to 2016 in 16 EU Member States plus Norway and Switzerland. The fact that spare part prices are listed by car model allows them to make cross-country price comparisons between exactly the same parts; for example, they are able to compare the price of a windscreen for a BMW 5 Series 530d 2993 cc 2011 between Germany and France in 2016. In order to estimate the impact of design protection on prices, Herz and Mejer (2020) use a statistical technique called difference-in-differences that allows to measure the differential effect between prices of identical parts in countries with and without repair clause. Results show that in the absence of a repair clause (competition) prices of identical parts are by 5–8% higher on average.

Availability of alternatives would bring considerable benefits to consumers in terms of price. If there was an EU-wide repair clause exemption, EU consumers in Member States currently without a repair clause would save between **EUR 415 and 664 million annually** on the purchase of visible automotive spare parts alone (see Annex 4 for details on methodology). These savings would realise if a new repair clause was binding for both old (already registered) and new designs.

Design protection may prevent the antitrust regime from achieving its full benefits for enterprises and consumers. The issue of extending design protection to spare parts has an impact on the "Motor Vehicle Block Exemption Regulation" (MVBER).[41] The MVBER provides for an exemption whereby Article 101(1) TFEU[42] shall not apply to vertical agreements relating to purchase, sale or resale of spare parts and/or repair and maintenance services provided that some conditions are met.[43] One of these conditions is that the agreement does not restrict the ability of spare parts suppliers to directly serve the aftermarket.[44]

The recent Evaluation of the MVBER[45] points to two rigidities in the aftermarkets. First, Original Equipment Suppliers (OES) contractual arrangements with VM may prevent or hamper the former from supplying the aftermarket directly, in competition with parts sold to the VMs and then resold as spare parts. Secondly, agreements between VM and authorised repairers may oblige or incite the latter to purchase most of their supplied parts directly from the VM network. Design protection for the spare parts in the aftermarket may render such behaviour legitimate.

[40] Herz & Mejer (2020) *The effect of design protection on price and price dispersion: Evidence from automotive spare parts*. Retrieved from https://mpra.ub.uni-muenchen.de/104137/

[41] Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ L 129, 28.5.2010, p. 52-57.

[42] This provision prohibits anticompetitive agreements and concerted practices.

[43] Article 4, MVBER.

[44] Article 5(b), MVBER.

[45] Commission Evaluation Report on the operation of the Motor Vehicle Block Exemption Regulation (EU) No 461/2010, COM(2021)264 of 28/05/2021.

The existing market fragmentation in the EU remains a problem for a majority of respondents, as highlighted by the First Public Consultation.[46] For SMEs, divergent approaches of the Member States are problematic for cross-border operations as they **create legal uncertainty and unpredictability**. For right holders, difficulties in efficiently protecting spare parts and enforcing their rights across the EU remain an issue. For other respondents, including design users and independent producers, the current patchwork approach leads to difficulties with and high cost of ensuring compliance, agreeing on licences, setting out distribution networks and managing imports.

Box 1: Legal uncertainty – practical example

Legal uncertainty caused by current fragmentation can be best illustrated with the e-commerce case. Currently, in order to protect itself against infringement claims, an independent European manufacturer of body parts includes on its distribution website (in German) a note stating that: *no original spare parts are offered in this catalogue; numbers of original spare parts are given for reference; parts of French cars that are produced by PRASCO Spa* (located in Italy where no protection is offered) *cannot be sold or offered for sale in France and/or in other countries where parts of French cars are protected by intellectual property law*.[47]

Fragmentation is optimal neither for independent producers and distributors (offering for sale into a Member State without repair clause would constitute infringement by vendor) nor for right holders. Also customers are insecure whether or not and in which Member States the purchase of certain spare parts is lawful and they are deprived in parts of the Union of choosing between competing spare parts.

In its supportive Opinion on the IP Action Plan, the European Parliament acknowledged that the patchwork of conflicting national laws created fragmentation in the internal market and legal uncertainty and therefore called on the Commission to include a repair clause in its future proposal for the purpose of avoiding distortions of competition.[48]

Beyond the automotive aftermarket, experts and stakeholders point to *domestic electrical appliances (e.g. vacuum cleaners), electronic devices (e.g. smartphones[49]), sanitary appliances, motorbikes, electric bikes, watches* as markets where the availability/affordability of spare parts in the aftermarket could be limited due to existence of design protection[50]. Due to lower availability of reliable sectoral data predictions about price effects are less reliable. By definition, however, one could assume

[46] It is to be recognised that all replies from industry stakeholders represent the automotive aftermarket.

[47] The notice, retrieved from Prasco der Spezialist für Karosserieteile website on 10 September 2021 reads as follows: *Die in diesem Katalog abgebildeten Artikel sind keine Originalteile. Alle angegebenen Referenz- und Originalnummern dienen nur zu Vergleichszwecken. Die von PRASCO Spa produzierten und/oder verteilten Ersatzteile für französische Autos dürfen in Frankreich und in Ländern, in denen das französische Recht an geistigem und gewerblichem Eigentum gültig ist, nicht verkauft und/oder wiederverkauft und/oder angeboten werden.*

[48] Report on an intellectual property action plan to support the EU's recovery and resilience, as adopted by the Legal Affairs Committee on 30 September 2021 (A9-0284/2021), para 33.

[49] Deloitte estimates the value of global repair market for smartphone to be USD 12 billion. https://www.statista.com/chart/20258/estimated-sales-of-smartphones-and-related-products-and-services/

[50] Europe Economics (2015, January). *The economic review of industrial rights in Europe*; Hartwig, H. (2016). Spare parts under European design and trade mark law. *Journal of Intellectual Property Law & Practice*, *11*(2), 121-129.

that the car spare parts savings constitute a lower bound of overall savings across all aftermarkets impacted by this design review.

With the sustainable product policy and eco-design policy[51] aiming to make products easier to repair, it is therefore important to assure that the scope of design protection leaves consumers with the choice of repair and does not constitute an obstacle for the repair markets to flourish.

2.1.2. Regulatory burdens

Due to partly outdated procedures and suboptimal fees to be paid for the RCD as well as divergent rules at national level which are not yet aligned with those of the RCD system, businesses in the EU, and, in particular, SMEs and individual designers, are faced with unnecessary hurdles and thus extra costs when using the system and, therefore, to a certain extent discouraged from applying for registered design protection at EU or national level. In addition, the recent EU trade mark reform has increased significantly the level of incoherence with the existing rules applicable to the RCD and its procedures. The resulting inconsistencies are causing friction in the EUIPO's smooth running of its proceedings, in particular its workflows and back-office IT-landscape. As also raised by major IP associations, the created differences of rules are also detrimental for businesses active in both systems (EUTM and RCD), who rightly expect to encounter corresponding procedural provisions (including in relation to payable fees) when not justified by the specificities of the IP right at hand.[52]

Outdated registration requirements of the RCD

The evaluation highlighted certain elements of the RCD system, which create unnecessary administrative restrictions for its users and therefore discourage the uptake of registered design protection.[53] These elements concern in particular the **outdated requirements for the representation of designs**. They do not allow designers to represent their designs in the best possible fashion, in accordance with best available technologies, for instance by means of dynamic representations showing a design from all possible angles. Furthermore, they are not suitable to appropriately reproduce new types of designs such as animated graphical user interfaces and protected other new emerging designs. This adds to the legal uncertainty on the subject-matter of protection as noted above.

Another illustration is the restriction in the CDR permitting to combine a number of designs in one application ('multiple application') only if the products belong all to the same class of the Locarno Classification ('unity of class requirement'). It was originally deemed necessary to limit the filing of multiple applications to designs belonging to the same class so as to prevent the diminishing of registration costs by filing in one application designs intended for all sorts of products. As shown by the evaluation, the unity of class requirement however unnecessarily involves administrative burdens for both the EUIPO and the users of the RCD system without much benefit.

Box 2: Filing of multiple RCD applications – practical example

[51] https://ec.europa.eu/growth/industry/sustainability/product-policy-and-ecodesign_en

[52] SWD(2020) 264, Section 5.7, p. 70.

[53] SWD(2020) 264, p. 71.

An applicant would not be able to file in the same multiple application 'hairdryers' and 'parts of hair dryers', since these parts belong to another class of the Locarno Classification. In order to seek protection for the design of these parts, the applicant would have to file a separate RCD design application.

This limitation therefore does not only increase the applicant's costs and administrative burden, but it also prevents the applicant from appropriately benefitting from the bulk discounts offered when seeking to register the designs.

The evaluation further showed that the recent trade mark reform increased the number of **inconsistencies between EU Trade Mark (EUTM) proceedings and RCD proceedings**[54]. For example, design applicants cannot rely on continuation of proceedings (in case a user missed certain types of time-limits) or revocation of decisions (in case of obvious mistakes made by the EUIPO) which are available in trade mark proceedings. As a consequence, users may mistakenly rely on certain safety nets which they are used to when dealing with EUTM proceedings which are not available when it comes to RCDs. It is detrimental for businesses active in both systems, who expect to encounter corresponding procedural provisions when not justified by the specificities of the IP right concerned. In addition, this is causing friction in the EUIPO's smooth running of its proceedings, especially in terms of its workflows and back-office IT landscape.

Sub-optimal fee structure and levels

The amounts of fees payable to the EUIPO in respect of the registration of RCDs are laid down in the Fees Regulation (EC) No 2246/2002. An adjustment of those fee amounts can only be effected by amending that Fees Regulation. The fees for RCDs have not been revised since the introduction of the Community design system. This means that in real terms they are now 26% lower than in 2002[55]. On the other hand, the fees for EU trade marks have been adjusted downwards several times, with very substantial cumulative decrease. In the context of the recent trade mark reform, the co-legislators deemed it appropriate to set the amounts of EU trade mark fees directly in the basic EU Trade Mark Regulation (EU) 2017/1001[56] ('EUTMR'), given their essential importance[57], so that the original Regulation on EU trade mark fees[58] was repealed. Apart from adjustments to the fee levels, changes were made to the fee structure such as by abolishing the separate registration fee (in addition to that for the application) and the fee for the transfer of a EUTM.

It is a fundamental objective of the CDR that the procedure for obtaining a RCD should present the minimum cost and difficulty to applicants, so as to make it readily accessible to SMEs as well as to individual designers[59].

[54] SWD(2020) 264, p. 70.

[55] The cumulative inflation from 2002 to 2020 for the EU27 amounted to 36% (Eurostat, HICP - annual data (average index and rate of change) [prc_hicp_aind]). Meaning that present value of EUR1 from 2002 is EUR 0.74.

[56] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, OJ L 154, 16.6.2017, p. 1.

[57] Recital 39 of the EUTMR.

[58] Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonisation in the Internal Market (Trade Marks and Designs), OJ L 303, 15.12.1995, p. 33.

[59] Recital 24.

However, in terms of the fee structure, given the short time (in case of so-called fast track registration in fact only 2-3 days) from filing to registration and publication of an RCD with no deficiencies, the current distinction between registration (EUR 230) and publication (EUR 120) fee causes unwarranted burdens in the fee administration for the users of the RCD system and the EUIPO.

Furthermore, **as regards the levels of fees to be paid to the EUIPO, larger entities currently tend to benefit from a less costly access to RCD protection, compared to SMEs and individual designers**. Where larger companies tend to protect more designs than smaller companies and individual designers, they can benefit more from the bulk discount offered to multiple applications. That is due to the amount of fees to be paid for the registration of a RCD being lower from 50% up to 80% the more RCDs are filed at the same time in a multiple application[60].

The option to combine a number of designs in one multiple design application and to benefit from a bulk discount was introduced with the particular aim of facilitating the filing of applications for those industry sectors which develop large numbers of possibly short-lived designs over short periods of time of which only some may be eventually commercialised[61]. According to EUIPO statistics, in 2019, for natural persons as filers the average number of designs per application was 2.34, for legal persons 3.63, corresponding to an average fee paid per design registration and publication of respectively EUR 250 and EUR 223 (12% higher for natural persons). This disadvantage is not only considerable when comparing the costs of a single application with that of the fees to be paid for additional designs, but due to the progressive structure of the bulk discounts the difference in filing fees become even more striking when more than ten designs are included in a multiple application. All this ultimately also means that single design filers (that is those that file an application for the registration of only one RCD) are actually cross-subsidising multiple RCD filers. Moreover, the distinction of the available (bulk) discounts in two different brackets (second to the tenth design, and eleventh design forward), which also applies for the payable fees in case of requesting deferment of publication of the registration[62], contributes to making the fee structure non-transparent and complex to the disadvantage especially of SMEs that are not usually supported by adequate legal expertise, and entailing administrative burdens in particular also for additional payments and reimbursements when individual designs of a multiple application do not proceed to registration.

As regards **renewal fees**, the Fees Regulation for the RCD provides an escalating fee for each renewal. In contrast to the bulk discount provided at the moment of application, there is no such discount on renewal. Some respondents in particular to the First Public Consultation were of the view that the renewal fee amounts are too high, especially for SMEs and individual designers, and that they should not increase each time a registered

[60] The basic fee to be paid for the registration of a single RCD is EUR 350, taking the actual registration fee (EUR 230) and publication fee (EUR 120) together. Bulk discounts are available when filing more than one RCD in a multiple application. For the registration of each additional design from the second to the tenth design filed in a multiple application, a basic fee of EUR 175 (EUR 115 registration fee plus EUR 60 publication fee) has to be paid, and a basic fee of EUR 80 (EUR 50 registration fee plus EUR 30 publication fee) for each additional design from the eleventh design onwards. This corresponds to a discount of 50% and almost 80% respectively.

[61] Recital 25 of the CDR.

[62] The fee for deferment of publication is EUR 40, the additional deferment fee for each design from the 2nd to the 10th design is EUR 20, and for each additional design from the 11th design onwards EUR 10.

design is renewed. In addition, they criticised that the renewal fee applies to every single design contained in a multiple application without the bulk discount being available after registration. However, that latter view does not take account of the above-mentioned special rationale for bulk discounts being granted at filing stage (to facilitate the testing of designs in the market). Furthermore, higher renewal than registration fees appear to be perfectly justified by the need of encouraging the non-renewal of not utilised designs. It is mainly also for that reason that most respondents to the Second Public Consultation (41%) were supportive of lowering the basic fee for the initial five years' registration of a Community design rather than reducing renewal fees (24%) in order to facilitate access to design protection for SMEs and individual designers.

Diverging procedural rules at national level

The evaluation revealed that the legal environment in the field of industrial designs remains very heterogeneous in spite of the partial harmonisation of national laws dating back to late 1990s. Harmonisation imposed by the DDir only focused on a restricted number of substantive rules that were then considered to most immediately affect the functioning of the internal market[63] (excluding in particular the controversial issue of spare parts protection as addressed in Section 2.1.1). Formal requirements and procedures were not covered at all. Moreover, the CDR was enacted three years after the DDir, which means that at the time the DDir came into being there was no 'common benchmark' against which the efficiency of national proceedings could be measured. By now, however, the procedures followed by the EUIPO have been in place for almost 20 years. They are generally regarded as meeting business needs and expectations, in particular in terms of timeliness and user-friendliness[64]. As a result, the current landscape of EU design law is still characterised by a wide divergence between national rules and procedures, both among themselves and in relation to the rules and procedures applied by the EUIPO. Although the EUIPO in cooperation with national IP offices has established converged practices within the framework of the European Trade Mark and Design Network (EUIPN)[65], certain issues were out of scope and not harmonised, as they would require changes to the national laws.

As shown by the First Public Consultation[66], there is a broad agreement among users of the design protection systems in Europe that the present level of approximation between national design laws, as well as with the RCD system, has not been sufficient. IP user organisations unanimously stated that further harmonisation of national design law, in particular with regard to procedural issues is needed. In response to the Second Public Consultation, the (outstanding) harmonisation of registration procedures also ranked high in terms of suitable measures to raise the usage of design protection. At a political level,

[63] Cf. Recital 5 of the Preamble to the DDir (similar to the limited scope of harmonisation imposed by the original Trade Mark Directive 89/104/EEC of 21 December 1988).
[64] For details, see SWD(2020) 264, p. 51 and 114.
[65] According to Article 151(1)(c) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, the EUIPO is tasked with promoting convergence of practices and tools in the fields of trade marks and designs, in cooperation with the central industrial property offices in the Member States, including the Benelux Office for Intellectual Property. Article 152 of that Regulation provides for a legal and financial framework for cooperation to promote convergence of practices and tools. For the activities of the EUIPN see European Union Intellectual Property Network (tmdn.org)
[66] For details, see SWD(2020) 264, p. 123, 124.

the Council[67] called for the revision of the industrial designs system in the Union to address and consider measures aimed at supporting the complementary relationship between the Community, national and regional design protection systems, as well as efforts to reduce areas of divergence within the design protection system in the Union. In addition, the European Parliament called for further harmonisation of the design application and invalidity procedures in the Member States and suggested that the Commission also thinks about aligning the DDir and CDR with a view to creating greater legal certainty[68].

As assessed in detail and supported by evidence in the evaluation[69], the existing gaps in harmonisation affect a variety of procedural areas. The following important examples illustrate practical problems caused by the non-harmonisation of rules and practices.

(a) Means and requirements of design representation

The requirements of national IP offices concerning representations of a design in an application for registration are (like in the case of the RCD) not yet aligned to the digital age, and differ in addition significantly. The First Public Consultation showed that among the aspects not covered by the DDir, those requirements were considered most in need of common modernisation and harmonisation. This is confirmed by a benchmarking study conducted in the EUIPN as part of the convergence programme on graphic representations of designs. The representation requirements relate, among others, to the number and types of viewings, the use of appropriate disclaimers, the neutral background[70] and the acceptance of computer-animated representations and 3D digital representations. While the EUIPN has so far managed to converge practices on the use of disclaimers, types of views and the representation of designs in a neutral background, further convergence of practices has not been possible partly due to (divergent) legal constraints in the Member States[71]. These legal constraints and divergences prevent applicants from both using best available technology for representing their designs and claiming convention priority[72] by using the same material for subsequent applications across jurisdictions. This creates additional costs for them and may lead to national rights of different scope for the same design.

Priority can only be claimed for the same previous application. Different national formal representation requirements result in diverging design applications, which in turn puts in doubt whether they represent the same design and priority can be claimed.

Box 3: Means and requirements of design presentation – practical example

[67] See Conclusions on intellectual property policy and the revision of the industrial designs system referred to in footnote 1, paragraph 21, first and fourth bullet point.
[68] Report on an intellectual property action plan to support the EU's recovery and resilience, as adopted by the Legal Affairs Committee on 30 September 2021 (A9-0284/2021), paras 32 and 35.
[69] SWD(2020) 264, p. 36 to 47.
[70] Representing a design in a neutral background is of key importance to avoid hampering automated image searches. Divergences of national rules therefore make it more difficult to develop common IT tools in the EU.
[71] For details see Common Communication on convergence on graphic representations of designs, May 2018, Common_communication7_en.pdf (europa.eu).
[72] A priority date is used to establish the precedence of rights, and has crucial importance for assessing novelty of a design. Applicants can rely on 'convention priority' within the meaning of the Paris Convention for the Protection of Industrial Property (1883) to gain a right of priority of six months from the date of filing of the first application in any State party to that Convention.

If designer X applies for a design right in France, it would be allowed to submit an unlimited number of design views. If X wants to subsequently claim priority on the basis of that right when applying for an RCD, X can merely file a maximum of 7 design views. On the other side, while national IP Offices usually allow applicants to represent their designs by static graphic or photographic reproduction only, at the EUIPO at least 3D digital representations are admitted, even though merely as an additional technical means of viewing the design[73]. Should however it become possible to represent a design by a video file at one of the national IP Offices for example without that this is also made possible at the EUIPO, the applicant would again not be able to use the same material for subsequent applications at national and EU level based on priority.

(b) Option and conditions for filing a multiple application

The option of combining a number of designs in one (multiple) application is available in most but not all Member States. To the extent this is the case, the conditions are the more not the same. Like the RCD regime, most national laws still require that the designs applied for belong to the same class of the Locarno Classification. Exceptions are Germany and the Benelux countries. The maximum number of designs that can be included in a multiple application also varies across the EU. Most interviewees from IP offices considered the unity of class requirement not helpful or no longer necessary. Different rules make multiple applications burdensome and costly for businesses in the context of multi-jurisdictional filings. 88% of all respondents to the First Public Consultation thus saw need of harmonisation.

Box 4: Filing of multiple applications – practical example

Where designer X can apply for a multiple application in Germany for designs belonging to different classes, X would not be able to reuse the same materials in most other member states and at the EUIPO that only allow multiple applications for designs belonging to the same class, but would have to file more than one application to seek protection for the same designs. This many not only lead to extra filing fees, but as mentioned above, not filing exactly the same material may also lead to priority issues.

(c) Option and length of deferment of publication

Many but not all Member States have provisions on deferred publication of a design registration[74]. Such a deferral helps prevent copycats while a product is launched. The available period of publication deferral varies significantly from 6 to 30 months[75]. Most respondents to the public consultation (76%) are in favour of harmonisation of the rules on deferment of publication, and some respondents suggest making the option to request a deferral mandatory at national level. Different national rules create legal uncertainty, extra costs in managing design portfolios, and an uneven level playing field for businesses.

[73] It does not replace the conventional static views. See Article 36(5) of the Regulation and Article 4 of the Implementing Regulation.

[74] The option of deferring the publication serves avoiding that the normal publication following registration of a design could in some cases destroy or jeopardise the success of a commercial operation involving a design (Recital 26 CDR).

[75] The period of deferral is 6 months in Denmark and Sweden; 12 months in the Benelux countries, and Slovenia; 18 months in Austria; and 30 months in the Czech Republic, Spain and Lithuania.

Due to the different deferment periods, a design applicant wanting to make use of this option in several Member States can only benefit of the minimum deferment period available if these countries offer this possibility at all.

Box 5: Deferment of publication – practical example

If company X wants to prevent competitors in Slovenia and the Czech Republic from knowing which product X is about to launch on the market, X can ask for deferment of publication in both countries. However, X will have to bear in mind that the period for deferral in Slovenia is 18 months shorter than in the Czech Republic. Therefore, after the shortest period, i.e. 12 months in the case of Slovenia, application of X will get published and the competitor in the Czech Republic may become aware of X's Slovenian design application. But also for competing undertakings that are merely active in one territory this lack of harmonisation may be detrimental, for instance in the case that company X does not have the possibility to request for deferment of publication, while company Y can avail of this option for 30 months and thus has an advantage over the competitor.

(d) Extent of substantive examination

In contrast to the EUIPO and the large majority in other Member States, five national IP Offices still examine ex officio whether a design applied for meets the requirements of novelty and individual character. These are the offices in the Czech Republic, Finland, Hungary, Romania and Slovakia. While the benefit of that examination is quite limited for design applicants, given that it only extends to prior registered designs (without coverage of non-registered designs), it negatively affects the overall duration of registration proceedings in the offices concerned, causes extra burdens and costs for both IP offices and businesses seeking design protection at national level[76], and prevents them from enjoying a level playing field compared to the Community design. On average time to register design in those five Member States was 2.1 times longer in 2019 than in the remaining countries.[77] Around 750 to 1000 applications annually are affected[78].

Box 6: Extent of substantive examination – practical examples

While company X would be able to get a registration in Spain within a few days, company Y in Hungary would need to wait at least three months before being able to enforce its design right[79]. This puts competitors in these countries in an unequal position. If company X needs to enforce its design right urgently and has no time to wait, it may decide to apply for an RCD as this would cover the whole EU and be registered within a few days. Not only does this lead to extra filing costs, X also runs the risk that priority may not be successfully claimed due to different formal requirement as

[76] Even deploying AI-based search tools makes it impossible for novelty examination to be exhaustive, as any earlier design in the world (registered or not) can be novelty destroying. Benefits are thus of limited value for applicants.
[77] Based on EUIPO data, in 2019 simple average time from application to registration of a design in five Member States with prior examination was 168 days, while in 19 others for which data was available – 80 days. The difference was even higher in preceding years.
[78] In CZ these would affect between 150 and 250 applications each year, in Finland between 100 and 140 , around 130 in Hungary , from 100 to 170 in SK , between 270 and 370 in RO (based on annual reports of the respective IP officies).
[79] In case no deficiencies are found. If there are deficiencies in the application the average time it takes for an application to be registered is 12 months for Hungary and 38 days in Spain.

to the maximum number of views, being 7 for RCDs and 100 in Hungary for electronic filings. As a consequence, the RCD may be invalidated due to lack of novelty and individual character vis-à-vis the previous Hungarian filing and the extra costs for the filing of the RCD were thus made in vain.

(e) Administrative invalidity procedures

While at Union level and in part of the Member States proceedings to invalidate a registered design can be brought directly before the EUIPO and national IP offices[80] respectively, in other Member States proceedings to invalidate a registered national design may only be brought before a judicial body[81].

Applications to court for **injunctions** or **declarations** of invalidity can add to the overall transaction costs involved in obtaining and maintaining a registered design in the EU. The results from both the First and the Second Public Consultation clearly show that harmonisation of the approach is desired. The absence of administrative invalidity procedures in some Member States also hinders a further harmonisation of practices and tools as developed in the EUIPN.

Moreover, litigation costs for pursuing **infringement** cases/**invalidity** cases is considered as one of the top three costs of having a design. Also the clear majority of respondents to the Second Public Consultation stressed the importance of introducing quick and inexpensive invalidity proceedings in all the national IP offices and see no reason why the situation for designs should differ from that of trade marks[82]. The non-availability of office-based proceedings in a part of the Union makes the design system in the EU particularly burdensome and expensive for SMEs and individual designers to go against registered designs not meriting protection in these countries.

In particular, the costs for the required legal representation by lawyers, including procurators, which normally exceed those involved by the representation through trade mark and design attorneys admitted to act before national IP offices (not least due to the greater legal complexity involved in court proceedings), is a reason for SMEs or individual designers not to go to court. In addition, the court fees are usually higher than the fees for invalidity proceedings requested by national offices being on average 285 EUR[83]. Backlogs at courts may also additionally delay the rendering of final decisions. The result is that in countries with administrative invalid proceedings the hurdle to start such proceedings is lower and the register is more likely to be cleaned of invalid designs. It also means that in countries where competitors can get a registered design declared invalid only through complex and costly court proceedings, the economic costs of registering invalid designs are "passed on" to them.

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[80] According to data obtained through a targeted questionnaire prepared by the Commission and addressed to national IP Offices in 2019 (IPO Questionnaire), office-based invalidity procedures are currently available in Austria, Bulgaria, Croatia, the Czech Republic, Denmark, Germany, Hungary, Ireland, Poland and Portugal.

[81] According to the IPO Qurestionnaire, a judicial procedure with the competent court to get a registered design invalidated is required in the Benelux countries, Cyprus, Estonia, Finland, France, Greece, Italy, Latvia, Lithuania, Romania, Slovenia, Spain, and Sweden.

[82] Following the trade mark reform, Member States are required to provide for office-based procedures for the revocation and declaration of invalidity of a registered trade mark (Article 45 of Directive (EU) 2015/2436 of 16 December 2015 of the European Parliament and of the Council to approximate the laws of Member States relating to trade marks).

[83] Fees range from EUR 77,70 in Czech Republic to EUR 550 in Austria. Data taken from the IPO survey.

Box 7: Invalidity proceedings – practical example

Company X intends to put a new design product into the whole EU market. However, X is concerned that the product could infringe both a registered trade mark and design in Finland. If X is of the view that neither of these registrations merit protection and wants to have them cancelled by the competent authorities, it would have to proceed differently. While for cancelling the registered trade mark X could file an application for a declaration of invalidity before the Finnish Patent and Registration Office, paying an official fee of EUR400 if done electronically, X would have to initiate judicial invalidity proceedings before the competent Market Court in Finland to get the registered design declared invalid, paying a much higher official fee of EUR2050 as legal entity.

Conclusion

The non-harmonisation of procedures, including the resulting limited convergence of practices, have a series of significant adverse consequences for all businesses and individual designers. This applies both to applicants active in different markets in Europe[84] and users of a single national system. Indeed, the differences between the existing regimes, for example, the availability of certain procedures and tools, legal uncertainty as well as speed of registration, lead to an uneven level playing field which is to the detriment of all users of the European design system, regardless of the geographical scope of design protection they seek to obtain. As a result, a company, planning its design strategy, already faces a multitude of unevenly regulated regimes, which present applicants with different degrees of accessibility, difficulty, predictability and speed in obtaining design protection leading to: higher costs and delays; underuse of (part of) the design systems and distortion of competition.

First, there is a direct increase in costs for cross-border filers. Due to divergent procedures applicants cannot use the same material across jurisdictions, have to manage portfolios of rights of different scope and be aware of the specificities of the different protection systems. As a consequence, they are obliged to: (a) increase in-house expertise so as to be in a position to internalise the knowledge necessary for effectively dealing with the various aspects of the system in all Member States, (b) seek expensive professional advice, often in the form of an international network of external consultants, especially when the issues involved require local legal expertise, and (c) develop and maintain overcomplicated data management tools in order to manage its designs portfolio efficiently, taking due account of the divergent rules applicable.

Second, the different standards applicable in different jurisdictions lead to an increased danger of forum shopping, since companies are often tempted to use one system instead of another, not on the basis of their marketing needs, but rather on the basis of convenience criteria like the ease or speed with which design registration can be obtained in a particular territory. For example, it may be known among design users that the examination practice is more rigorous in one Member State than in another (as e.g. not including the assessment of prior art), and, consequently, decide to obtain design protection at the latter IP office (or, alternatively, at the EUIPO, which for example does not examine prior art ex officio either). As a possible consequence thereof, the situations

[84] As also confirmed by the responses to the Second Public Consultation, in particular SMEs partly apply first for the registration of their designs at national level to save costs before applying also for protection in the form of an RCD based on so-called convention priority, or make use of several national systems in parallel to register a number of national designs, as part of their company's marketing strategy.

of some national IP offices might become unsustainable which would be to the detriment of individual designers and SMEs that apply in one or two member states only or first obtain design protection at national level before deciding to apply elsewhere on the basis of convention priority. Moreover, it would endanger the fundamental principle of coexistence (including harmonious complementarity and free choice) between RCD and national design systems, which is so much supported by stakeholders (as in the trade mark field), could be put at risk.

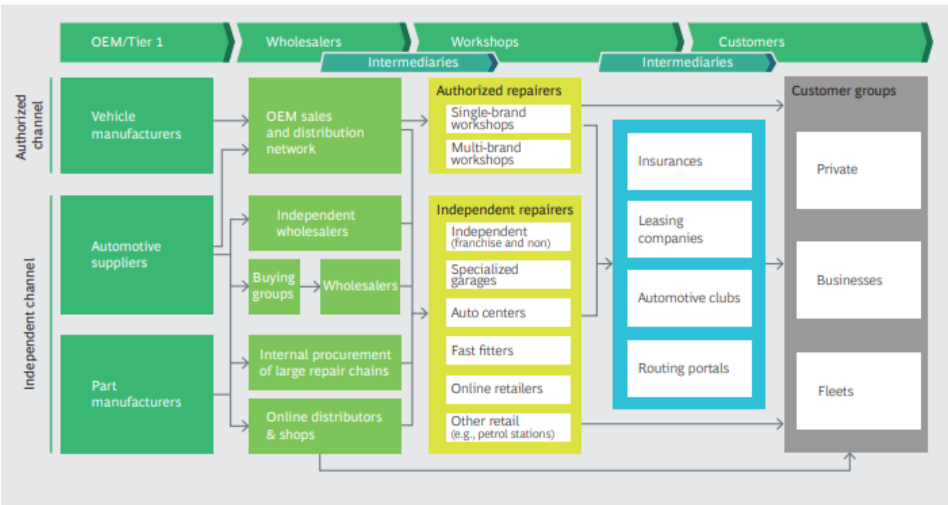
Third, the above mentioned deficiencies also distort the level playing field for companies, with further negative consequences on the competitiveness of EU companies and the competiveness of the EU as a whole. It should also be noted that the above effects are more acute for SMEs and individual applicants, even if active in only one or two markets and thus are more impacted by less efficient national protection systems. To the extent that they are active on several markets, they have less resources to hire expensive teams of international professional consultants to cater for their different filing needs. This leads to discrimination and artificial barriers, since small companies find it increasingly difficult to compete with big multinationals.

2.2. How will the problems evolve?

2.2.1. Single market and competition in spare parts market

Figure 2.1 illustrates the structure of the automotive aftermarket. Competition in the European aftermarket of auto parts would continue to occur across two channels: authorised and independent. The former includes vehicle manufacturers (VM) and their affiliated repair shops. Spare parts distributed in this channel are manufactured either by the VM themselves or by original equipment suppliers (OESs) that supply the parts for the vehicle assembly. The independent aftermarket includes OES that supply spare parts under their own brands and independent suppliers that do not supply parts for vehicle assembly i.e. have no formal contractual arrangements with vehicle manufacturers (hereafter “non-OES”). Suppliers in this independent market rely on wholesale distributors to deliver parts to repair shops.

Figure 2.1. Aftermarket separated into authorised and independent channels



Source: Exhibit 1 in BCG, CLEPA and Wolk After Sales (March, 2021) *At the crossroads: The European Aftermarket 2030.*

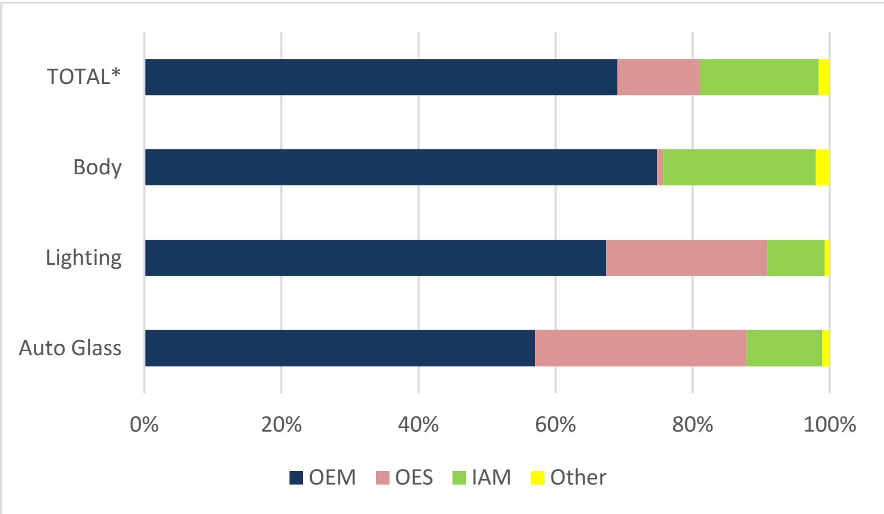
Producers

In Member States **without a repair clause,** VM would continue prohibiting the production, putting on the market and offering for sale of identical parts by independent manufacturers on the basis of their national design rights.

Location of production: Non-OES continue foregoing production in these markets. The evidence point that this is indeed the case as fewer production sites are owned by the non-OES parts producers in markets without a repair clause.[85] OES, on the contrary, would keep production sites often located in the protected markets. This is because of geographical proximity of OES and VM car assembly sites.

Putting on the market: OES' contractual arrangements with VM may continue to prevent or hamper the former from supplying the aftermarket directly. Figure 2.2 shows that this is indeed the case for the segment of body parts where there is very limited presence of OES brands but not for lighting and auto glass segments where competition from OES brands is much stronger as reflected in higher market shares. Still, OES would continue to be barred by VM from directly supplying lighting and glass segments in MS without a repair clause; the distribution of their spare parts production shifts exclusively to the VM resulting in undiversified customer portfolio. Finally, even if the OES are allowed to market spare parts in the EU aftermarkets, they might remain prohibited to produce on EU territory parts supposed to be exported to third countries (e.g. Australia) where no design protection of spare parts exists.

Figure 2.2. Market shares by segment and origin of the brand (whole EU, 2019)



Note(s): (*) Total value reflect three market segments: body, lighting and auto glass. The production of body panels was traditionally a core activity of VM. Metal body panels are still mostly produced by the OEM whereas plastic panels, such as bumpers, are fully sourced to OES on the basis of exclusivity contracts. Still, OES do not supply parts with their own logo to the aftermarket in parallel. The only competition in this segment comes from non-OES who hold 22% of the market.
Source: VVA *et al.* (2021) Tables 16-18.

In Member States with a repair clause, the aftermarket would be sustained but as these markets would not comprise the entire internal market, it will continue to suffer from the **lack of economies of scale**. Limited access to EU-wide market with the growing

[85] Wolk After Sales (2021), supra note. Section 3.1.2. Purchasing criteria.

technological complexity of spare part production will make it harder for independent producers to cover increasing fixed cost of bringing visible spare parts to the market.

In Member States with a repair clause, independent producers (non-OES) will continue to compete equally with OES. They would be still, however, at disadvantage as they cannot benefit from the economies of scale offered by a single market. They would not be allowed to place their products in 16 Member States that represent 49% of the visible spare part market in the EU. Since they do not have supply contracts with VMs they would keep struggling for higher market volumes to recuperate fixed costs of investments i.e. investments into product development and production lines.

The cost of reverse engineering[86] is expected to increase in the future. This is driven by the increased use of composite materials in the production of vehicles. Composite materials reduce weight of the car increasing their performance and generating savings on the use. On one hand, the production of composites is becoming increasingly cheaper and is being done by an increasing number of manufacturers. On the other, processing higher-quality composites requires high temperatures, an extremely clean work environment, and labour-intensive processes. Finally, in contrast to, parts made of rubber, plastic, tool steel, stainless steel, and aluminium alloys composites cannot be 3D printed.[87] This growing technological complexity favours VMs and their affiliates.

Wholesale distributors

Sourcing from a single supplier will continue as an important factor in repairer purchasing decisions.[88] It is linked to the process convenience by ordering, delivery and generating price discounts. **Independent parts distributors will remain at disadvantage as they are no longer in the position to offer their customers a full range of spare parts, i.e. including visible spare parts**. The same is true for OES with regard to car makers or models where they have no supply contracts with but would nevertheless prefer to offer a full range of spare parts.

There are additional knock-on effects resulting from design protection. The elimination of competition in the submarket of visible spare parts necessarily affects the whole EUR 50.7 billion market of automotive spare parts (as of 2019) by shifting the balance of power, fragile as it is there anyway, in favour of the VMs. More specifically, distribution channels in the European automotive market would remain below efficiency frontier. In 2017, the three leading aftermarket players together control just 15 percent of the market. By contrast, the consolidation process in the US is already well advanced with the top three players boosting a combined market share of almost 50 percent.[89] The financial pressure that companies experienced due to reduced sales during the covid-19 pandemic will likely accelerate industry consolidation across the value chain in the EU. Current divergent rules on design protection may constrain this healthy consolidation process, in particular when it comes to independent players, leading to suboptimal outcomes.

[86] A process by which the design of an object (visible part) is re-created through the analysis of its structure, function and operation using a physical part as a starting point.

[87] Hoberg, F. (2020, October 10) *Ersatzteile aus dem Drucker – doch das Problem liegt in der Stabilität*. *Die Welt*.

[88] Work After Sales (2020), supra note. Section 4.1. *Manufacturing sites for visible parts*.

[89] Roland Berger (2018, June) *Survival of the Fittest*.

Economies of scale are needed to generate savings in parts procurement, to optimize logistics and warehousing costs.

Repairers

Independent (body) repairers would continue to be forced to buy design protected visible spare parts from their competitors, the authorised car dealers, necessarily at considerable margins. At the same time, authorised car dealers may keep discounts from VMs. Accordingly, rivalry in the aftermarkets remains weakened.

In the future, competition between the repairers will be shaped with **the secularly stagnating demand for collision repairs** on one hand **and increased connectivity** on the other. Fewer miles driven every year and improved security technology (Advanced Driver Assistance Systems – ADAS) will reduce collision rates by ~15% until 2030 leading to fewer repairs[90]. Furthermore, competition between VM affiliated and independent repairers will be impacted by fleet connectivity. By 2030, around 50% of the fleet will have connectivity that includes direct data streaming, processing, and communication with external parties.[91] The VMs have an advantage over the independent channel because of their direct data access.[92]

Consumers

In Member States without a repair clause, consumers would continue to be forced to buy visible spare parts exclusively from the VM and their distribution channel as supplying from another source would constitute an IP infringement. Since visible spare parts are not interchangeable between VM competition may only work indirectly through the primary automotive market, mainly through brand reputation effects and the proportion of buyers who make their choice taking into account the lifetime costs of a car. However, as suggested in the Evaluation of the MVBER, at least for passenger cars, links would remain weak between the primary automotive markets and the aftermarkets.[93] As explained above (see Section 2.1.1), the vehicle owner remains a captive consumer, subject to a tied pricing system and the inherent risk to be overcharged for spare parts.

Online sales are restricted by the fragmented IP and represents an average share of 2.3% of total purchasing value.[94] Buying via the internet in the MS with a repair clause, a consumer in a Member States without repair clause has to demonstrate that such order is done privately and for non-commercial purposes, otherwise such purchase would constitute an IP infringement. The risk of being sued for IP infringement discourages repair service providers to buy cross-border. Furthermore, to benefit from discounts workshops have an incentive to stick to the specific distributor (supplier) rather than looking for ad-hoc more competitive offers. Therefore, online (cross-border) sales are expected to have limited impact on increasing competition on the spare parts market.

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[90] BCG, CLEPA & Wolk After Sales (2021, March) *At the crossroads: The European Aftermarket 2030*.
[91] Ibidem.
[92] The recent MVBER Evaluation COM(2021)264 has concluded that independent repairers will only be able to continue to exert competitive pressure if they have access to key inputs such as spare parts, tools, training, technical information and vehicle-generated data.
[93] This may be the case for the passenger cars. See Section 2.1. in COM(2021)264.
[94] Ibidem. Wolk After Sales Report (2021).

The degree to which car manufactures exploit design protection in their pricing strategies varies substantially. Until recently, the usual approach of carmakers to price spare parts was rather simple: in most cases, carmakers simply set the prices of spare parts equal to a fixed multiplier of the respective manufacturing costs. The innovation was brought in 2008 by algorithmic pricing (Partneo). According to publically available information, five major carmakers used an algorithmic pricing software (Partneo) to identify the maximum price consumers would be willing to pay for automotive spare parts. Thanks to this software, between 2008 and 2013 these major carmakers increased prices of visible spare parts by 15% on average, boosting their total revenues by around EUR 1.5 billion over nearly ten years.[95] In consequence, without the design reform, one could expect OEM to extract even more spare parts rent than currently, thanks to sophisticated price differentiation techniques.

2.2.2. Regulatory burdens

Outdated procedures

Without update and simplification of RCD procedures, the RCD system would continue not meeting modern business needs and unnecessarily impose burdens on businesses, SMEs and individual designers to make effective and efficient use of the system.

RCD fees

Without changes, the real cost of fees would continue to decline together with inflation. Already in 2020 the fees were 26% lower in real terms than in 2002. Taking into account ECB inflation forecast, in 2023 they are expected to be 30% lower than in 2002[96]. However, without streamlining of the RCD fee structure and in particular an adjustment of the amount of fees to be paid for the registration of RCDs, the Community design system would not meet its objective of presenting the minimum cost and difficulty to applicants, so as to make it readily accessible to SMEs as well as to individual designers[97], stifling innovation and the development of new products.

Specifically, without creating a more balanced, less complex and more transparent RCD fee system benefiting small and large entities equally, SMEs and individual designers would continue to be discouraged from seeking Union-wide design protection in registered form. Larger entities filing numerous designs would continue to be privileged and smaller ones continue cross-subsidising the former.

In addition, applicants of all types would continue facing unnecessary administrative burdens when having to pay a separate publication fee shortly after the application fee. Also, certain fees would continue to be charged in relation to the design registry that do

[95] For media coverage of this case, we refer to: Philippin, Y. (2018, May 31). How Renault and PSA Peugeot Citroën secretly hiked global cost of spare parts by €1.5bn. *Mediapart*; Gnirke, K. (2018a, May 31). Unternehmensberatung soll Renault und Peugeot bei Preisabsprachen geholfen haben. *Der Spiegel Mobilität*; Gnirke, K. (2018, June 1). Die Abzock-Konzerne. *Der Spiegel Mobilität*; Bergin T. & Frost L. (2018, June 3). Software and stealth: how carmakers hike spare parts prices. *Reuters Technology News*; Mandrescu, D. (2018, June 7). When algorithmic pricing meets concerted practices - the case of Partneo. *CoRe Blog*.

[96] ECB staff macroeconomic projections for the euro area (September 2021): Inflation in 2021 of 2.2%, in 2022 of 1.7% and in 2023 of 1.5%.

[97] Recital 24.

not apply for EUTMs, such differences unnecessarily complicating the work of both applicants and the EUIPO, and increasing costs to maintain different (operations) management tools.

Divergent national rules

Without appropriate changes, the current sub-optimal conditions for European businesses and the under-developed complementarity between the various design systems are not likely to improve. It is true that there could be some promising further convergence on design law aspects achieved through the EUIPN based on the cooperation framework established in the context of the trade mark reform[98]. However, such collaboration among IP Offices in the EU also clearly revealed that the existing legal differences in the laws of the Member States are a hindrance to further alignment of practices in the EU. National IP offices, which due to existing legal differences are prevented from participating in cooperation projects with the EUIPO and other IP offices, run the risk of falling behind in terms of automation, timeliness, reliability, predictability and user-friendliness. The less attractive they become, compared to the RCD system, the greater is the risk that design owners cease to use them altogether, opting for RCD protection instead. In the long run, this may threaten the viability of certain national systems and the harmonious and complementary coexistence of the two systems which ensures the principle of free choice. This applies all the more so as there is no harmonisation achieved at international level either (i.e. EU action remains necessary). The long-pending Draft Design Law Treaty (similar to the Singapore Treaty on the Law of Trademarks), aiming at simplifying and harmonising administrative procedures in respect of national design applications, is still far from being adopted.

3. WHY SHOULD THE EU ACT?

3.1. Legal basis

In the context of the establishment and functioning of the internal market, Article 118(1) TFEU empowers the European Parliament and the Council to establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the EU, including the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.

Furthermore, Article 114(1) TFEU empowers the European Parliament and the Council to adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States, which have as their object the establishment and functioning of the internal market.

3.2. Subsidiarity: Necessity of EU action

The Community design (in registered and unregistered form) is a self-standing EU intellectual property title which has been created by an EU Regulation. In as much as the analysis carried out as part of this impact assessment proved that the modification of certain provisions of the Regulation is necessary in order to improve and streamline in

[98] See information provided in footnote 65.

particular the RCD system, only the EU legislator is entitled to make the necessary amendments[99].

The same goes for (simultaneously) necessary amendments of corresponding provisions, which form already part of the DDir.

Moreover, taking into account that the identified problems related to the significant divergences of the regulatory framework either do not allow, or notably distort, a level playing field for EU companies with further negative consequences on their competitiveness and that of the EU as a whole (e.g. spare parts), it is advisable to adopt measures that can improve the relevant conditions for the functioning of the internal market. Such measures aiming to extend the current level of approximation through the DDir can only be taken at EU level, all the more so given the need to ensure coherence with the RCD system. It has to be considered in this context that the RCD system is embedded in the European design system which is built on the principle of coexistence and complementarity between national and Union-wide design protection. While the CD Regulation provides a complete system where all issues of substantive and procedural law are provided for, the current level of legislative approximation reflected in the DDir is only limited to selected provisions of substantive law. In order to be able to ensure effective and sustainable coexistence and complementarity between the components involved, it is necessary to create an overall harmonious system of design protection in Europe with similar substantive rules and at least principal procedural provisions which are compatible.

As regards the issue of design protection for spare parts specifically, it is to be added that the completion of the internal market for spare parts can only be achieved at EU level. The more than 20 years of experience with the provisions of Article 14 DDir has shown no strong trend towards harmonisation among Member States on a voluntary basis (despite the introduction of a repair clause in a few more Member States) or through self-regulation by the industry. In terms of proportionality, action at EU level does not cause any immediate costs. Aftermarket liberalisation only requires legal acts in those Member States that currently protect spare parts to lift this protection and hence causes the lowest administrative costs of all options considered.

3.3. Subsidiarity: Added value of EU action

Action at EU level would ensure that the design protection system in Europe as a whole gets substantially more accessible and efficient for businesses, in particular SMEs and individual designers. It would further ensure the outstanding completion of the single market for repair spare parts to the substantial benefit of consumers being able to choose between competing parts at lower prices.

[99] This is all the more valid in view of the EUIPO being a regulatory Agency of the EU with legal, administrative and financial autonomy, which was created by the Council to manage the RCD system (in addition to that of the EU trade mark).

4. Objectives: What is to be achieved?

4.1. General objectives

The general aim of the reform initiative on the legislation on industrial designs is to promote contribution to design excellence, innovation and competitiveness in the EU by ensuring that the design protection system is fit for purpose in the digital age and becomes more accessible and efficient for individual designers, SMEs and design intensive industries. Furthermore, it aims at completing the single market for repair spare parts.

4.2. Specific objective

This initiative has three specific objectives linked to the respective problems identified:

- Opening up the spare parts aftermarket for competition (**Objective 1**);
- Improving the accessibility, efficiency and affordability of registered Community design protection (**Objective 2**);
- Enhancing complementarity and interoperability between the Community and national design systems, in particular through harmonisation of procedural rules (**Objective 3**).

5. What are the available policy options?

5.1. What is the baseline from which options are assessed?

The respective baselines from which options are assessed are already described above in Section 2.2.

5.2. Description of the policy options

5.2.1. Options to tackle Objective 1 on spare parts protection

The decision to open up the aftermarket for competition was already taken at the moment of adoption of the DDir. The latter does not require any harmonisation with respect to the protection of spare parts by a design right. Article 14 stipulates that Member States shall maintain their existing laws in this regard. They may, however, change those provisions only in a way that liberalises the spare parts market (the "freeze plus" solution). A Member State that, at the time of adoption of the DDir, did not grant design protection of spare parts could thus not reintroduce such protection.

Against that background, the options for consideration are the following:

Baseline: The current status quo, as provided for by Article 14 DDir and Article 110(1) CDR, would continue on a permanent basis, i.e. Member States remain free to retain national rules extending design protection to the reproduction of spare parts for the purpose of repair, while no such protection should continue to exist at Union level.

Option 1.1: **Full liberalisation for all designs**, i.e. the market of 'must-match' spare parts would be opened for competition in the entire EU, extending it to both existing and new designs. This option would involve inserting into the DDir a 'repair clause', as contained in Article 110(1) CDR, and allowing the identical reproduction of protected parts of complex products for the purpose of repair. The inserted repair clause would have legal effect for both the future and the past (i.e. be applicable to designs granted before and after its entry into force). Both the CDR and DDir would be explicit in that the repair clause only extends to parts of complex products whose shape is dictated by the product's overall appearance (so-called 'must-match' parts). As it is already the case in liberalised national aftermarkets, parts manufacturers would have to inform consumers about the origin of the parts so that they can make an informed choice between competing spare parts[100].

Option 1.2: **Instant full liberalisation for new designs followed by full liberalisation for old designs after transitional ten-year period**: Same changes as previous option, except that the repair clause to be inserted into the DDir would have instant legal effect only for the future (i.e. be applicable only to designs applied for after entry into force). Designs already granted before entry into force would continue to be protected for a transitional period of ten years.

Option 1.3: **Full liberalisation for new designs**: As in the previous option, the repair clause to be inserted into the DDir would have legal effect only for the future. Designs already granted before entry into force would not be touched and thus be allowed to be protected for the maximum term of 25 years.

5.2.2. Options to tackle Objective 2 on complex procedures and sub-optimal fees

5.2.2.1 Update and simplification of rules

Baseline: Current procedures are maintained.

Sole Option 2: **Simplification and streamlining of RCD procedures** (including through alignment with trade mark reform).

- Update of requirements for the representation of designs (e.g. inclusion of dynamic 3D-representation and video filing)
- Deletion of "unity of class" requirement for multiple applications
- Alignment of RCD proceedings with EU trade mark proceedings.

5.2.2.2 Fees payable for RCD

Baseline: Current fee structure and levels are maintained.

Option 3: **Lower RCD registration fee and easier multiple applications:** This option would require the removal of the unity of class requirement in the CDR for multiple

[100] According to the CJEU in Joined Cases C-397/16 and C-435/16, *Acacia*, persons relying on the repair clause exemption laid down in Article 110 CDR must contribute, as far as possible, to ensuring compliance with the conditions laid down in that provision.

applications and the amendment of the Fees Regulation for the adjustment of fee amounts. In order to ensure equal treatment of applicants with smaller and larger filing volumes, the latter would also involve the introduction of a flat fee per additional design and thus the abolition of bulk discounts being granted at different levels dependent on the number of designs contained in a multiple application. To counterbalance these benefits at filing stage, the above would be coupled with an increase of subsequent renewal fees. This model would allow easier access to RCD protection, in particular for SMEs (cheaper acquisition of the right and first renewal), while at the same time it would safeguard that only those RCDs utilised in the market place remain on the register by increasing subsequent renewals fees for second to fourth renewal.

Sub-option 3.1: According to the first sub-option, the headline fee to obtain a single RCD would be reduced from EUR 350 to EUR 250. For each additional design forming part of a multiple application, the fee would be EUR 125 [101]leading to savings of EUR 125 vis-à-vis a single design application per design. The fee for renewals under this option would be as follows: first renewal – EUR 70; second renewal – EUR 140; third renewal – EUR 280; fourth renewal EUR 560[102]. For this option, the sum of fees for the first two renewals would be equivalent to those under the current fee level, that is EUR 210 in total[103].

Sub-option 3.2: Under the second sub-option, the headline fee would be also EUR 250 but each additional design of a multiple application further discounted to EUR 100 instead of the proposed EUR 125 under sub-option 3.1. This would further promote easy access to RCD protection. However, unlike sub-option 3.1 all renewal fees would be higher than under the current system in order to counterbalance the likely increase of design applications at filing stage. The fees for renewals under this option would be as follows: first renewal – EUR 80; second renewal – EUR 160; third renewal – EUR 320; fourth renewal EUR 640. This option would effectively allow applicants to register two RCDs for the same fee as currently required for a single RCD.

In both cases adjustment of fees would be coupled with a simplification of the fee structure by abolishing the separate publication fee and adding this fee to the registration fee (so that in the above sub-options the reduced headline fee would include the publication fee amount). In order to align RCD rules with those for the EUTM, the transfer fee for RCDs is proposed to be abolished as well. Additionally a cap of 50 designs per application would be introduced to keep expected loss of revenues limited and prevent potential abuses of multiple applications due to abolition of the transfer fee[104].

[101] Under the current system it is EUR 115 for each design from the second to the tenth design and EUR 50 for each design from the eleventh design onwards.

[102] Under the current system it is EUR 90 for the first renewal, EUR 120 for the second, EUR 150 for the third and EUR 180 for the fourth period of renewal.

[103] EUR 90 + EUR 120.

[104] The included abolition of the fee to be paid for the transfer of an application for a RCD to another party will open a possibility that ‘design application service providers’ arise encouraged to make profit from filing multiple applications (collecting design applications from third parties, gathering them in a single application, applying in their own name and subsequently transferring them back to the actual applicants).

5.2.3. Options to tackle Objective 3 on divergent procedural rules

When it comes to consideration of available policy options, the necessary level and focus of approximation of national laws should be assessed. The options under consideration are the following:

Baseline: No further approximation of national design laws and procedures.

Option 4.1: **Partial further approximation of national laws and their coherence with the RCD system.** This option would involve the addition of provisions to the DDir on selected design law aspects not yet addressed therein and identified by stakeholders in greatest need of harmonisation, in particular, concerning procedures, in alignment with relevant provisions contained in the CDR. In terms of procedures, this would allow, *inter alia*, users of all national design protection systems also to a) represent their designs by other means that merely static graphic or photographic reproduction when applying for registration, b) file multiple applications at domestic level by combining several designs in one application, and without being restricted to products belonging to the same Locarno Class, c) request deferment of the publication of a design application for a period of 30 months from the date of filing, d) rapidly obtain a design registration without being subject to prior art examination, and, e) seek for the invalidation of a registered design before the IP office. The addition of principal procedural rules to the DDir would be combined with the further alignment of a few selected substantive law aspects (apart from the spare parts issue) in accordance with the provisions of the CDR. These few additional substantive law aspects concern the legal relevance of the product indication for the scope of design protection, the right to prior use, and the presumptions of ownership and validity.

Option 4.2: Full approximation of national design laws and procedures. This approach would be based on Option 4.1, encompassing its above components, but include all remaining aspects of substantive design law and procedures which are part of the CDR but not of the DDir, such as specific rules on unregistered design protection, designs as objects of property, surrender of a registered design, appeal procedures, general procedures before the IP Office (e.g. oral proceedings, taking of evidence, or notification), or apportionment of costs.

When it comes to options 4.1 and 4.2 it should be furthermore assessed how such an approximation could be pursued. Even though this question touches upon the choice of legal instrument, it is considered that this issue is of crucial importance to addressing the effectiveness and efficiency of both policy options and should be tackled here.

– It could be envisaged that the approximation would be carried out on a voluntary basis (sub-options 4.1a and 4.2a, respectively). In such a case, there would be no further approximation in formal terms, i.e. no changes to the DDir. National offices would be encouraged, by non-legislative means, to align their design laws and procedures. To this end, the Commission would issue a Communication (Recommendation) and/or Member States would agree to approximate their national laws on a voluntary basis. In this context the possibility of converging selected issues within the EUIPN based on the specific cooperation framework to promote convergence of practices, as established under Article 152 of the EUTMR, should be considered. This course of action could be suitable in particular for very technical issues such as the formal requirements for representation of a design.

– Alternatively, the approximation could be mandatory, i.e. driven by an EU legislative measure which would oblige Member States to align their design laws (sub-options 4.1b and 4.2b, respectively).

5.3. Options discarded at an early stage

5.3.1. Spare parts protection

Option 1.4: A system seeking a **short term of design protection**: Under this alternative, design protection for spare parts would be effective for only a limited period of time (such as five years). After this period, the spare parts could no longer be covered by design protection and any third party would be free to produce and/or market them.

Option 1.5: A **remuneration system** for the use of protected designs, including the appropriate level for remuneration. In the context of this option, independent producers could produce spare parts in exchange for a reasonable remuneration to be paid to the holder of the design right.

As already pointed out above, the decision to open up the spare parts aftermarket for competition was already taken at the moment of adoption of the DDir, obliging Member States to "freeze" the legal status quo and permitting them to amend their existing laws only in a way that liberalises the spare parts market. Given that both **Options 1.4** and **1.5** would imply the re-introduction of design protection for repair spare parts (at least) to certain extent in Member States that already fully liberalised their aftermarkets (either in form of time-restricted protection when opting for a shorter term of protection or in form of a license fee to be paid to right holders on terms to be agreed), it is deemed appropriate to discard these options at an early stage as clearly going against the "freeze plus" agreement reflected in Article 14 of the DDir. It appears also politically unrealistic to contemplate the implementation of these options any further in view of the strong opposition to be expected from the Member States that have already opened up their aftermarkets by means of a repair clause. Furthermore, these options were already tested in the context of past initiatives in vain[105]. The introduction of a remuneration system proved in addition to be too complicated and thus unfeasible in practice as the Greek example has shown[106]. The responses to the two public consultations, and, in particular, to the Second Public Consultation in the context of which potential options for solving the problem were consulted with stakeholders also confirmed that there is actually no real support for them.[107]

[105] In order to prevent the creation of a captive market in spare parts, the Commission originally proposed in 1993 (COM(93) 344 final) the inclusion of a limited term of protection for spare parts of only three years. In response to amendments proposed by the European Parliament, the Commission subsequently proposed in an amended proposal of 1996 (COM(96) 66 final) the introduction of a remuneration system to operate as from the date of registration of the design. However, that amended proposal did not meet with approval by the Council either.

[106] Greek design law provides for a repair clause combined with a five-year term of protection and remuneration. However, the remuneration system has never been implemented due to failure of vehicle manufacturers and equipment suppliers in finding an agreement on the amount of royalties.

[107] It is revealing in that context that even the European Automobile Manufaturers' Accociation rather expressed its preference for maintaining the current status quo instead of pleading for these other options.

5.3.2. Further harmonisation of national rules

Option 4.3: A single design rulebook which would entirely replace Member States' design laws by setting uniform rules across the EU. As a result, all national IP offices would apply identical provisions when it comes to their national designs.

This option would be clearly disproportionate in view of the demonstrated needs. It would not take into account at all the historical development of laws in Member States and would unduly deprive them from any kind of flexibility at national level. Accordingly, this option will not be considered any further.

6. WHAT ARE THE IMPACTS OF THE POLICY OPTIONS?

6.1. Spare parts protection

The different options would have varying impacts on single market performance.

6.1.1. Full liberalisation for all designs (Option 1.1)

Abolition of design protection in the aftermarket would lead to increased competition in across the value chain. This option would assure maximum allocative efficiency.

Impact on prices

The impact on car manufacturers will most probably be limited to downstream price competition and will be heterogeneous across VMs. Herz & Mejer (2020) show that there are differences in the degree to which car manufacturers exploit design protection in their pricing strategies. VMs that exploit design protection in their pricing strategies today to a significant degree, will need to adjust their strategies and set lower prices as otherwise the final customers would switch to alternatives.

Still, despite full liberalisation, OEM and OES producers will be able to charge higher prices than that of independent suppliers. According to Wolk After Sales survey,[108] the perceived quality of the product is a very important factor, along with fitting accuracy, that both repairers and customers take into account in their purchasing decisions. Furthermore, the same survey shows that in the perception of the repairers, OEM and OES parts are of higher quality compared to parts produced by independent suppliers.

There will be potential savings to customers in markets where currently no repair clause is in place ranging between EUR 415 and 664 million annually due to price competition (for details see Annex 4). According to Insurance Europe[109], around 12 million motor third-party liability claims are made annually. Assuming that 60%[110] of those claims, i.e. 7.2 million, are made in Member States without a repair clause (including DE and FR), **one arrives at a saving per insurance claim in Member States without a repair clause between EUR 58 and 92**.

[108] Wolk After Sales (2021), supra note, Section 3.1. Purchasing behaviour of workshops.
[109] Insurance Europe. (2019, February). Report on European Motor Insurance Markets.
[110] Proxy with the share of the EU car fleet. Eurostat, Passenger cars, by age.

VMs may try to compensate for their loss of profits drawn from their market power in the spare parts market by increasing their prices for new cars. However, the possibility of passing on higher costs to the primary market will be limited by competition in that primary market. If so, with around 12 million new cars registered[111] annually in pre-Covid years, **the potential annual loss of revenues per car sold is between EUR 34 and 55**.[112]

Impact on competition

Both OES and independent suppliers (non-OES) will benefit from greater operational freedom that will allow them to strengthen their market position and to consolidate. First, OES parts producers in their capacity as VM-suppliers enjoy direct access to the aftermarket. In their capacity as "independent" producers they should be able to offer a full range of spare parts. Second, independent parts producers will be able to sell their parts in the entire EU market. This may lead to more investments in the EU. Third, independent distributors can offer complete lines of spare parts in the entire EU market and benefit from the economies of scale. Finally, independent repairers retain their chance to compete, with prospect of success, against the networks of authorised car dealers/repairers.[113]

In contrast to the situation in 2004, the introduction of a repair clause today may help the independent aftermarket channel remain competitive in the world characterised by reduced profit margins due to declining demand for collision repairs (see Section 2.2.1). Economies of scale that will result from market liberalisation as well as efficiency gains due to possible consolidation may help the independent sector maintain their competitiveness, allowing for investments needed to keep up with digital transformation of the industry. In case the independent channel becomes more competitive, the impact on VMs will go beyond price competition in the downstream market.

First, certain amount of turnover will shift from the VMs to the independent sector. This will presumably happen relatively less in the lighting and glass markets where the market share of VMs brands is the smallest. It may, above all, occur in the market which is of key interest to the car industry: the body panel. Among three visible spare parts segments, body parts is the largest one with the value of EUR 9.7 billion (60% of total) in 2019. The VMs have a very strong position in this market. 75% of sales are OEM parts out of which 73.33% is sold via authorised networks of car manufacturers[114]. Today, in this segment, the main competition comes from independent players (as shown

[111] DG Mobility and Transport (European Commission) (2021), supra note.

[112] Loss of revenue per car is calculated by dividing savings to consumers by the number of new cars registered.

[113] There is a total of 309,172 workshops in the EU27 and only 19% of them are authorised workshops of the VMs. Among them there are 147,039 multi-brand mechanic workshops, 35,966 body/paint workshops and 9,978 car glass workshops (Work After Sales (2021), supra note. p. 18.). Yet, the number of independent garages differ between Member States reflecting the age of the car fleet. Based on data from 2014 in DE, ES, NL and BE – 58% of garages (around 55,500) are not connected to manufacturers, going up to 93- 96% of workshops in Baltic States ". In Eastern Europe, independent workshops are dominant. In Southern Europe there tend to be a large number of independent repairers, while there are a larger number of authorised dealers in France and Germany. Motorists across much of Northern Europe are traditionally loyal to local garages and generally prefer to let professionals choose the appropriate parts rather than fitting it themselves". For details see Study on the operation of the system of access to vehicle repair and maintenance information (2014), page 132.

[114] Wolk After Sales (2021), supra note. p. 40.

in Section 2.2.1) who have manufacturing sites located both in the EU (16 sites) and outside the EU (14 sites in Turkey, China, and Taiwan) [115].

Assuming that market liberalisation will bring the current VM market share (75%) down to the levels of lighting (67%) or glass (57%) segments, between 8% (EUR 0.78 billion) and 18% (EUR 1.75 billion) of the overall body part segment is at stake. Yet the impact will differ between plastic (bumper) and metal body parts (wings, bonnets, doors). Today production of plastic body parts for the first assembly and for aftermarket is fully outsourced to OES who do not engage themselves in the aftermarket. Metal body parts, on the contrary, are produced for the most part by VMs which implies that OES will need to make a necessary investment for setting up production lines if they wish to market metal body parts under their own brand[116]. Still, how much of the body market independent producers will be able to capture depends on how close substitute parts produced by independent parts are. Under a full liberalisation scenario, VMs will be able to rely on the strength of their trade marks and their dealer networks; independent body parts producers, on the other hand, face a severe handicap in amortizing the expensive production tools compared to the VM and their OES. Looking beyond the body part segment, there will be little impact on lighting and glass segments where there is already a strong presence of OES brands (see Figure 2 in Section 2.2.1). Against this background, VMs would rather favour a reform that foresees the direct opening for lighting and glass and delays opening for body parts. This is precisely what the partial repair clause recently adopted in France provides for.

Second, full liberalisation may facilitate the process of consolidation of distribution networks (a trend explained in Section 2.2). **In such situation, car manufacturers may face stronger bargaining power from wholesales who buying larger volumes will be able to negotiate lower prices.** Economies of scale can reach considerable dimensions in the automotive aftermarket. According to Roland Berger[117], savings of between 10 and 20% are possible in the procurement of original parts and the cost of private label parts can be cut by 5–10%. Olivier Wyman[118] finds that in 2014 total after sales (incl. services by branded repair shops, OEM import activities and sales of OEM parts) accounted for a modest share of revenues (11%) but for a significant share (38%) of profits of automakers.

Third, it is to be further expected that full market liberalisation may intensify competition between independent and authorised repairers. On one hand, independent repairers are now in a better competitive position as they are free to choose spare parts and not be obliged to use OEM parts (in line with the objectives of the MVBER). On the other, authorised repairers remain the main distributors of the OEM parts.[119] In order to attract customers, repairers will compete not only by prices but also via other instruments like service (density of networks, availability over time) and product quality (quality of material, warranties). This opening up of the market will also require that consumers pay more attention to the products they purchase. Results of a

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115 Ibidem, p. 49.

116 Ibidem, p. 50.

117 Roland Berger (2018, June) supra note.

118 Olivier Wyman (2015, September) Graphics System Profit 2035 - Reinvent Sales.

119 In the markets with a repair clause 29% of visible parts are sold to the customers via VM authorised workshops. It is 41% in markets without repair clause. Wolk After Sales (2021), supra note.

survey conveyed by Wolk After Sales[120] show that customers actually exert high influence on the repairers' purchasing decisions.

Impact on legal uncertainty

Full harmonisation of rules and their application to all designs would bring legal certainty and predictability to the aftermarket (see further also in relation to administrative and compliance cost).

Impact on investment and innovation

It is inherently difficult to precisely assess the impact of IPR protection on car market innovation. IPRs do not guarantee that the right holder can amortize its investment. They only give it a zone of exclusivity, but the "reward" is exclusively fixed by the market as a result of consumer preference. This preference is exercised at the primary market (new cars) when the car is sold but not on the spare parts market.

VMs will certainly continue to use design as a marketing instrument for their core business irrespective of whether or not there is protection in the aftermarket. Secondly, available evidence at the time of the 2004 impact assessment suggests that the investment in the design of the outer skin of a car is relatively modest. It is at best 0.7 % of a vehicle maker's turnover[121]. This can be compared with profit margins expected by car manufacturers, forecasted for 2021 at 10-12% for Daimler, 10% for PSA, 7-9% for BMW, 6-7.5% for VW, 2.8% for Renault[122]. Related to the number of cars sold **the cost of the body design on average is EUR 50 – 60 per car in the upper segment and significantly less for mass produced cars.** These figures suggest that the impact of introducing a repair clause would be most significant for independent producers that will benefit from a potentially bigger market share. It is also likely that these independent producers, benefiting from the scale of the internal market, will step up their investment and innovation efforts.

Impact on employment

Table 6.1 shows that visible parts for vehicle assembly in the EU are produced at 1,388 unique manufacturing sites worldwide. Out of these, 268 are OEM (VM sites) locations, 1,066 are OES locations. Only about 7% of the sites are located outside the EU and their import accounts for 11% of the EU27 total production.[123] One would expect that OES and independent sites are located in Member States with a repair clause. Yet, the opposite is true as almost 70% of OES sites are located in Member States without a repair clause (Table 6.1). That can be explained by the presence of automotive assembly plants in these Member States.[124] Unfortunately, the available data, does not allow to distinguish how many of the OES manufacturing sites are producing for the first assembly and which for aftermarket. Accordingly, reliable forecasts on what is the impact of extended design protection to spare parts on the location of production sites are not viable.

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[120] Work After Sales (2021), supra note. Section 3.1.2. *Purchasing criteria*.
[121] 2004 Extended Impact Assessment, supra note. p. 30.
[122] Forbes, (2021, August 19) "European Auto Profit Outlook Could Be Undermined By Price Inflation, Chip Shortage"
[123] Wolk After Sales Experts (2021), supra note, Table 27.
[124] ACEA, Interactive map – Automobile assembly and production plants in Europe.

Table 6.1. Geographical location of visible parts manufacturing sites (2019)

	EU27	*With repair clause*	*Without Repair clause*	**Non-EU27**	**Total**
OEM[1,2]	**215**	*69*	*146*	**53**	**268**
OES[1,3]	**1025**	*308*	*717*	**41**	**1066**
Non-OES	**28**	*18*	*10*	**27**	**55**
Total	**1265**	*394*	*871*	**121**	**1388**

Source: ([1]) Reflect location of sites that supplies for first assembly in the EU; ([2]) Sites producing "metal" body parts. ([3]) Including sites producing "plastic" body parts. Table 19 Wolk After Sale Report. Analysis based on MarkLines database.

Looking at production and trade statistics, Wolk After Sales Experts[125] evaluated what is a share of visible parts production that is put on aftermarket in the total production of visible parts. Results of their analysis shows that in 2019, in the EU-27, total domestic consumption of visible parts (both first assembly and aftermarket) was EUR 50.7 billion. Out of this, EUR 6.8 billion, which reflects value of aftermarket at manufacturing level, is put on the aftermarket. The value of non-OES aftermarket at this level totals EUR 1.3 billion[126]. The share of aftermarket in domestic consumption of visible parts is therefore rather small and amount to 13.4%.

Against this background, and taking into account the stagnating demand, consumer preference for quality, strong position of VM in the visible spare parts market (see Section 2.2.) and employment creation by independent producers, we expect limited net impact on manufacturing employment.

Impact on consumer safety

Safety concerns have always been raised by opponents to a repair clause defending car manufacturers' interests, including in reply to the two public consultations. It is argued that the clause constitutes a danger for consumer protection, as allowing spare parts of inferior quality to enter the market. No evidence was however presented in support of that allegation[127]. There is no evidence either that more, or more serious injuries resulting from a car crash occurred in Member States without design protection as compared to Member States with design protection for spare parts[128]. While it is clear that both safety and quality of spare parts are matters of proper concern and must be taken seriously, it must be noted though that the function of design protection is not to generate and safeguard safety and a particular product quality[129]. Provided the substantive

[125] Wolk After Sales Experts (2021), *supra* note, Section 4.

[126] Ibidem, Section 4.3.

[127] Search on Safety Gate for dangerous non-food products (europa.eu) did not reveal any relevant result. As far as car manufacturers have also sporadically alleged that market liberalisation would contribute to more counterfeiting, no relevant evidence was presented either. The Commission nevertheless tried to measure that by means of customs data, which however, turned out practically impossible.

[128] A Study on '*The consequences for the safety of consumers and third parties of the proposed directive amending Directive 98/71/EC on the legal protection of design rights'* commissioned by the EP's Legal Affairs Committee concluded in 2006 that there was no anecdotal or statistical evidence that aftermarket parts had created more safety risks in practice than OE-parts and that it was remarkable that the vehicle industry that had advanced the charge of safety problems was unable to provide any evidence.

[129] Josef Drexl, supra note, p. 243; Annnette Kur, Die Reparaturklausel im Designrecht – ein Ende der Blockade in Sicht?, Mitt. 2019, p. 301, 306.

requirements are met (novelty and individual character of the given design), design law only protects the outside (visible) “appearance” of a product. The structural characteristics of a product (materials, processing methods, fit or specifications, i.e. all relevant factors for safety and quality) are not covered and not taken into account.

The EU Motor Vehicle Type-Approval System provided for in Regulation (EU) 2018/858[130] ensures high levels of road safety and environmental protection for vehicles equipped with new original parts. Therefore, in some cases, the use of non-original spare parts may raise concerns, as they have not been tested in appointed technical laboratories as original parts are. This affects mainly bumpers, bonnets, windscreens, side body panels and side glazing with regard to the tests on pedestrian protection, frontal impact and side impact. Nevertheless, this should not influence design protection legislation, since road safety and environmental protection for vehicles fall under the responsibility of both vehicle homologation and road use authorities, who would need to adopt the necessary measures, if any[131]. In this context, it is worth underlining the role of market surveillance authorities and the mandatory periodic Vehicle Technical Inspections ensuring that all vehicles in use meet given road safety and environmental protection levels.

Apart from that, it is not comprehensible why it should be only a concern of original manufacturers and design right holders respectively to guarantee the safety of the spare parts offered in the market. It can be presumed that independent manufacturers do not only wish to produce inexpensive but also safe and robust spare parts. This is all the more valid if they are genuinely interested to compete in the market on a permanent basis.[132]

Administrative and compliance cost

The ‘full liberalisation for all designs option’ requires amendment of the Design Directive (i.e. inclusion of repair clause) and transposition into national laws of the Member States. It does not involve the creation of new administrative nor compliance costs on producers. The completion of the single market in this area would result in a simplification of daily lives of administrations/courts, companies and consumers. Firstly, there would be no more uncertainty about the applicable law across the EU. Hence, administrative (search) costs, resulting from the existence of different national regimes in parallel, for independent producers and distributors to find out about the legal situation in a given Member State where they want to do business, would fall away. The same holds for the corresponding costs of repair for consumers and repairers in need of finding out if a part has been legally produced within the EU and if they are allowed to use it in their home country or possibly in other Member States they want to travel to or through. Secondly, the removal of design protection would imply the disappearance of litigation cases, resulting in a reduction of burdens for administrations and courts.

[130] Regulation (EU) 2018/858 of 30 May 2018 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Reg. (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC, OJ L 151, 14.6.2018, p. 1 -218.

[131] The 2006 EP Study found that type approval and authorisation “are more than adequate means to ensure safety” and that vehicle manufacturers were unjustified in invoking a general risk to safety from the use of non-original parts to protect their profit margins.

[132] Jutta Figge/Nadine Kahlberg, supra note, p. 250.

Impact on existing design rights

The 'full liberalisation for all designs' option, exempting protection not only for future but also already registered designs in Member States currently not having a repair clause, might conflict with fundamental rights' protection under Article 17 of the Charter of Fundamental Rights of the European Union (CFREU) and the principle of protection of legitimate expectations.

While this question is not entirely clear from the case law of the Court of Justice of the European Union (CJEU), it could be argued in that context that the full extent of guarantees associated with the classic right to property and provided in Article 17(1) CFREU is also available to protected intellectual property under Article 17(2) CFREU. According to CJEU case law, Article 17 CFREU "applies to rights with an asset value creating, under the legal system, an established legal position enabling the holder to exercise those rights autonomously and for his benefit".[133] It is true that the intended encroachment upon already protected design rights would only be "partial", as affecting existing rights only in the aftermarket (only component parts specifically used for repair would be non-infringing) while leaving them untouched in the primary market where the relevant parts are used for the assembly of new cars. However, even though the latter implies that "expropriation" of rights to property can safely be excluded, inserting a repair clause with retrospective legal effect would still constitute an interference with existing rights.

Under the case law of the European Court of Human Rights (ECHR)[134], in order to be lawful, an interference must be "in the public interest", "subject to the conditions provided by law and by the general principles of international law" and must strike a "fair balance" between the demands of the general interest of the Union and the requirements of the protection of the individual's fundamental rights. It is considered that such fair balance and required proportionality could only be ensured by providing for an appropriate transitional period to safeguard the legitimate interests of right holders, which takes us to option 1.2 below.

6.1.2. Instant full liberalisation for new designs followed by full liberalisation for old designs after transitional ten-year period (Option 1.2)

Economic impacts of this option will be the same as for Option 1.1. but they will fully realise only after the transition period of 10 years.

Impact on competition

During the ten-year transition period, competition will be limited to the new car designs put on the market. **Full liberalisation for new designs will promote competition and entry in collision parts for the new, connected cars**, a market that is characterised with declining demand (due to ADAS) and higher entry cost (due to the use of new/composite materials) when compared to traditional combustion engine cars. Furthermore, instant liberalisation for new designs will promote, more broadly, competition in repair services

[133] See Case C-283/11, Sky Osterreich GmbH v. Osterreichischer Rundfunk, para. 34; also, Case T-614/13, Romonta GmbH v Commission, para. 57.
[134] For example, ECHR Judgement of 30 May 2000, Alberghiera v. Italy, Application No. 31524/96, §55.

for connected cars, a market where car manufacturers have a stronger competitive position because of their direct access to the data (see Section 2.2.1.). It has the potential to limit control VMs could gain over aftermarket in the future.

As far as VMs are concerned, today, the VM authorised repair channel capturers a very high share of parts and services for vehicles that are four years and younger.[135] According to BCG *et al*. Report[136], incumbent automakers (i.e. producers of cars with combustion engines) are looking for additional profit pools as they face increased competition from electric/connected car manufacturers (e.g. Tesla). They may therefore go for a deeper penetration in the aftermarket – and in particular for vehicles that are older than five years -- to generate additional profits and revenues. The transitional period of 10 years may help them to capture higher shares in the old (combustion engine) aftermarket.

Impact on consumers

Most VMs launch a new generation of a given model ('redesign') every five to eight years.[137] In the meantime, they may add small changes to the skin and/or interior design of a car to boost consumer interest in a model. Those changes tend to be made to *the bumpers, lights and grille* and are called 'a facelift'. As a result among new cars there are 'redesigned', 'facelifted' and existing models. The two first will be subject to a new repair clause but not the third one as it will benefit from existing protection.

Calculation put forward in Annex 4 shows that at the end of the transition period between 10 and 20% of the passenger car fleet in newly liberalised markets will benefit from a repair clause. Furthermore, during the first five years there will be little room for competition since, as it was mentioned earlier, it is the VM authorised repair channel which capturers a very high share of parts and services for vehicles that are four years and younger. The time where consumers could benefit most today (5-10 years old cars) will not be open to competition.

Impact on legal uncertainty

The clear cut-off date will bring legal certainty to the market and will promote investment.

Impact on existing design rights

As stated above in relation to Option 1.1, the introduction of a repair clause with retrospective effect would interfere with existing design rights which enjoy protection under Article 17(2) CFREU. This does however not mean that these rights are inviolable and must for that reason be absolutely protected[138]. In order to be justifiable, the

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[135] Ibidem.
[136] BCG, CLEPA & Wolk After Sales (2021, March), supra note. Trend 10 on page 14.
[137] See specialised press: https://www.autotrader.com/car-shopping/buying-car-why-you-should-pay-attention-model-cycles-239246; or https://www.carwow.co.uk/guides/glossary/car-facelift-explained-0658#gref.
[138] See CJEU in Case C-360/10 *SABAM*, para 41.

interference would have to strike a “fair balance” of interests involved and be proportional to be admissible[139].

A repair clause would pursue a public interest being well founded in the transitional provision contained in Article 14 of the DDir[140], which is to liberalise the spare parts aftermarket for the purposes of fair and effective competition (linked also to consumer protection and competition as broader public interests). Furthermore, such clause would only involve a partial restriction of design rights in the aftermarket, i.e. only to the extent that relevant parts are used for repair purposes so as to restore the original appearance of the product. The scope and exercise of rights in the primary market would be left entirely untouched. Therefore, it is considered that the legitimate interests of right owners would be sufficiently safeguarded, and that the required fair balance and proportionality would be ensured, under the condition that an appropriate transitional period is provided during which existing design rights would remain unaffected also in the aftermarket[141].

In the light also of the minimum term of design protection to be granted for under Article 26(3) of the TRIPS Agreement (see also Section 8.2 on compatibility with international obligations), which is ten years, it appears to be both appropriate and sufficient that the duration of that transitional period corresponds to that same term of ten years from the date of entry into force of the recast Directive to safeguard the interests of right owners[142]. Even proceeding from the (hardly realistic) assumption that (actually low) design development costs would not be entirely amortisable on the primary market, such transitional period would still offer the chance in particular to owners of “younger” designs (i.e. registered since not long ago) to compensate possible investments which could not be amortised in the primary market.

6.1.3. Full liberalisation for new designs (Option 1.3)

Economic impacts of this option would be the same as for Option 1.1. only if all cars on the market were those newly designed. Taking into account that the new generation of a given model is introduced on average every six to eight years, and that it takes on average 14 years to renew the fleet of vehicles in the EU[143], we can expect to see full benefits of this option after 20 to 25 years (in cases where maximum protection is sought by producers). Calculations in Annex 4 show that 20 years after less than half of the passenger car fleet will benefit from a repair clause. One cannot exclude that in order to maintain profits on spare parts, manufactures might avoid changes to visible spare parts designs and seek protection for the full term of 25 years. Given competitive pressure and fast evolving car designs, this seems, however, rather an unlikely scenario.

6.2. Simplification and streamlining of RCD procedures (Option 2)

Impact on the EUIPO and users of the registration system

[139] See also Jarass, Charta der Grundrechte der Europäischen Union, 3. Aufl. 2016, Art. 17, Rn. 31ff.
[140] Article 14 explicitly permits Member States to change their existing design laws only “if the purpose is to liberalise the market for such parts”.
[141] Cf. Verfassungsrechtliche Anforderungen an die Beschränkung bestehender Designrechte bei der Einführung der Reparaturklausel, Gutachten im Auftrag des Gesamtverbands Autoteile-Handel e. V. (GVA), erstattet von Prof. Dr. Foroud Shirvani (März 2009).
[142] Ibidem, p. 44.
[143] SWD/2018/190 final, “Impact Assessment on general safety and the protection of vehicle occupants and vulnerable road users” (2018), page 10

The proposed modernisation of the filing system by overhauling the requirements for the design representation in an application for a RCD will be greatly beneficial both for applying businesses and the EUIPO. Around a quarter of RCD applications filed in 2019/2020 were deficient. More than half of these (14% of all applications) lacked a proper representation of the design so as to permit all the details of the matter for which protection is sought to be clearly distinguished and allow for publication. The modernised regime on the representation of designs (both allowing and requiring a clear and precise design representation) will facilitate the filing of designs by businesses and individual designers while significantly reducing the potential for deficiencies and increasing legal certainty. Applicants will consequently have to pay less to their lawyers for settling deficiencies in applications.

The new regime on design representation shall involve savings for design applicants of between EUR 160 and EUR 200 per application. Savings are annual, in 2024 they are expected to amount at EUR 0.8 to 1.02 million in total.

Table 6.2. Savings from simplification of requirements for the representation of designs

Saving per owner (application) (EUR)	160 to 200
Applications affected	14.3%
Year 2024 impact	
Applications affected	5,112
Total savings (EUR million)	0.82 to 1.02

Source: Own calculations based on EUIPO data (see Annex 9).

The proposed abolition of the “unity of class requirement” for businesses wishing to apply for RCD protection by means of a multiple application will have different impacts on the EUIPO and users of the RCD system. In fact, the majority of RCDs filed form part of multiple applications. The abolition of the “unity of class requirement” should result in an increase of such applications. This will entail losses of revenue for EUIPO and savings for the users of the RCD system.

According to EUIPO calculations, around 20% of owners might be affected. The simplification of the filing of multiple applications is expected to produce savings annually, in 2024 between EUR 0.6 and 1.35 million depending on the fee system chosen (Options 3 described below).

Table. 6.3. Savings from abolition of unity of class requirement

Fee structure →	**Current**	**Opt. 3.1**	**Opt. 3.2**
Saving per owner (application) (EUR)	492	234	281
Year 2024 impact			
Applications affected	2746 (7.7% of all applications, 20% of owners)		
Total savings (EUR million)	1.35	0.64	0.77

Source: Own calculations based on EUIPO data (see Annex 9).

6.3 RCD fees

Sub-options 3.1 and 3.2

Impact on users of the registration system

Table. 6.4. Overview of current and proposed fee structure for RCD (in EUR)

<table>
<tr><th>First 5 year period
Number of designs per application</th><th>Current</th><th>Option 3.1</th><th>Option 3.2</th></tr>
<tr><td>1</td><td>350</td><td>250</td><td>250</td></tr>
<tr><td>2-10</td><td>175</td><td rowspan="2">125</td><td rowspan="2">100</td></tr>
<tr><td>11 and more*</td><td>80</td></tr>
<tr><th colspan="4">Cost of each renewal (each for 5 years)</th></tr>
<tr><td>1st</td><td>90</td><td>70</td><td>80</td></tr>
<tr><td>2nd</td><td>120</td><td>140</td><td>160</td></tr>
<tr><td>3rd</td><td>150</td><td>280</td><td>320</td></tr>
<tr><td>4th</td><td>180</td><td>560</td><td>640</td></tr>
</table>

Note(s): * no limit currently, in case of Option 3.1 and 3.2 limit of 50 designs per application.
Source: Own calculations based on EUIPO data (see Annex 9).

The new fee structure would benefit those with lower number of designs per application and those who renew protection only once. Excluding the 4th renewal (on which no data is yet available) Sub-option 3.1 promises to deliver net savings in 2024 to the amount of around EUR 4.1 million and sub-option 3.2 of EUR 4.6 million[144]. Businesses would get more value for money and would not pay more for the EUIPO services than is strictly necessary. This would enable in particular SMEs and individual designers to limit their costs and to compete with larger firms on more advantageous conditions, which, in turn, is in the benefit of consumers and, eventually of society as a whole.

The new fee structure will benefit designers who include up to 22 designs in a single application in case of Opt 3.1 and up to 48 designs in case of Opt. 3.2. Taking into account the historical distribution of number of designs per application, 97.7% of applications will experience cost saving in case of Opt 3.1 and 99% in case of Opt. 3.2.

As fees will be updated in the Regulation, they will enter into force immediately after adoption. We expect that this could be as early as mid-2023, with 2024 as the first full year of the new system.

Savings for new owners applying for design protection in 2024 are expected at around EUR 345 (Opt.3.1.) to EUR 494 (Opt. 3.2). Savings for the owners making 1st renewal (extending protection to 10 years) at EUR 173 and EUR 88 respectively. The owners wishing to protect their designs for 15, 20 and 25 years will pay significantly more than currently. The cap in the number of applications in a single filing set at 50 is expected to affect just a small fraction of all owners, nevertheless increasing their cost significantly. Elimination of the transfer fee should produce savings of around EUR 200 per each transferred design. Summary of the expected changes and impacts is provided in the table below and in Annex 9.

[144] The impact of the 4th renewal depends on RCD owners demand. At the time of writing this IA there was no historical experience with the 4th renewal, so its impact is based solely on assumptions. With the 4th renewal the net impact of option 3.1 and 3.2 amounts to average savings of EUR 1.8 million (see also table 6.5). EUIPO provided estimations of the impact of fee changes on their budget (without the 4th renewal). According to EUIPO, the impact of both options 3.1 and 3.2 is around EUR 3.2 million – see Annex 7. The difference comes from using a slightly different methodology. EUIPO calculations are based on individual designs, while the calculations used in this impact assessment are based on number of applications and owners, which required additional assumptions but allowed for identification of the number of entities affected (see also Annex 9).

Table 6.5. Overview of maximum expected impact of options on fees in year 2024.

Fee structure:		Current		Option 3.1		Option 3.2	
	Design owners affected	per owner (EUR)	Total (EUR million)	per owner (EUR)	Total (EUR million)	per owner (EUR)	Total (EUR million)
Application fee	14,659	0	0	-345.79	-5.1	-494.34	-7.2
1st renewal fee*	6,155	0	0	-172.90	-1.1	-87.67	-0.5
2nd renewal fee*	3,157	0	0	175.33	0.6	350.66	1.1
3rd renewal fee*	1,351	0	0	1,139.66	1.5	1,490.33	2
4th renewal fee*	701**	0	0	3,345.93	2.3	4,049.69	2.8
Cap at 50	71	2,539.88	0.18	2,539.88	0.18	2,539.88	0.18
No transfer fee*	375	-1,665	-0.6	-1665.18	-0.6	-1665.18	-0.6
Total			-0.45		-2.25		-2.25
Total without 4th renewal			-0.45		-4.55		-5.05

Note(s): * renewals and transfers are made on individual designs, this is an approximation of affected owners based on proportion of designs per application per owner; ** full assumption, there is no experience yet with 4th renewal
Source: Own assessment see Annex 9.

Consequently, the new fee structure will benefit new design owners and those that prolong protection only once. With the average (2019-2020) number of designs per application standing at 3.4 for companies and 2.3 for natural persons (including also small companies without legal entity), the benefits from the application fee reduction will be slightly higher for an average company. Taking into account that companies renew their designs from 2.5 (1st renewal) to 3.3 (3rd renewal) times more often than persons, the bulk of savings (1st renewal) and costs (2nd and subsequent renewals) will affect them, with negligible impact on persons (see Annex 9).

According to the EUIPO, the lowering of fees is not expected to significantly increase the number of designs protected (based on experience with EUTM fee reductions) at least in 2024 and 2025. In an optimistic scenario however, the new fee system could lead to an increase in the number of design owners in 2030 from 15% (Opt. 3.1) to 21% (Opt.3.2) in comparison to the number expected under the current system. This could translate into additional 2,300-2,500 design owners (Opt. 3.1) to 3,200 to 3,400 (Opt 3.2) in 2030.

Unintended effects

Among the disadvantages of the proposed fee reduction is the allegation that a lower cost for the registration of a RCD could lead to more “frivolous” or “abusive” registrations of designs. However, there is no data which would support such a position. Furthermore, under sub-options 3.1 and 3.2 a flat fee for each additional design in a multiple application applies. In addition, increasing the higher level of renewal fees for RCDs would discourage the maintenance of designs that are not intended to be utilised.

Could fees be further reduced?

Fees for an exclusive unitary IP title like the RCD extending to the whole EU territory need to reflect the economic value of the right granted in order not to distort competition and prevent innovation. Lower fees could encourage flagrant applications, put sustainability of national design protection systems at risk and cut supporting activities of the EUIPO (such as e.g. IP awareness raising campaigns or SME support). Moreover, respondents to the First Public Consultation (including IP owners and their representatives) did not call for drastically lower fees and considered that fees at the EU level should be sufficiently higher than national fees to ensure a proper balance between the protection systems.

Impact on administrative burdens

The abolition of the publication fee would reduce administrative burdens as it unifies the registration and publication fee to a single filing fee, and thus simplifies the registration process of design applications. Applicants would no longer be obliged to pay a separate publication fee at the moment of filing the design application but instead pay only the registration fee. This will in particular make the payment of fees for multiple applications simpler whose publication fees currently decrease in proportion to the number of designs.

Regarding multiple applications, the above proposal to introduce a flat fee per additional design instead of staggering them in two brackets (2nd to 10th design, 11th design upwards), **is therefore also warranted for reasons of simplification**. In the course of application proceedings, one or more designs of a multiple application pertaining to one or both brackets are frequently dropped, requiring a re-calculation of the additional fees. This would be facilitated by a flat fee.

Impact on the EUIPO

According to Article 172(2) of the EUTMR, the amounts of the EU trade mark and design fees shall be fixed at such a level as to ensure that the subsequent revenue is, in principle, sufficient to balance the EUIPO's budget. A potential adjustment of fees in order to make the system more accessible in particular for SMEs and individual designers will therefore need to ensure that this budgetary principle is complied with.

This budgetary principle aims at the Community design system to be financially independent of the revenues from EU trade mark fees but does not strive to be cost-based at a granular level to cover the costs of specific administrative acts. Therefore, policy considerations come into play when determining the levels of individual fees, for instance with respect to the fact that fees for renewals also aim at avoiding an extended protection for RCDs which are actually not commercialised.

RCD revenues account for around 11% of the total fee revenues of the EUIPO – and stood at around EUR 30m[145] in 2020. Expenditures directly attributable to RCD account for around 1/3 of the income. The rest is used to finance certain "non-fee producing" activities, including awareness raising activities to promote knowledge and understanding of design protection, and cooperation projects to foster convergence and transparency of practices to the benefit of users of the design protection systems (further details are provided in Annex 7, Section II, 1.b). Consequently, it would be possible to lower fees further but only at the expense of these other activities[146]. The proposed fee structure aims largely at preserving EUIPO income while shifting incentives for first time application and protection for shorter periods.

[145] EUIPO budget 2020 https://euipo.europa.eu/ohimportal/en/transparency-portal/economic/office-budget.
[146] Article 151(1)(c) EUTMR tasks the EUIPO to promote convergence of practices and tools in the area of trade marks and designs. Under Article 152(5) EUTMR, the EUIPO has to provide financial support to relevant cooperation projects with a ceiling of funding of 15% of its yearly revenue.

The EUIPO estimated a total loss of revenue in 2024 at EUR 3.2 million for option 3.1, and 3.16 million for option 3.2. . The real impact on the EUIPO budget will however be smaller due to proceeds from the 4th renewal. Using the forecast from Annex 9, the additional proceeds from the 4th renewal should more than offset all other losses in revenue, resulting in a revenue increase ranging from EUR 0.26 to EUR 1 million.

According to EUIPO data, the proposed adjustment of fees following sub-option 3.1 or 3.2 does not promise to cause significant (structural) negative budgetary results with respect to RCD related income and expenditure only. Detailed information on the evolution of the EUIPO budget as consequence of the fee adjustments is provided in Annex 7.

Impacts on National IP offices

In addition, with a view to the relation of coexistence between the Community and the national design systems, it is necessary to also look at the fee levels of national IP offices and compare those with the RCD fees. The creation of excessive benefits of the latter, resulting in a too strong approximation with the fees demanded at national level, could have the undesired effect that the financial advantages of registering their designs as RCDs weigh up to any possible disadvantage of the RCD system or the advantages of seeking national protection regardless of the filer's actual business needs. This would go against the intention of the Union legislator whereby national design systems shall not be replaced by the RCD regime.

National design registrations are widely used. In 2019 there were around 120,000 filings at national IP offices, more than to EUIPO. Businesses and especially SMEs participating in the Design evaluation welcomed the coexistence of national and EU systems. National registration was seen as often providing the adequate territorial coverage, allowing for best (strategic) protection of IP according to individual needs and size of company.[147]

A reduction of the basic RCD registration fee would not put coexistence at risk. It is true that this fee cut would bring the RCD registration fee level closer to the registration fee level of national offices for domestic filings. However, a reduced RCD registration fee would still keep a clear and sufficient distance from the comparable fee at national level. The indicative table in Annex 8 shows the levels of design fees requested in each Member State. Taking into account the actual filing volumes of national (regional) designs shown in the same Annex, the average cost of a national design in 2019 was well below EUR 100 for an electronic filing. This average cost for registering a national design is substantially lower than the basic fee of EUR 350 to be paid for the registration of a RCD.

Under the current system the basic fee of EUR 350 is equal to (the total) average electronic fees of 4 national offices. The proposed fee of EUR 250 is equivalent to (the total) average fees in almost 3 Member States.

The aforesaid also applies if one considers the highest current national fees for a single design application equalling to EUR 250 (FI). The national offices currently charging an application fee the amount of which is quite high compared to the level of the corresponding RCD fee would be free to adjust their fee levels accordingly (by reducing

[147] See also Annex 13 for more in-depth analysis of two systems coexistence.

the basic registration fee) and ensure a more favourable ratio compared to the EUIPO basic registration fee.

It is also noteworthy that during the last decade the number of design applications to national offices remained remarkably stable at around 120,000 a year despite constant growth in RCD application. This could suggest that RCD is not undermining demand for national protection.

6.4 Options for further harmonisation

The current scope of harmonisation of industrial design laws in Europe is significantly restricted as the DDir follows a minimum harmonisation approach by limiting its scope to selected substantive law aspects (baseline). The persisting negative effects associated with this option have been clearly described under the 'problem definition' in Section 2.1.2 above.

The First Public Consultation clearly revealed the most relevant areas for further harmonisation. Accordingly, the approximation exercise should focus on the most significant divergences in design laws and procedures causing major problems to the users at both national and EU levels, as described above in section 5.2.3 (Option 4.1). Since only a limited scope of changes would need to be done in Member States' laws (usually in the form of mere adjustments of existing provisions and not by creating new rules), it is expected that the alignment exercise could be done within a reasonable period of time. Furthermore, to the extent necessary such an approximation of Member States' laws could be pursued together with identical modifications to the RCD regime which would ensure coherence between the two systems. This was not possible at the time of the adoption of the DDir as the CDR was adopted three years later. In the meantime, the RCD system has proved well its merits (as shown by the recent evaluation) and should therefore serve, as much as possible and appropriate, as a benchmark for future alignment of national laws, as it was also the case when aligning Member States' laws relating to trade marks.

Under Option 4.2, the scope of the approximation exercise would not be limited to particular aspects of design laws but would encompass the whole range of provisions on substantive law, procedures and practices. Accordingly, the design systems in Europe would evolve from partially coherent and aligned to fully harmonised regimes. However, the analysis of existing problems (Section 2.1.2) has not demonstrated an apparent need for a full scale approximation of all design provisions. As a result, option 4.2 would be disproportionate to the actual needs. Moreover, such a scenario would necessitate far reaching changes at Member States' level, involving not only amendments to national design laws but possibly also to civil, administrative and other laws.

When it comes to the implementation of options 4.1 and 4.2, one could consider that the desired approximation of design laws and procedures could be achieved without a legislative intervention at the EU level. In this case, Member States would have to agree on a common approach/benchmark and align, accordingly, their laws and procedures on a voluntary basis (sub-options 4.1a and 4.2a). However, the achievement of the operational objectives identified in Section 4.2 is highly unlikely. Firstly, such a process would be very lengthy given the wide range of existing divergences between national laws. The duration and outcome of such an exercise would fully depend on the commitment of all Member States and their willingness to find common approaches. It is questionable how strong the incentives for this would be, taking into consideration that further harmonisation is called for by industry but not by national administrations. Moreover, it would be very difficult to arrive at a unanimous decision among the 27 Member States. Therefore, the process would more likely result in lowest common denominator solutions than the most appropriate ones. Moreover, it might be easier to find a common approach on the less controversial issues whereas there would not be any guarantee that the most serious problems would be properly addressed. Finally, the objective of achieving coherence between national laws and the RCD system would remain out of the reach of this exercise.

Accordingly, it appears more appropriate to pursue harmonisation by means of an EU-driven action, i.e. a legally binding instrument, to ensure the achievement of the identified objective as regards in particular substantive design laws and procedures (sub-options 4.1b and 4.2b). An exception should however be made with respect to selected very technical issues, such as the divergent, detailed formality requirements for the representation of designs. While it is for example appropriate to abolish the requirement of (static) graphic or photographic reproduction altogether by legislative harmonisation in the DDir[148] to remove legal constraints at Member States' level[149], and allow so for the outstanding alignment to the digital age, the use of the existing cooperation framework to foster convergence of practices and tools under Article 152 of the EUTMR seems more suitable for converging on specific technical standards. The latter would allow ensuring certain flexibilities to keep abreast with technical advancement, whilst safeguarding harmonised standards enacted by the competent national authorities, thereby also further improving collaboration within the EUIPN.

Impacts on users of the registration system

Further harmonisation of national laws, in particular procedures is strongly supported by user organisations that represent both large and small design owners, as well as their agents, as the feedback to the two Public Consultations clearly showed. Enhanced harmonisation is expected to have an overwhelmingly positive effect on all those users of the design protection systems. Moreover, there are indications that the impact of the proposed changes will be even more significant and positive for SMEs than for LEs. As described in Section 2.1.2 (problem definition), given the current low level of harmonisation, applicants active in certain Member States are disadvantaged vis-à-vis applicants in other Member States and those that apply for a RCD in terms of speed of registration, access to and costs of the system.

The proposed abandonment of ex-officio examination of prior art also at national level promises to significantly reduce the duration of registration proceedings in those Member States where it is still carried out (CZ, FI, HU, RO, SK). Businesses will thus be able to ensure protection much faster and at lower costs. In CZ this would affect between 150 and 250 applications each year, in Finland between 100 and 140, around 130 in Hungary, from 100 to 170 in SK, and, between 270 and 370 in RO[150]. Altogether for around 750 to

[148] This would equal the abolition of the requirement of graphic representation in the trade mark reform.
[149] As identified in the context of cooperation projet CP6, see *supra* note 86.
[150] Industrial Property Office of the Czech Republic, Annual Reports 2019 and 2020; Finish Patent and Registration Office website; Hungarian Intellectual Property Office, Annual Report 2018-2019; The Industrial Property Office of the Slovak Republic, Annual Report 2019; State Office for Inventions and Trade marks Romania, Annual Report 2019.

1000 applications annually in the EU, the design registration time could be more than halved (based on comparison with an average registration time in countries without prior art examination).

Moreover, companies who seek design protection under several national laws depend to a large extent on external expertise. In this context, it is generally perceived, on the basis of contacts with stakeholders, that SMEs, that do not have in-house IP experts, often pay substantially more when it comes to "advisers" fees compared to larger companies which have experienced in-house employees. According to data provided by the Member States for the EUIPN DesignView database, around 45% of applications at national IP offices (or around 60,400 applications) used a legal representative in 2019.

Ensuring for example that all Member States provide quick and efficient office-based procedures to get an invalid design registration cancelled without having to go to court[151] at much higher expense and greater delay should be clearly beneficial for both competitors and right holders as the following example of compared costs for respective proceedings for trade marks in Greece illustrates.

Table 6.6. Costs of invalidity proceedings in Greece

	Official costs	Professional fees
Judicial design invalidity proceedings (first instance only)	Approx. EUR 200 (including process-server fees)	EUR 6,000 to EUR 12,000
Administrative trade mark invalidity proceedings (first instance only)	EUR 114 (plus process-server fees etc., in total approx. EUR 200)	EUR 2,000 to EUR 5,000

Source: ECTA data[152], comparable complete information not available for other Member States, mainly as Member States are still in transposition period and system and reporting is not yet set up everywhere.

The introduction of office-based design invalidity proceedings in Germany in 2015 serves as good example of substantial cost benefits achieved for businesses. While in the past for judicial design invalidity proceedings court fees of EUR 1,638 were to be paid[153], since the reform of legislation there only an official fee of EUR 300 is payable to the German Patent and Trade Mark Office for the filing of an application for declaration of invalidity.

In response to the Second Public Consultation an overwhelming majority of respondents, including associations of IP right owners and IP attorneys and agents expressed strong support for making the provision of such office-based invalidity procedures mandatory at national level. In that context, the establishment of office-based cancellation proceedings in the area of trade marks were much praised to have been an effective means to reduce costs and burdens for businesses, and SMEs in particular.

Impacts on National IP offices

Option 4.1b would imply the obligation for Member States to adapt, accordingly, their national legislations. Considering the heterogeneity in design systems, it is impossible to

[151] For Member States providing office-based invalidity procedures on one side and those providing for judicial invalidity procedures before the competent court on the other, see *supra* notes 80 and 81.

[152] The indicated amounts of fees may fluctuate significantly, depending on the complexity of the case and the professional representation obtained. They are based on expert experience and assume average complexity of the case at issue.

[153] This concerned a case of average value of dispute of EUR 50,000.

draw a general conclusion, for example, as to whether these adaptations would be more burdensome for small national offices than for big ones or vice versa.

In terms of cost, because of the heterogeneity of national design systems, it is assumed that certain national offices would bear variable additional costs linked to further harmonisation efforts in the short to medium term. Such costs and/or cost savings for each and every national design system can only be calculated at national level in the light of the peculiarities of each design system. However, most changes in the EU legislation would not entail major changes to existing laws and essentially bring more clarity, consistency and legal certainty without any significant impact on resources and structures (see Annex 5, Section 4).

The few changes that might have a significant impact on some national systems relate foremost to the setting up of administrative invalidity procedures in the Member States where such procedures do not already exist. The establishment of such office-based procedures might involve substantial expenses for smaller IP Offices. This could be particularly problematic in countries where only very few invalidity cases are currently brought before their courts. A reason for such low numbers could however be precisely the existing lack of efficient proceedings to contest invalid registrations. In any case, office-based invalidity procedures have already been established everywhere for the cancellation of trade marks in transposition of the reformed Trade Mark Directive such that it should be possible to use synergies in that context. Moreover, and as much supported by stakeholders in response to the Second Public Consultation, cooperation between the EUIPO and national IP offices could be extended appropriately to assist in capacity building and cushion negative impacts on that part of smaller IP offices with only few cases to deal with.

Option 4.1b would contribute to improving the efficiency and effectiveness of procedures at European IP offices and eventually lead to significant cost savings. As such, it would also increase the competitiveness of national offices and allow them to extend the scope of cooperation with OHIM and other IP offices to the procedural areas concerned (such as that concerning invalidity of a design). Data supporting such costs and/or cost savings are however not available.

7. HOW DO THE OPTIONS COMPARE?

The following tables provide information comparing the policy options in light of the effectiveness and efficiency criteria as well as impact on most affected stakeholders.

Except for Option 2 whose efficiency depends on choice of option 3, there is no impact of policy options on effectiveness or efficiency of other options. Thus they can be considered independently of each other.

Table 7.1 Comparison of policy options against effectiveness and efficiency criteria

Option	**Effectiveness (contribution to achieving objectives)**		**Efficiency (costs and benefits)**
	Objective 1: Opening up the spare parts aftermarket to competition	**Objective 3: Enhancing complementarity and interoperability between the RCD and national design systems**	
Baseline	(0) Entry cost is increasing thus	(0) Divergent rules remain in	**Net effect: (0)**

	status quo may result in less competition in the future Potential brake for the development of repair markets	place (due to narrower scope of RCD rights businesses will continue using national design regimes instead of RCD system despite the latter suiting EU-wide activity much better)	**Cost for consumers:** EUR 415-663m per year, diminishing with time if more countries decide to liberalise (e.g. FR from 2023 for new designs only)
Option 1.1 Full liberalisation for all designs	(++) Most benefits to customers In line with EU antitrust regime Legal certainty from day 1 Unclear impact on investment	(++) Full harmonisation	**Net effect: (++)** **Benefit to consumer**: EUR 415-663m per year **Cost for VM**: loss of income corresponding to consumer benefit resulting from increased competitive pressure;
Option 1.2 Instant full liberalisation for new designs followed by full liberalisation for old designs after transitional period	(+) During the 10 year transition, benefits to consumers limited to new deigns Transition allows firms to accommodate Limited legal certainty during transition period Unclear impact on investment	(+) Full harmonisation will be achieved after the transition period of 10 years	**Net effect: (+)** **Benefit to consumers**: (+) During the 10 year transition each year benefits will increase by EUR 4 to 13 m per year to reach up to 10-20% of Opt. 1.1 value. After the transition period annual benefits will be net present value of Opt. 1.1. (EUR 340-544m* after 10 years); **Cost for VM**: loss of income corresponding to consumer benefit resulting from increased competitive pressure;
Option 1.3 Full liberalisation for new designs	(0/+) Existing designs can be protected up to 25 years, liberalisation afterwards Limited legal certainty Unclear impact on investment	(0) Full harmonisation will not be achieved until existing designs are on the market (up to 25 years)	**Net effect: (0/+)** **Benefit to consumer:** (+) After first 10 years 10-20% of Opt.1.1 benefits, after 15 years 15-30%, after 20 years 20-40%. EUR 415-663m per year only after current designs no longer available on the market, thus far lower benefit in discounted net present value terms (EUR 253-404m after 25 years*). **Cost for VM**: loss of income corresponding to consumer benefit resulting from increased competitive pressure;

Legend: ++ significant positive impact; + positive impact; 0 neutral; - negative impact; -- significant negative impact;
* discount rate: 2% ECB inflation target

Table 7.2 Comparison of policy options against effectiveness and efficiency criteria

	Objective 2: Improving accessibility, efficiency and affordability of RCD protection	**Objective 3: Enhancing complementarity and interoperability between the RCD and national design systems**	**Efficiency (costs and benefits)**
Option 2 Simplification and streamlining of RCD procedures	(+) Easier/safer access to protection due to abolition of unity of class requirement for multiple applications and new standards for design representation (less deficiencies); procedural alignment with EUTM procedures will increase efficiency	(+/0) Update of RCD filing regime will also boost convergence of practices and technical standards with MS	**Net effect**: (++) **Benefits in 2024**: Dependent on fee structure: current: EUR 2.4m, Opt. 3.1: EUR 1.7m, Opt. 3.2.: EUR 1.8m, EUR 1million through new representation standards, rest through facilitation of multiple RCD applications)
Option 3 Lower RCD registration fee and easier multiple applications with bulk discount	(+) Lower fees for basic protection Higher discounts for including several designs in one application (multiple application) Removal of unity of class requirement will make it easier to use multiple applications and use discounted fees	(0) Major shift from national to RCD filings are not expected. Although on average for RCD fee one could buy protection in 3 EU MS, instead of 4 currently.	**Net effect: (+)** **Benefit**: lower fees for basic RCD protection and for the first renewal **Cost**: higher fees for RCD 3rd and 4th renewal (protection up to 20 and 25 years); cap at 50 designs for single application Potential for lower income to EUIPO (subject to uncertain proceeds from 4th renewal)

	Objective 2: Improving accessibility, efficiency and affordability of RCD protection	Objective 3: Enhancing complementarity and interoperability between the RCD and national design systems	Efficiency (costs and benefits)
Sub-option 3.1	(++) More affordable access to basic protection should encourage usage. Coupled with proportional increase of renewal fees for protection up to 20 and 25 years	(0) Proper balance of coexistence is safeguarded. RCD system will be slightly more attractive	**Net effect: (++)** **Benefit**: in 2024 - Basic protection EUR 4.9m, 1st renewal EUR 1.1m Potential increase in applications/design owners in 2030 from 0 to 15% **Cost in 2024:** in 2024 - 2nd renewal EUR 0.6m, 3rd: EUR 1.5m, 4th: 2.3m
Sub-option 3.2	(++/-) Even more affordable access to basic protection should further encourage usage. Coupled with rather disproportional increase of renewal fees for protection up to 20 and 25 years	(0) Proper balance of coexistence is safeguarded. RCD system will be slightly more attractive	**Net effect: (++)** **Benefit**: in 2024 - Basic protection EUR 7m, 1st renewal EUR 0.5m Potential increase in applications/design owners in 2030 from 0 to 21% **Cost:** in 2024 - 2nd renewal EUR 1.1m, 3rd: EUR 2m, 4th: 2.8m
Option 4.1 Partial further approximation of national rules and their coherence with RCD system	(+) While further approximation of national laws shall foremost render national systems more accessible, greater coherence with RCD (and resulting increased potential for expansion of convergence of EUIPO and EU MS offices practices) will contribute to increasing also accessibility and transparency of RCD system.	(++) Significant enhancement of complementarity and interoperability of design systems. Larger scope of normative harmonisation will also allow convergence of EUIPO and EU MS offices practices to be extended accordingly, thereby further potentiating level of consistency and predictability.	**Net effect: (++)** **Benefits**: Facilitation of multiple applications (not quantifiable at national level) Abolition of ex-officio examination of prior art should at least halve duration of registration procedure for up to 1000 applicants a year Office-based invalidity procedures can be up to three times cheaper than court based (due to lower lawyer fees - EL example) Costs: Implementation costs for national offices (reduced income and setup costs for new procedures)
Sub-option 4.1a Voluntary	(+/0) Less apt to contribute to increasing also accessibility and transparency of RCD system, especially in light of 20 years experience with voluntary liberalisation of spare parts.	(-/0) Less apt to achieve enhanced complementarity and complementarity except in very technical areas requiring flexibility to keep abreast with technological advancement (e.g. technical standards for representation of designs).	Net effect: (-/0) Benefits: Consistent principal rules Costs: much time and effort needed
Sub-option 4.1b Mandatory	(+)More apt to contribute to increasing also accessibility and transparency of RCD system	(++) More apt to achieve enhanced complementarity and complementarity not being limited to lowest common denominator solutions.	Net effects (+) Benefits: Consistent principal rules Costs: little time and effort needed
Option 4.2 Full approximation of national laws and procedures and their coherence with RCD system	(++) Full harmonisation of national laws in alignment with RCD system will significantly contribute to increasing also accessibility and transparency of RCD system	(++) Full complementarity and interoperability of the design protection systems	
Sub-option 4.2a **Voluntary**	(+)Less apt to contribute to increasing also accessibility and transparency of RCD system	(0/-) Less apt to achieve full complementarity and complementarity not being limited to lowest common denominator solutions.	Net effect: (--) Benefits: fully consistent laws Costs: too much time needed, excessive costs, and disproportional to actual needs
Sub-option 4.2b Mandatory	(++)More apt to contribute to increasing also accessibility and transparency of RCD system	(++) More apt to achieve full complementarity and complementarity not being limited to lowest common	Net effect (--) Benefits: fully consistent laws Costs: too much time needed, excessive costs, and disproportional to actual needs

	Objective 2: Improving accessibility, efficiency and affordability of RCD protection	Objective 3: Enhancing complementarity and interoperability between the RCD and national design systems	Efficiency (costs and benefits)
		denominator solutions.	

Legend: **++** significant positive impact; **+** positive impact; **0** neutral; **-** negative impact; **--** significant negative impact;

Table 7.3 Comparison of the impact of policy options 1 on stakeholders

	Vehicle producers	Spare parts producers OEM	Spare parts producers independent	Authorised Repairers & Distributors	Independent Repairers & Distributors	Citizens/Customers
Baseline	**0**	**0**	**0-**	**0**	**0**	**0**
Option 1.1 Full liberalisation for all designs	**(-)** Price competition in all MS; loss of market power; possible modest loss of market shares for body parts;	**(++)** Economies of scale due to access to entire EU market; potentially more freedom to operate in the aftermarket;	(++) Economies of scale due to access to entire EU market;	**(N/A)** Freedom to choose parts for repair; potential loss on distribution of VM spare parts;	**(++)** Possibility to offer alternatives, possible consolidation of distribution channels and workshops; benefits form legal certainty;	**(++)** Instant freedom of choice as regards spare parts throughout the EU;
Costs:	Loss of income corresponding to consumer benefit resulting from increased competitive pressure;					
Benefits:	Annual cost savings of between EUR 415m and 664m for clients in countries currently without a repair clause					
Option 1.2 Full liberalisation for new designs + old after 10 years	**(short run: 0, long run: -)** Competition for new designs (*connected cars*); for existing designs (*combustion engine cars*) delayed competition; status quo in the short run;	**(+)** Impact delayed in time, compared to Option 1.1;	**(+)** Impact delayed in time, compared to Option 1.1;	**(N/A)**	**(+)** Impact delayed in time, compared to Option 1.1;	**(short run: 0, long run: ++)** Both non protected (new) and protected (old) spare parts on the market during 10 year transition, leading to confusion and potential (unintended) infringements; full freedom to choose afterwards
Costs:	Loss of income corresponding to consumer benefit resulting from increased competitive pressure;					
Benefits:	During the 10-year transition each year benefits will increase by EUR 4 to 13 m per year to reach up to 10-20% of Opt. 1.1 value. After the transition period annual benefits will be net present value of Opt. 1.1: EUR 340-544m*;					
Option 1.3 Full liberalisation for new designs	**(short run: 0, long run: -)** Only new spare parts designs liberalised, for existing ones monopoly possible for up to 25 years;	**(+)** Impact delayed in time, compared to Option 1.2.	**(+)** Impact delayed in time, compared to Option 1.2.	**(N/A)** Keep control in protected markets over the distribution of the parts covered under the old designs (*combustion engine cars*)	(--) Legal uncertainty;	**(medium run: 0, long run: ++)** Both non protected (new) and protected (old) spare parts on the market for up to 25 years leading to confusion and potential (unintended) infringements; full freedom to choose afterwards
Costs:	Loss of income corresponding to consumer benefit resulting from increased competitive pressure;					
Benefits:	After first 10 years 10-20% of Opt. 1.1 benefits, after 15 years 15-30%, after 20 years 20-40%. EUR 415-663m per year only after current designs no longer available on the market, thus far lower benefit in discounted net present value terms (EUR 253-404m after 25 years*).					

Legend: **++** significant positive impact; **+** positive impact; **0** neutral; **-** negative impact; **--** significant negative impact; * discount rate: 2% ECB inflation target

Table 7.4 Comparison of the impact of policy options 2 to 4 on stakeholders

	Firms applying for protection	**Individuals (+SMEs) applying for protection**	**IP offices**	**Citizens**
Baseline	0	0	0	0
Option 2 Simplification and streamlining of RCD procedures	(++)Easier access and savings for firms due to lower deficiency potential and extended, less costly access to multiple applications, and greater predictability.	(++)Particularly easier access and savings for individuals/SMEs due to lower deficiency potential and extended, less costly access to multiple applications, and greater predictability.	(++)EUIPO able to run RCD operations more efficiently (less deficient applications to treat; smoother running of workflows and back office IT landscape due to alignment with EUTM procedures); facilitation of task to foster convergence of practices and tools in cooperation with nat. IP offices (EUIPO serving as benchmark).	(+/0)No significant (quantifiable) impact; consumers to profit from wider variety of products though, as designs foster product differentiation
Costs:	EUR 0	EUR 0	Loss corresponding to benefits of firms and individuals	Reduction in fees for IP lawyers corresponding to benefits to firms and individuals
Benefits:	EUR 160 to 200 per applicant, for up to 14% of applicants due to simplified representation EUR 492, 234 and 281 due to facilitation of multiple RCD applications in case of current fee structure, Opt. 3.1 and 3.2 respectively. Affecting up to 20% of applicants		Reduction of deficient applications and abolition of unity of class requirement reduces time and cost of examination and correspondence.	Not quantifiable
Benefits:				
Option 3 Lower RCD registration fee and easier multiple applications with bulk discount	(+/-) More affordable access and savings for firms filing fewer designs, and for shorter period, increased cost for firms filing large numbers of designs and for long period.	(++) More affordable access and savings for individuals and SMEs tending to file fewer designs, and for shorter period.	(-/0)Loss of revenue for EUIPO; no major impact on nat. IP offices through potential shift from nat. to RCD filings (nat. IP offices free to cushion effects by lowering own fees).	(+/0)No significant (quantifiable) impact; consumers to profit from wider variety of products though, as (more) designs foster product differentiation
Opt. 3.1 Costs*:	EUR 74, 478 and 1398 for 2nd,3rd and 4th renewal respectively	EUR 47, 305 and 893 for 2nd,3rd and 4th renewal respectively	Equal to benefits for firms and individuals. EUIPO estimates at EUR 3.2m	EUR 0
Opt. 3.1. Benefits*	EUR 144 per application and EUR 74 for 1st renewal	EUR 132 per application and EUR 47 for 1st renewal	Equal to cost for firms and individuals. Proceeds from 4th renewal may be higher than costs	Not quantifiable
Opt. 3.2 Costs*:	EUR 147, 625 and 1692 for 2nd,3rd and 4th renewal respectively	EUR 94, 399 and 1081 for 2nd,3rd and 4th renewal respectively	Equal to benefits for firms and individuals. EUIPO estimates at EUR 3.16m	EUR 0
Opt. 3.2. Benefits*	EUR 211 per application and EUR 37 for 1st renewal	EUR 166 per application and EUR 23 for 1st renewal	Equal to cost for firms and individuals. Proceeds from 4th renewal may be higher than costs	Not quantifiable
Option 4.1 Partial further approximation of national rules and their coherence with RCD system **4.1a voluntary** **4.1b mandatory**	(++)Easier, less costly access to protection, incl. through combined use of nat. and RCD systems; greater predictability; easier, less costly way to defend against/cancel registered designs not meriting protection; lower costs in managing IP portfolios. Aforesaid positive impacts only (timely) guaranteed pursuing legislative harmonisation (sub-option 4.2).	(++)Particularly easier, less costly access to protection, incl. through combined use of nat. and RCD systems; greater predictability (less need for external expertise); easier, less costly way to defend against/cancel registered designs not meriting protection; lower costs in managing IP portfolios. Aforesaid positive impacts only (timely) guaranteed pursuing legislative harmonisation (sub-option 4.2).	(++) National IP Offices becoming more attractive and competitive at bearable, proportional implementing cost; facilitation of EUIPO task to foster convergence of practices and tools in cooperation with nat. IP offices. Aforesaid positive impacts only (timely) guaranteed pursuing legislative harmonisation (sub-option 4.2).	(0)No significant (measurable) impact; consumers indirectly to profit from wider variety of products though, as (more) designs foster product differentiation.
Costs:	Adaptation to new system, including learning process		Setting up of administrative invalidity procedure in Member States where it does not exist	Reduction in legal fees corresponding to benefits of firms and individuals

Benefits:	Lower need of legal expertise could affect up to 45% of applications. Savings on IP office-based invalidity procedures from EUR 4,000 to 7,000 per case (based on EL example)		Not quantifiable	Not quantifiable
Option 4.2 Full approximation of national laws and procedures **4.2a voluntary** **4.2b mandatory**	(+/--)As Option 4.2 would necessitate very far reaching changes at MS's level, firms would have to wait (unreasonably) long time for benefits to materialise; far reaching changes would not correspond to actual needs.	(+/--)As Option 4.2 would necessitate very far reaching changes at MS's level, firms would have to wait (unreasonably) long time for benefits to materialise; far reaching changes would not correspond to actual needs.	(--)Excessive and disproportional burdens and implementing costs for nat. IP Offices and other national authorities; no flexibility left for tailored rules taking account of legal traditions and other national specificities.	(+/0)No significant (quantifiable) impact; consumers to profit from wider variety of products though, as (more) designs foster product differentiation
Costs:	Potentially higher than 4.1. due to magnitude of changes			
Benefits:	Potentially higher than 4.1. due to magnitude of changes			
Legend: **++** significant positive impact, **+** positive impact, **0** neutral, **-** negative impact, **--** significant negative impact; *- weighted averages based on distribution of designs per application in 2019/20				

8. PREFERRED OPTION

8.1 Conclusion on impacts and coherence

Based on the analyses carried out in the previous sections, the preferred set of options includes Option 1.2, Option 2, Sub-option 3.1 and Sub-option 4.1b.

Option 1.2 is considered to be the most proportional one to achieve complete harmonisation in the internal market on the principle of liberalisation. It is true that the price and competition benefits stemming from Option 1.1 are more immediate, however, Option 1.2 has the following advantages. First, it is in line with the spirit of the transitory agreement on the design regime on spare parts agreed in the DDir, aiming at complete liberalisation of the spare parts market in the EU. Second, by offering a transitional period it allows VMs to adjust their market conduct with minimum risk or disruption to investment and innovation. Third, it is adequately prudent when it comes to the issue of fundamental rights and international obligations (see Section 8.2).

This option also is in line with the Commission's intention in the previous proposal in 2004 as well as consistent and complementary with the MVBER regime. Liberalisation of the spare parts market will help to ensure effective competition in the vehicle spare parts, service and repair markets and thus achieve benefits for enterprises and consumers in the automotive aftermarkets. Last but not least, Option 1.2 is coherent and complements efforts put forward in the Sustainable Product Initiative that aims at promoting repairs and circular economy.

The completion of the single market by opening up the entire EU spare parts aftermarket is strongly supported by independent spare parts manufacturers and distributors, associations representing their interests, academia, as well as consumer organisations.

With a view to making RCD protection more accessible and affordable for businesses and keeping abreast with technological advancement, Option 2 on simplification and streamlining of procedures combined with Sub-option 3.1 on fees (not involving a too drastic, disproportional increase of renewal fees compared to Sup-option 3.2), promises to involve positive impacts and bring clear benefits for businesses, in particular SMEs and individual designers.

Sub-option 4.1b on further approximation of national provisions, in particular by adding principal procedural rules into the DDir in alignment with the CDR, will make it easier and less costly for firms and designers to obtain design protection across Member States, including through the combined use of national and RCD systems, and in the context of multijurisdictional filing strategies. This option will further increase predictability, help reducing costs in managing multinational IP portfolios, and make it easier and cheaper to have invalid designs removed from the register.

Going for mandatory further approximation of national rules in the areas identified by stakeholders as being of top priority will have also additional positive impacts on cooperation between the EUIPO and national IP offices under the existing framework laid down in Article 152 EUTMR in terms of facilitating extension of convergence of practice and the development of common tools also to those new areas (such as concerning invalidation of designs). This promises to further potentiate the net benefits for users of the design protection systems in the EU while enhancing their complementarity and interoperability.

Apart from Member State authorities and the European Parliament, design intensive industries and designers, associations of design right holders and intellectual property attorneys and agents strongly support the proposed modernisation, streamlining and further harmonisation of the design protection systems in terms of the set of Options 2, 3.1 and 4.1b.

Additionally, the preferred set of options will be supported by substantial efforts within a wide range of awareness raising activities being carried out or planned by the EUIPO for the future in order to increase knowledge, understanding and successful use of IP, including designs. This shall contribute to further boosting the uptake of registered design protection in the EU and strengthening competitiveness on the basis of future proofed, more accessible and predictable rules proposed in the present initiative.

8.2 Compatibility with International Obligations

Option 1.2 on spare parts protection would also be fully compatible with international obligations of the Union under the TRIPS Agreement. Article 26 TRIPS allows for limited exceptions to the protection of industrial designs, provided that they do not unreasonably conflict with normal exploitation, and do not unreasonably prejudice the interests of the right holder, which must however be balanced against the legitimate interests of third parties.

It is considered that the repair clause to be introduced into the DDir complies with these requirements. It would even be permissible to exclude design protection for spare parts altogether, as TRIPS does not impose a particular definition of objects eligible for protection[154]. At stake is indeed only an exception to protection confined to component parts of complex products which are needed to restore the appearance of a complex product, and this exception only concerns the exercise of the right when such parts are used for repair purposes.

The interests of owners of existing rights are adequately and beyond any reasonable doubt safeguarded through the grant of a ten-year transitional period during which they

[154] Drexl, Hilty, Kur, Design Protection for Spare Parts and the Commission's Proposal for a Repairs Clause, IIC 2005, p. 448, p. 454.

can still prevent third parties from using their designs also in the aftermarket. As already concluded above, the foreseen duration of that transitional period is compliant with the minimum term of design protection to be provided for under Article 26(3) TRIPS.

8.3 REFIT (simplification and improved efficiency)

The following table summarises cost savings of the preferred option.

Table 8.1. REFIT Cost Savings – Preferred Option

Description	*Annual Amount*	*Comments*
Liberalisation of spare parts market (Opt. 1.2)	EUR 340-544 million	Savings to customers, fully realised after 10-year transition period. During the 10-year transition each year benefits will increase by EUR 4 to 13m per year to reach EUR 40 to 130m in the last year.
Change of RCD fees (Opt. 3.1)	EUR 1.6 million*	Consists of savings to those protecting for 5 to 10 years of EUR 6.2 million (such protection period is more often sought by natural persons and firms without legal entity) and cost increases of EUR 4.6 million to those protecting RCD from 15 to 25 years.
Other simplifications (e.g. means and requirements of design representation) (Opt. 2)	EUR 1 million*	Concerns around 14% of RCD applicants. Realised at initial application.
Facilitation of multiple applications (Opt 2)	EUR 0.64 million*	Concerns around 20% of RCD applicants. Realised at initial application.
No transfer fee	EUR 0.63 million	Simplification for around 3000 designs that annually are transferred to different owner.
Office-based invalidity procedure in national IP offices	EUR 4,000 – 7,000 per case	Concerns those seeking to cancel an invalid design registration.
No ex-officio examination of prior art in national IP offices	Registration time cut in half	Concerns around 1000 applications a year.

** estimate for 2024, can be higher in subsequent years if demand for RCD protection increases (potentially by 15%)*

9. HOW WILL ACTUAL IMPACTS BE MONITORED AND EVALUATED?

The Commission will be monitoring the market for spare parts to see whether the envisaged savings have materialised. As part of the project the following could be envisaged: i) repetition of the study on price differences between Member States; ii) stakeholders survey to gauge behavioural changes of customers, strategies of VMs and spare parts providers, choices and recommendations of independent garages. The Commission will also monitor the impact of the spare parts liberalisation on other markets.

As regards changes to the EUIPO fees and procedures, the Commission will be using EUIPO annual reports. The Commission welcomes the change in EUIPO reporting that took place in 2021 to include disaggregation of designs filings per SMEs[155]. The Commission is in contact with the EUIPO to improve the statistics provided.

In particular the following will be monitored: change in number of designs filings at the EUIPO, the usage of design protection by SMEs, change in number of multiple applications, change in number of designs with renewed protection and number of renewals.

In terms of approximation of national laws, the Commission will scrutinise Member States' notifications of transposing measures and will react to any delays or inconsistencies. The Commission will calculate implementation deficits and communicate these via the Single Market Scoreboard[156]. When all rules are properly transposed the following indicators will be considered for evaluation: the option and conditions for filing a multiple application, the option and length of deferment of publication, the existence of substantive examination, and the provision of administrative invalidity procedures.

All monitoring and reporting activities should take into account the necessary transposition period as well as sufficient time for the market participants to accommodate to the new situation. Thus, in the short term the Commission will rely on information from stakeholders and Members States as regards implementation. As for the Regulation, a proper evaluation of the changes should be done five years after full implementation of all new provisions, including at the level of secondary legislation.

Objectives	**Indicators**	**Sources of information**
Strengthened design protection (promote contribution to design excellence, innovation and competitiveness in the EU)	a) Measurement of increase of profitability of firms making use of strengthened design b) Measurement of price increase for consumers c) Measurement of increase of new designs (more new products on the market)	Study
Opening up the spare parts aftermarket to competition	a) Monitor consumer prices of spare parts b) Monitor availability of different types of spare parts c) Monitor frequency of repair versus purchase of new vehicle	Study
Improving the accessibility and affordability of Community design protection	a) Measurement of cost savings by EUIPO (e.g. because less procedural mistakes are made by applicants due to i) deletion of unity of class requirement, ii) easier representation requirements, iii) shared IT systems with EUTM system)	EUIPO
Enhancing complementarity and interoperability between the Community and national design systems, in particular through harmonisation of procedural rules.	a) Number of remaining differences between national laws (transposition check) b) Evolution in companies' direct cost for IP advice c) Average time needed to register an RCD (including average time needed for an invalidity procedure) – possible benchmark: average time in 5 best performing offices	Transposition study Study IPO survey Evaluation study to support the review of the instrument 5 years after its date of

[155] EUIPO (2021) "Consolidated Annual Activity Report 2020", page 5.
[156] https://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/transposition/index_en.htm

		application

ANNEX 1: PROCEDURAL INFORMATION

1. Lead DG, DEcide Planning/CWP references

Lead DG: DG Internal Market, Industry, Entrepreneurship and SMEs

Decide numbers of the underlying initiatives: PLAN/2020/8768 (Review of Community Design Regulation) and PLAN/2020/8769 (Review of Design Directive).

2. Organisation and timing

The inception impact assessment was published on 24 November 2020. It was followed by a feedback period that lasted from 24 November 2020 to 12 January 2021. Twenty nine stakeholders submitted feedback.

The Commission held a public consultation from 29 April to 22 July 2021. This consultation was available on the Better Regulation Portal of the Commission and open to anyone who wished to reply. The public consultation received 105 replies through the EU survey and five via e-mail.

The following DGs (Directorates General) have been invited to contribute to this impact assessment: SG (Secretariat-General), COMP (Competition), EAC (Education, Youth, Sport, Culture), ENER (Energy), ENV (Environment), CNECT (Communications Networks, Content and Technology), JRC (Joint Research Centre), JUST (Justice and Consumers), SJ (Legal Service), TAXUD (Taxation and Customs Union) and TRADE (Trade). The EUIPO also participated in the ISSG. The ISSG met four times in 2021 to give an update on the ongoing work and discuss preliminary versions of the impact assessment report, together with all the supporting documents.

3. Consultation of the RSB

The RSB was consulted in an upfront meeting on 27 May 2021. The present impact assessment report was submitted to the RSB on 27/10/2021. The impact assessment was discussed with the RSB on 24/11/2021, and the RSB issued a positive opinion on 26/11/2021. Based on the RSB recommendations, the impact assessment has been revised as follows:

RSB recommendations	Changes to the impact assessment
(1) The report is not sufficiently clear why the current mixed national and EU design protection system needs to be maintained and protected. The report should make clear why it does not envisage an overall more efficient design protection system, by letting the EU system compete fully with the national systems. This could lead seemingly to lower fees and promote administrative efficiency, which would be to the benefit of companies and increase overall EU competitiveness. In this regard, the report should clarify to what extent the level of national fees should continue to play a limiting role on the reduction of EU fees.	Section 6.3 was enhanced with additional arguments and Annex 13 on Coexistence of national and EU systems was added
(2) Taking into account the relevant findings in the	Annex 12 on existing and planned awareness raising

2020 evaluation on the lack of awareness of the possibilities for companies to use EU design protection, the report should better explain why it does not consider additional actions on awareness-raising in the context of this initiative.	activities was added.
(3) The report should better explain the competitive effects that can be expected from cross-border spare parts internet sales under the baseline scenario. It should also better explain that the liberalisation of the spare parts aftermarket through the removal of design protection of spare parts is a necessary, but not a sufficient, condition for creating a well functioning internal market in spare parts.	Impact of internet sales of spare parts was added to the baseline scenario (Section 2.2.1).
(4) The report should better explain the robustness and the uncertainties with regard to the estimates on the increase of the number of protected designs by changing the level of the fees, in particular with regard to the so-called 'optimistic scenario'.	The additional caveats on data limitations were added to Annex 9.5
(5) Given that the direct expenditures of the European Union Intellectual Property Organisation (EUIPO) directly attributable to the Registered Community Design only represent about one third of the relevant fee revenues, the report should clarify why it does not propose to reduce the fees for registered EU designs further. It should also explore the room for further reduction of the fees including through considering potential rationalisations and administrative overhead reductions at the EUIPO.	The rationale for not lowering the RCD fees further was added to Section 6.3. Examples of the EUIPO activities financed from the fee revenues were further highlighted (such as awareness raising campaigns or SME support).
(6) The report should better reflect the differences in views between key stakeholders on design protection of spare parts and explain how and why it took them into account.	Annex 2a focusing on stakeholders views on spare parts liberalisation was added

4. **Evidence, sources and quality**

DG GROW conducted and contracted several studies related to the revision of the designs legislation. All the studies, with the exception of the study by Wolk After Sales Experts, were published prior to the online public consultation.

The series of studies include:

- Europe Economics (June 2015). Economic review of industrial design in Europe
- Time.lex, Queen Mary - London, Spark Legal Network & Indiville (April 2016). Legal review on design protection in Europe
- Mendis, D., Nordemann, J.D., Ballardini, R.M., Brorsen, H, del Carmen Calatrava Moreno, M., Robson, J. & Dickens, P. (February 2020). Intellectual property implications of the development of industrial 3D printing

Two studies focus explicitly on spare part protection:

- Herz, B. & Mejer, M. (2020). The effect of design protection on price and price dispersion: Evidence from automotive spare parts. Published in *International Journal of Industrial Organization* with manuscript available online 14 September 2021, In Press.

- Nikolic, Z. (September, 2021). Market structure of motor vehicle visible spare parts in the EU. Study commissioned to Wolk After Sales Experts GmbH. Available at https://op.europa.eu/s/sMA8

ANNEX 2: STAKEHOLDER CONSULTATION

1. Introduction

The Commission announced in its communication of 25 November 2020 entitled '*Making the most of the EU's innovative potential – An intellectual property action plan to support the EU's recovery and resilience*'[157] that it will revise the EU legislation on design protection. Alongside the publication of the IP Action Plan, an inception impact assessment[158] was published for this initiative.

The review follows from an exhaustive evaluation of the EU legislation on design protection[159], which was supported by a comprehensive public consultation and two major economic and legal studies.

The evaluation analysed to what extent the current EU legislation on design protection has achieved its objectives in terms of efficiency, effectiveness, relevance, coherence and EU added value.

Consultation activities

The Commission conducted a public consultation[160] between 29 April and 22 July 2021 with the aim to gather further stakeholder evidence and views to support the review of the CDR and the DDir. The public consultation served as complement to the extensive public consultation on design protection already carried out in the context of the evaluation. More specifically, it sought to obtain views of all those affected by design protection in Europe on selected issues and potential policy options and their impacts.

2. Analysis of responses

54% of the stakeholders[161] considers that increasing clarity and transparency of rules and making them future-proof would help most in **raising the usage of design protection**. 45% of the stakeholders indicates that raising awareness about the availability, benefits and ways of protecting designs would help most in this. According to some stakeholders harmonising registration procedures (35%), streamlining and simplifying registration procedures (24%) or adjusting fee levels or structure (18%) would help most in raising the usage of design protection.

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[157] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0760

[158] *Inception Impact Assessment on the review of the Design Directive and Community Design Regulation* https://ec.europa.eu/docsroom/documents/43848

[159] *Staff Working Document on the evaluation of the EU legislation on designs protection* https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1846-Evaluation-of-EU-legislation-on-design-protection_en

[160] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12609-Intellectual-property-review-of-EU-rules-on-industrial-design-Design-Directive-/public-consultation_en

[161] For greater clarity, for the calculation of the percentages and shares of stakeholders only those respondents are taken into account, which expressed opinion on the given matter. The respondents that chose 'no opinion' on the given matter are not taken into account in the calculation.

As regards **repair spare parts protection**, the majority of the respondents to the Public Consultation considers that having different rules on this matter in the EU is a problem.

More than 1/4 of the stakeholders (27%), mainly the representatives of independent manufacturers and consumer associations argue that all the EU Member States should open the market of 'must-match' spare parts for competition, covering both existing and new designs. They point out that the protection of 'must-match' spare parts constitutes an abuse of design protection, gives manufacturers of complex products (in particular VMs) an undue monopoly, eliminates competition in the spare parts aftermarket and makes it difficult for customs to assess the infringing (or non-infringing) character of spare parts crossing the border.

Other arguments raised by stakeholders are that the lack of a repair clause: (i) makes it difficult for companies (SMEs in particular) to operate across the internal market and protect and enforce their IP rights across the EU; (ii) leads to serious obstacles in the free movement of goods and (iii) involves confusion and considerable legal uncertainty both for professionals and consumers. The stakeholders believe that the fragmentation of the market results in: (i) unequal chances for companies, notably SMEs; (ii) different offerings of products available to consumers across the Member States and (iii) increases the prices of 'must-match' spare parts for consumers and insurance companies. They also point out that opening the market of 'must-match' spare parts for competition only for future designs would preserve the current market fragmentation and complexity for another 25 years. These stakeholders also underline that under the current rules it is hard to prevent infringements of design rights in Member States which have a regime to protect spare parts. They also point out that the spare parts clause would not have any negative impact on the safety of spare parts, because spare parts are subject to a number of EU safety standards that apply to all producers in order to ensure identical safety requirements.

1/5 of the stakeholders (20%), including public authorities, were in favour of opening the market of 'must-match' spare parts for competition, limited to new designs, thus the repair clause should have legal effect only for the future (i.e. be applicable to designs granted after its entry into force). They suggest the opening of the market with a transitional period. They point out that opening the market for existing designs would undermine legal certainty and damage businesses that developed these designs in view of future incomes expected through the IP protection on these spare parts. Some stakeholders point out that opening the market with retroactive effect would be contrary to the EU Charter on Fundamental Rights and Protocol 1 of the European Convention on Human Rights, because it would be an expropriation of the property right.

Slightly less than 1/5 (18%) of the stakeholders, mainly right holders from the automobile industry, were against the liberalisation of the market of 'must-match' spare parts. They argue that the exclusion of repair spare parts from design protection is alien to the intellectual property system and not justifiable. They emphasise that it deprives the manufacturers of complex products (in particular cars) of a fair return on their investment and eliminates the incentive for innovation. They argue that only right holders have the necessary expertise and know-how to manufacture high quality, safe and functionally adequate spare parts and that low quality spare parts (many coming from third countries without safety standards) would harm also the reputation of the right holder and endanger the safety of consumers.

Some stakeholders, mainly from the automobile industry, call for protection for spare parts both at EU and at national level, arguing that this would help to fight against the inflow of low quality spare parts from third countries.

As regards the **scope of design protection**, the results of the Public Consultation confirms the need for clarifying that the eligible subject matter of design protection also covers new type of (graphic) designs (notwithstanding the absence of physical embodiment). The results show that the large majority of the stakeholders would welcome clarifying the eligible subject matter of design protection and cover also graphical user interfaces and icons. However, 2/3 of the stakeholders is not in favour of extending the subject of design protection beyond visually perceptible matter to include, for example, also sound designs (jingles or voices). Most of those opposing the extension beyond visually perceptible matter, argue that this would go against the basic concept of design protection and would constitute a meaningful difference between the EU's and the International Classification for Industrial Designs under the Locarno Agreement, since the latter does not cover these types of designs. Some stakeholders point out that these types of designs may be protected under copyright or trade mark law and the overlap would create legal uncertainty. A number of stakeholders consider that it is not possible to represent the visually non-perceptible aspects of a design in the design register in a manner that allows third parties to clearly understand the subject matter of protection. 17% of the stakeholders is in favour of extending the subject of design protection beyond visually perceptible matter, as long as this aspect is linked to an external visual component of the design, arguing that this extension would stimulate innovation in certain product categories (e.g. furniture, automobile, bicycle and videogames).

The stakeholders are divided as regards the **introduction of a more systematic (non-exhaustive) categorisation of design types** in the EU law (30% is in favour, 32% is against such categorisation). The categorisation could be achieved by drawing a clearer distinction between the three principle design categories, that is graphical design (which may include inter alia logos, graphical user interfaces, surface patterns and typographical typefaces), design related to physical objects (which may include inter alia packaging and sets of articles), and get-up (which may include inter alia interior design).

The respondents, which are in favour of introducing a more systemic (non-exhaustive) categorisation stress that his would create greater transparency, clarity and accessibility of the EU legislation on designs and provide guidance to economic operators in evaluating their chances in protecting a product with a design (e.g. optimise searches for prior art). These stakeholders point out however that the categorisation should by no means limit the subject matter of design protection.

The respondents, which are against introducing a more systemic (non-exhaustive) categorisation, question the necessity of such categorisation, arguing that the users of the EU's design system are already familiar with these categories and it would just create uncertainty concerning the subject matter of design protection. Some stakeholders indicate that the International Classification for Industrial Designs under the Locarno Agreement and the European Union Intellectual Property Office's guidelines are sufficiently clear for the administration of designs, making the categorisation unnecessary.

As regards the definition/scope of a **'set of articles'**, the large majority of the stakeholders agrees that these designs need to be eligible for design protection at EU level. However, the stakeholders have diverging views concerning the definition/scope of a ‘set of articles’. (“*a ‘set of articles’ is a set of physical objects, ordinarily sold and intended to be used together, coordinated in their overall appearance*”). 52% of them do not find the proposed definition/scope appropriate. Some stakeholders suggest that the definition/scope should not only include physical objects but also graphical user interfaces, icons and virtual objects (e.g. virtual chess set, emojis or symbols). Others propose replacing the term *‘object’* with the term *‘product’*, arguing that the latter has a well-defined meaning in the EU law, covering industrial or handicraft items, whereas the former would be new and undefined. Some stakeholders find the criteria *‘coordinated overall appearance’* ambiguous or unnecessary. Some stakeholders find the definition/scope too narrow, because it requires the two criteria *‘ordinarily sold together’* and *‘intended to be used together’* to be fulfilled cumulatively. Some stakeholders from the fashion industry suggest that the definition should include also *‘series of articles’*, which are articles having the same design and sold in different sizes, colours, but associated with the same requirements and general characteristics (e.g. variations of the same product).

As regards the definition/scope of **‘get-up’,** the stakeholders have diverging views, but the large majority of them agrees that these designs, including also the arrangement of the interior of a room, shop or restaurant in accordance with the International Classification for Industrial Designs under the Locarno Agreement, need to be eligible for design protection. The views are diverging concerning the way *‘get-up’* should be formulated or referred to in the EU law. 63% of the stakeholders do not find the definition/scope proposed in the questionnaire (“a *‘get-up’ consists of the arrangement of separate items to form a coordinated overall appearance”*) appropriate. Some stakeholders expressed doubts about the necessity to define this concept at EU level, indicating that this concept could be covered even without a definition (e.g. recognised in the recital or listed among the products). Most stakeholders consider the term *‘coordinated overall appearance’* too vague and subjective that would cause legal uncertainty. Some stakeholders point out that the term *‘get-up’* is not used in other language versions of the Regulation and Directive (e.g. Dutch, French, German, Italian and Spanish), therefore, for greater clarity it would be useful to add another term to it.

As regards the **acts done privately for non-commercial purposes** (Article 20(1)(a) CDR and Article 13(1)(a) DDir)), the large majority of stakeholders (81%) considers that it is easy to use this limitation and the wording is considered suitable also to enable future technological developments. A few stakeholders indicate that technological development (e.g. 3D printing) and new social trends (e.g. influencers on social media) make the use of this limitation difficult.

The large majority of stakeholders (79%) considers the scope of this limitation in the current law appropriate. Some stakeholders are concerned about the consequences of the potential expansion of the scope of this limitation, in particular when considering technological developments, such as 3D printing, emphasising that it would endanger the balance between right holders and users and lead to the increase of infringing activities. If 3D printing becomes more common in the future, they fear that this limitation would lead to an immunity for 3D printing activities.

As regards **acts done for experimental purposes** (Article 20(1)(b) and Article 13(1)(b)), the large majority (79%) of the stakeholders considers that it is easy to use this limitation, emphasising that the current wording enables innovation and the lack of case law indicates that the use of this limitation is not controversial in practice. The majority of the stakeholders (71%) considers the scope of this limitation in the current law appropriate.

As regards the **acts of reproduction for the purpose of making citations** (Article 20(1)(c) and Article 13(1)(c)), the majority of the stakeholders (60%) consider that it is easy to use this limitation and stresses that the low number of court cases shows that the scope of this limitation is clear for the users. The majority of the stakeholders (73%) considers the scope of this limitation in the current law appropriate. They consider that the Court of Justice of the European Union in the Nintendo Case (C-24/16, C-25/16) found the right scope for this limitation to counterbalance the far-reaching scope of design protection. (i.e. the act of reproduction for the purpose of making citations has to be compatible with fair commercial practices, and should not give the impression of a commercial connection between the third party and the design holder, should not take unfair advantage of the holder's commercial repute and should not negatively affect the economic interests that the design holder could derive from the exploitation of its design). Some stakeholders underline that the use of a design merely for the purpose of decoration or ornamentation should not be covered by this limitation, but acts that fall under a copyright exception (e.g. quotation), should not be considered an infringement under design law either. Other stakeholders (40%), however, do not agree with the judgement of the CJEU in the Nintendo Case and stress that it is not easy to use this exception because the limitation has become too broad.

As regards the **act of reproduction for the purpose of teaching** (Article 20(1)(c) and Article 13(1)(c), the large majority of the stakeholders (93%) consider that it is easy to use this limitation. The large majority of the stakeholders (90%) considers the scope of this limitation in the current law appropriate.

As regards complementing the catalogue of limitations by declaring the **presentation of one's own product as an alternative or as accessory or spare part to the product of the competitor** as permissible, stakeholders have diverging views. 43% of the stakeholders consider that the presentation of one's own product as an alternative or as accessory or spare part to the product of the competitor would be beneficial for the consumers to find alternative products, accessories or spare parts for more affordable prices. These stakeholders stress that the honest commercial practices criterion would guarantee that the use remains within the boundaries of fair competition. 57% of the stakeholders consider that this use should not be permissible, because it would not comply with the honest commercial practices criterion and would lead to unfair competition and misleading advertising or ride on the coattails of the reputation of the design holder by suggesting a commercial connection between the two owners of the products. These stakeholders underline that the current law allows referring to the product of the competitor by its name or its trade mark.

As regards complementing the catalogue of limitations by declaring **illustrations for comparative advertising** as permissible, stakeholders have diverging views. 56% of the stakeholders are against declaring illustrations for comparative advertising as permissible, claiming that it would lead to unfair competition or misleading advertising or would allow riding on the coattails of the reputation of the design holder. 44% of the stakeholders support declaring illustrations for comparative advertising as permissible, underlining that it is beneficial for consumers to be able to make informed decisions based on comparisons between equivalent products. These stakeholders also indicate that Directive 2016/114/EC on misleading and comparative advertising allows making a reference to the trade mark of the competitor where it complies with the conditions laid down by this Directive, the intended aim being solely to distinguish between them and thus to highlight differences objectively. According to these stakeholders, referring to the design of the competitor needs to be also permissible, but the limitation is to be applied narrowly in order to safeguard the legitimate interests of the design holder. Some stakeholders underline that uses, which are permissible under trade mark or copyright law, are to be permissible also under design law.

As regards complementing the catalogue of limitations by declaring **comment, critique or parody** as permissible, stakeholder have diverging views. 54% of the stakeholders consider that uses, which are permissible under copyright law, are to be permissible also under design law, in particular because of the possibility to cumulate design and copyright protection on the same product. These stakeholders emphasise that this limitation is to be applied narrowly in order to safeguard the legitimate interests of the design holder. 46% of the stakeholders are against declaring comment, critique or parody as permissible, arguing that this would lead to that third parties unfairly disparage others' designs by taking advantage of this limitation.

As regards complementing the catalogue of limitations by declaring **using the design to foster innovation** (e.g. creation of new designs) with help of new technologies such as artificial intelligence (along the line of the text and data mining exception in copyright law) as permissible, the stakeholders have diverging views. 34% of the stakeholders support declaring the use of the design to foster innovation as permissible. Some stakeholders underline that this limitation is not clear, would lead to legal uncertainty and endanger the balance between design holders and users. These stakeholders emphasise that this limitation needs to embrace new technological developments, but interpreted narrowly, in order to ensure legal certainty for design holders and that the limitation applies only in situations where there is a clear rationale for its use. These stakeholders point out that before introducing this new limitation for designs developed with help of new technologies such as artificial intelligence, there are some matters to be clarified (e.g. who would be considered the design holder and how much human intervention is needed in the design process to qualify for design protection). 66% of the stakeholders are against declaring this use permissible, claiming that it would lead to unfair competition.

As regards the question whether or not there is an **overlap between copyright and design protection, which make the choice difficult**, the stakeholders' views are diverging, slightly more stakeholders considering that the overlap does not make the choice difficult. The large majority of stakeholders agree that the 'principle of cumulation' laid down in the DDir (Article 17) and in the CDR (Article 96(2)) is key for most design-intensive sectors. Based on this rule a design can be protected by both design and copyright law, provided that protection requirements are fulfilled for both of these rights.

Almost 1/2 of the stakeholders consider that the relationship between copyright and design law is unclear and this could potentially lead to less reliance on design protection or to the circumvention of one IP right by the other. They argue that copyright is more advantageous, because it is cheaper and provides a longer protection. Some stakeholders express concerns that a possible liberalisation of the spare parts market could be undermined by copyright in situations when the spare part is eligible for copyright protection.

Slightly more than 1/2 of the stakeholders do not find the choice between the two regimes difficult, emphasising that the recent case law of the CJEU (see in particular *Flos*[162], *Cofemel*[163], and *Brompton*[164]) has harmonised the notion of 'work' and thus helped clarify the relationship between copyright and design law. These stakeholders stress that the 'notion of work' is an autonomous concept of EU law that needs to be interpreted and applied uniformly.

Almost 2/3 of the stakeholders (63%) do not consider the concern serious that in view of the conditions for granting copyright protection, potential right holders opt for copyright protection instead of design protection, to such a degree that the special design regime created for designers and design-oriented industries runs void. These stakeholders underline that the two regimes pursue different objectives and have different eligibility criteria and stress that the design protection has certain advantages, in particular, the benefits of registered protection (e.g. absolute protection, clarity regarding priority date and ownership, burden of proof, public notice of rights, searchability, potential to assert rights through registration and enforceability) that outweighs copyright protection, therefore, many industries rely on design protection even when their products are eligible for copyright protection.

Around 2/3 of the stakeholders do not consider the concern serious that the conditions for granting copyright protection in addition to design protection lead to overreach of protection and distortion of competition (in particular by allowing overlap of protection beyond the 25 years' maximum term of design protection).

Almost 2/3 of the stakeholders consider that there should be **changes to the current rules in the EU on the relationship between design and copyright protection**. The views of the stakeholders are diverging concerning the necessary change. Most stakeholders that support to change the current rules (26%) consider that it is necessary to remove the margin of discretion for Member States to determine the conditions for copyright protection, because the notion of 'work' has recently been harmonised by the case law of the CJEU. The Court of Justice of the European Union (CJEU) found that the 'notion of work' is an autonomous concept of EU law that needs to be interpreted and applied uniformly and this puts into question whether the margin of manoeuvre currently left to the Member States remains justified. Consequently, many stakeholders raise that the provision in the Directive (second sentence in Article 17) which lays down that Member States set the conditions under which such protection is granted, including the level of originality required, no longer appears justified.

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[162] Judgment of the Court, 27.1.2011, *Flos*, C-168/09, ECLI:EU:C:2011:29. The CJEU clarified that Member States cannot exclude copyright protection for designs, triggering changes in some national law, widening the copyright protection for works of applied art, and the possible overlap with design law.

[163] Judgment of the Court, 12.9.2019, *Cofemel*, C-683/17, ECLI:EU:C:2019:721, concerning copyright protection of applied arts (interior design), which appears to be an important area of interaction between copyright and design law. Building on the respective objectives and rules of design and copyright law, the CJEU concluded that cumulation of protection may only *"be envisaged in certain situations"* (point 52), i.e. when a design meets the copyright protection requirements, taking into account that aesthetic effect does not equal originality. The criterion of the author's own intellectual creation remains the criterion to be taken into account.

[164] Judgment of the Court, 11.6.2020, *Brompton Bicycle*, C-833/18, ECLI:EU:C:2020:461. In this case, the Court concluded that a product whose shape is, at least in part, necessary to obtain a technical result, can receive copyright protection where that product is an original work resulting from intellectual creation, meaning that through that shape, its author expresses his creative ability in an original manner by making free and creative choices in such a way that that shape reflects his personality.

Some stakeholders (13%) consider that it would be necessary to adopt guidelines clarifying relevant case law of the CJEU, emphasising that the guidelines would create clarity about the EU legal framework, reduce divergences between the national case laws, thus increasing the predictability of court decisions.

Almost 1/4 of the stakeholders (24%) consider that it would be necessary to set in the EU law the specific standards under which designs can be protected by copyright law to create absolute certainty, whereas others are against amending copyright concepts through design law.

The majority of stakeholders (71%) never or rarely **register the same design as national design in various Member States**. The main reason for this mentioned by many stakeholders is that it increases costs while offering more limited protection than a Community design, which offers EU-wide protection at a relatively low cost.

However, some stakeholders mention certain circumstances under which it is advantageous to register the same design as national design in various Member States. In certain situations, it is cheaper and more practical to register the design as national designs instead of a Community design. Where, for multiple-design applications, the designs are not in the same Locarno class, some national design registries allow (unlike the EUIPO) such designs to be combined into a single application, thus making the application process cheaper. In certain situations, where the protection through a Community design is not possible due to national obstacles in certain Member States, the option is used to register the same design in various Member States.

Another reason to opt for national design protection is, for instance, to make the design harder to invalidate in strategic markets (since it is easier to pursue an application for invalidity before the EUIPO than it is before certain national IP offices or courts in the case of a national design application).

Some stakeholders stress that since it is not possible to protect spare parts at EU level with a Community design, registering the relevant designs in various Member States may be a reasonable business decision.

The majority of stakeholders (73%) never or rarely **register the same design as national design first and subsequently also as registered Community design based on convention priority**. Some stakeholders indicate that in some situations it is useful to register a design first at national level. When the applicant does not know with certainty the market potential of its product, it may be reasonable to register the design as national design first and subsequently, within the priority or grace period, if the product proved successful and the design holder wants to expand the business to other markets, also as registered Community design.

Some stakeholders indicate that in order to ensure a priority right for a multiple application, it is practical to file a national application first and then register a multiple application for Community design for only a selection of the designs.

Stakeholders are divided concerning the need for changing the current rules on **exhibition priority**, with slightly more (49%) being in favour of a legislative change. This right has the effect that the date on which the design was displayed at an officially recognised exhibition will count as the date of filing of the design application for the purposes of establishing which rights take precedence. For Community designs this right is essentially limited to world exhibitions and does not cover display at other, national or international, exhibitions. Given the paucity of world exhibitions, and the fact that such exhibitions do not involve business-to-business exchange, this limitation is criticised by quite a number of stakeholders representing mainly the exhibition industries, which calls for aligning the Community design regime with broader national standards accepting exhibition certificates from other trade fairs. They suggest that a selected list of recognised exhibitions could be established along with strictly codified procedures and documents that the exhibition authorities should release for the purpose of claiming priority. The exhibition industry suggests that the reference in the Community Design Regulation to the Convention on International Exhibitions (signed in Paris on 22 November 1928 and last revised on 30 November 1972) should be replaced by the requirement of international status of the trade fairs used by the Union of International Fairs (UFI)[165].

The stakeholders, furthermore, considered the lack of harmonisation of priority certificates issued by trade fair organisers as a problem that negatively influences the complementarity and interoperability between the Community and national design systems. Quite a number of stakeholders criticised also the diverging national rules concerning the list of exhibitions that are accepted to claim exhibition priority and called for harmonising the national rules and broadening the list of trade fairs that are accepted.

Quite a number of stakeholders (39%), however, are against changing the rules on the exhibition priority, emphasising that the requirements set by Convention on International Exhibitions guarantee the necessary authenticity and seriousness of the priority claimed. These stakeholders stress that considering the low number of exhibition priority claims and that the Design Law Treaty also limits the exhibition priority to official or officially recognised international exhibitions, it would not be practical to change the current rules.

In contrast to the EUIPO and the vast majority of national industrial property offices, the industrial property offices of five Member States still carry out **ex officio examination of prior art** for the purposes of establishing novelty of a design applied for registration. The stakeholders express diverging views on this matter. Quite a number of stakeholders (38%) consider that Member States should remain free to examine novelty of a design, because the ex officio examination of prior art has a number of benefits. They consider that ex officio examination increases the legal certainty over the validity of the design for the applicant since it provides a first filter for registering manifestly invalid design rights. For these reasons, several stakeholders consider that ex officio examination of prior art should be introduced both at EU and national level.

Quite a number of the stakeholders (28%) however consider that Member States should not be allowed to do so any more in alignment with the Community design system, because the different practices fragment the EU market, the ex officio examination causes additional administrative burden and costs for businesses and increases the duration of the design registration procedure. Some stakeholders also stress that the lack of ex officio examination does not appear to lead to the registration of more invalid designs. They consider also that the lack of ex office examination for prior art does not undermine the legal certainty over the validity of the design for the applicant.

[165] Based on the following criteria: a) the number of direct foreign exhibitors and multinational exhibitors represents at least 10% of the total number of exhibitors at the fair; or b) the number of foreign visits or visitors represents at least 5% of the total number of visits or visitors at the exhibition.

In some Member States, where it is currently not possible to seek for the **invalidation of a registered design before the industrial property office**, only a very few invalidity cases are brought before the competent courts. 2/3 of the stakeholders (66%) consider that Member States should be required to establish quick and inexpensive proceedings before their industrial property offices to get registered designs invalidated. They point out that the non-availability of office-based proceedings for the invalidation of registered designs in some Member States makes the design system in these Member States inefficient, and thus burdensome for businesses, in particular SMEs and individual designers. They also emphasise that in order to assist in capacity building and cushion potential negative impacts on the part of smaller IP offices, cooperation between the EUIPO and national IP Offices should be extended appropriately. They stress that under the current rules the only way for competitors to invalidate a design right is to go through complex and costly invalidity proceedings before national courts, which is a deterrent. In addition, many public authorities are in favour of introducing mandatory invalidity proceedings at national level.

Those stakeholders (18%) that are against introducing mandatory administrative invalidity proceedings point out that in some Member States so few designs are invalidated that there is not enough experience nor demand to run such proceedings efficiently.

As regards the **fee levels**, 41% of the stakeholders consider that the basic fee for the initial five years' registration of a Community design (EUR 350) should be lowered. They point out that lowering the registration fee level would make the design protection more accessible to SMEs and individual designers without affecting the delicate balance between the national and EU level protection. 24% of the stakeholders consider that the fee(s) for renewing the registration of a Community design should be lowered.

Some stakeholders call for the introduction of a genuine use requirement for designs, but many stakeholders are expressly against this. One of the problems mentioned by several stakeholders is that the renewal fee of the registered designs increases each time. A number of stakeholders call for aligning the EU and international renewal fee levels. Some stakeholders express concerns about the requirement that designs combined under a single application have to fall under the same Locarno class. They also criticise that multiple designs in the same Locarno class can benefit from a bulk discount at the application phase, whereas this is not available at the point of renewal.

As regards the introduction of a **commonly recognised symbol,** pointing to the fact that the design incorporated in a product is registered (design notice), the large majority of the stakeholders (72%) consider this being a suitable means to raise awareness about the EU design system. These stakeholders point out that the commonly recognised symbol would make the public aware of the fact that a certain right is protected and indicate ownership on it that can be enforced against third parties. They emphasise that the symbol could inform third parties about the fact that the design is registered, deterring them from copying it and serving as proof of knowledge of registration in infringement cases. Some stakeholders suggest introducing the possibility to use the commonly recognised symbol also for unregistered designs. Some stakeholders stress that the symbol would also serve as a useful tool to enhance the value of the protected right for its design holder from a valuation and marketing perspective. They consider however that the symbol should remain optional, because it may be an additional cost for the design holders and impractical for certain product categories.

Some stakeholders (27%) do not support the introduction of a commonly recognised symbol, emphasising that its use would not be practical in certain sectors (e.g. those sectors, which offer small products or sectors with strong considerations of aesthetics).

The stakeholders raised a number of **additional issues** in relation to the design reform, which were not subject to the questionnaire (but already covered by the previous, broader public consultation in the context of the evaluation).

Many stakeholders suggest that the design holder should be entitled to take action against counterfeit goods in transit, similarly to the provisions on goods in transit in the EUTMR and TMD.

Many stakeholders, mainly right holders, suggest abolishing the condition for multiple applications in Article 37(1) CDR that the products in which the designs are intended to be incorporated or to which they are intended to be applied all belong to the same class of the International Classification for Industrial Designs (‘unity of class’ requirement).

A number of stakeholders call for a more user-friendly registration procedure and electronic search tools, which is fit for the digital age (e.g. electronic filing). They propose that the EUIPO and the national IP offices accept the possibility to deposit more than seven views/representations per design or to modify the views/representations following an objection by the EUIPO or a national IP office on their mode of representation, without expanding the scope of protection, as well as the ability to file 3D formats, video files and animations for the representation of the design.

Some stakeholders suggest introducing a simple opposition procedure that would allow third parties to prevent the registration of an allegedly infringing design.

Some stakeholders consider that the provisions on deferment of publication needs to be harmonised between Member States, by requiring Member States to provide for this possibility with the same maximum duration and with the possibility for the applicant to have its design published before the expiration of the maximum duration of the deferment period and to make minor changes to the design during the deferment period without invalidating the deposited design.

Annex 2a: Stakeholders views on Spare parts liberalisation

Design protection for visible spare parts was the most controversial topic of the stakeholder consultations. While car manufacturers, their specific interest groups and brands associations, where they are prominent members, are not supportive of the introduction of an EU-wide repair clause into the DDir, the independent repair sector, including lobby associations, consumer organisations and academia strongly advocate the full liberalisation of the spare parts aftermarket.

Main arguments put forward in favour of design protection are:

- Exemption for spare parts in design law is alien to IP system and not justifiable.
- Removal of protection deprives car manufacturers of the right to a fair return on their investment and eliminates the incentive for innovation, leading to reduced design diversity and correspondingly negative effects on innovative markets.
- Alleged economic advantages of the repair clause (lower prices) are unproven.
- Design protection is needed to protect public against unsafe and inferior parts.

Main arguments put forward against design protection for spare parts (and in favour of liberalisation) and followed in this impact assessment:

- Spare parts protection is abusive as contradicting the actual purpose of design protection which is to foster creativity through design innovation.
- Extension of protection to must-match spare parts implies the complete elimination of competition in the aftermarket. Unlike its effects on the primary market, applying design protection to must-match parts in respect of which there is no design alternative gives vehicle manufacturers a product monopoly.
- Lack of fair competition deprives vehicle owners from any choice (making them captive consumers) and is cause for verifiably higher prices.
- Design protection is not the right instrument to generate and safeguard safety and quality of spare parts. Safety is a matter of specific legislation (type-approval and authorisation) and quality is a matter of market forces and consumer choice (for decades spare parts from a variety of sources have been offered in Europe).

Table. 2a.1. Answers to question 3. Should there be changes to design protection for repair spare parts?

	All	**Manufacture of motor vehicles**	**Manufacture of parts and accessories for motor vehicles**	**Consumer organisation**	**Public authority (national)**
Yes, limited to new designs	20%	0%	0%	0%	43% (HR, LT, IT)
Yes, to both existing and new designs	27%	0%	89%	100%	0%
No changes	18%	20%	0%	0%	14% (SE)
Other	35%	80%*	11%	0%	43% (ES, HU, EE)
Answers	83	5	9	2	7

** Manufacturers asked for full protection of spare parts in all MS (no liberalisation at all even in 12 MS who already have liberalised)*
Source: OPC analysis

ANNEX 3: WHO IS AFFECTED AND HOW?

1. Practical implications of the initiative

The most significant benefits of the initiative relate to the liberalisation of the spare parts aftermarket. This will especially concern the vehicles market and should reach between EUR 340 and 544 million after the ten-year transition period.

Other changes relate to the adjustment of fees for registered Community design protection and simplifications for users to apply and manage their rights. The adjustment of fees aims at making protection more attractive to those seeking protection up to ten years, while charging significantly more for longer term protection. The new regime also strives to keep national design protection attractive for local users, and seeks to limit negative impacts on the EUIPO budget.

The final set of changes regards the approximation of national rules and alignment to the CDR to facilitate cross-border filing and design portfolio management. These changes are most difficult to quantify, thus just a couple of examples are mentioned below.

2. Summary of costs and benefits

I. Overview of Benefits (total for all provisions) – Preferred Option		
Description	***Amount***	***Comments***
Direct benefits		
Liberalisation of the aftermarket for spare parts. Limited to new designs for the first 10 years (Opt. 1.2)	In the car market for visible spare parts: EUR 340-544m per year from year 11. During the 10-year transition each year benefits will increase by EUR 4 to 13m per year to reach up to EUR 40-130m in year 10.	Benefits to customers. As regards car market to those from AT, BG, CY, CZ, DE, DK, EE, FI, FR, HR, MT, PT, RO, SE, SI, SK
Reduction of RCD fees for basic protection and 1st renewal (Opt. 3.1)	EUR 6 million*	Basic protection reduction concerns all applicants, renewal only those who decide to renew – around 49% of owners renew after 5 years.
Other simplifications (e.g. means and requirements of design representation) (Opt. 2.)	EUR 1 million*	Concerns around 14% of RCD applicants. Realised at initial application.
Facilitation of multiple applications (Opt 2)	EUR 0.64 million*	Concerns around 20% of RCD applicants. Realised at initial application.
No transfer fee (Opt 3)	EUR 0.63 million*	Simplification for around 3000 designs that annually are transferred to different owners.
Office-based invalidity procedure in national IP offices	EUR 4,000 – 7,000 per case	Concerns those seeking to cancel invalid design
No ex-officio examination of prior art in national IP offices	Registration time cut in half	Concerns around 1000 applications a year

Indirect benefits		
N/A		

** Estimate for 2024. Benefits will increase with raise of number of applications/protected designs. In the optimistic scenario number of applications may raise by 15% in 2030 in comparison to the baseline growth.*

II. Overview of costs – Preferred option							
		Citizens/Consumers		Businesses		Administrations	
		One-off	Recurrent	One-off*	Recurrent	One-off	Recurrent
2nd renewal (15 years protection)	Direct costs	n/a	n/a	EUR 175.33 per owner Total annually*: EUR0.6m	n/a	n/a	n/a
	Indirect costs	n/a	n/a	n/a	n/a	n/a	n/a
3rd renewal (20 years protection)	Direct costs	n/a	n/a	EUR 1,139.66 per owner Total annually*: EUR1.5m	n/a	n/a	n/a
	Indirect costs	n/a	n/a	n/a	n/a	n/a	n/a
4th renewal (25 years protection)	Direct costs	n/a	n/a	EUR 3,345.93 per owner Total annually*: EUR2.3m	n/a	n/a	n/a
	Indirect costs	n/a	n/a	n/a	n/a	n/a	n/a
Cap of 50 designs per application	Direct costs	n/a	n/a	EUR 2,539.88 per owner Total annually*: EUR0.18m	n/a	n/a	n/a
	Indirect costs	n/a	n/a	n/a	n/a	n/a	n/a

** Each of the cost below are paid only once per each design or application.*

ANNEX 4: ANALYTICAL METHODS

The analytical methods used in the various studies mentioned in Annex 1 are explained in the text of the respective studies.

Measuring the impact of introducing EU-wide repair clause

Using data on prices of 12 types of spare parts for 60 car models from 2001 to 2016 in 16 EU member states plus Norway and Switzerland, Herz & Mejer (2020) difference-in-differences estimates imply that design protection extended to the use of spare parts for the purpose of repair increases prices of these parts in Europe by about 5–8%.

Herz & Mejer (2020) use these estimates to calculate potential savings to the European Union customers. "Savings" refer to the counterfactual decrease in spending of EU consumers for a given quantity of spare parts. The quantity is proxy using the spare parts market data coming from GlobalData Report[166] that documents that in 2017 the annual value of the market for visible spare parts (i.e. lighting, body parts and glazing segments) in the EU in 2016 amounted to EUR 20 billion with 45% of sales occurring in the countries without repair clause exemption. The market size includes the UK who was at that time member of the European Union and who has a repair clause exemption. Herz & Mejer (2020) conclude that the EU28 consumers would save between EUR 450 and 720 million annually on the purchase of visible automotive spare parts alone.

For the purpose of this impact assessment the saving estimates by Herz & Mejer (2020) are updated with the data on market size reported in Wolk After Sales Experts Study (2021). According to this recent study, in 2019 the market size for visible spare parts in the EU27 (i.e. post-Brexit) amounted to EUR 16.3 billion with almost 51% of sales (EUR 8.3 billion) occurring in countries without repair clause exemption, resulting in potential annual savings to the EU customers between EUR 415 and EUR 664 million.

Assessment of options

Most VMs launch a new generation of a given model ('redesign') every five to eight years.[167] In the meantime, they may add small changes to the skin and/or interior design of a car to boost consumer interests in a model. Those changes tend to be made to *the bumpers, lights and grille* and are called 'a facelift'. For the purpose of assessment of options it is therefore assumed that 'redesign' takes place every six years and 'facelift' every three years.

Data on vehicles in use by age comes from the ACEA Report.[168] Out of 16 MS that do not have a repair clause in place or liberalised the market only recently (i.e. Germany and France), detailed information is available for as much as 12 MS.[169] In 2019, there were 123 million passenger cars on the roads in those MS and among them 7.2 million new cars.

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[166] GlobalData (2017). The European Car Crash Repair Parts Market 2012 – 2022: Market size, market forecast and recommendations. Published: February 2017.

[167] See specialised press: https://www.autotrader.com/car-shopping/buying-car-why-you-should-pay-attention-model-cycles-239246; or https://www.carwow.co.uk/guides/glossary/car-facelift-explained-0658#gref

[168] ACEA Report (2021, January) Vehicles in use, Europe. p. 10 - Vehicles in use by Age.

[169] Infomration on Bulgaria, Croatia, Cyprus and Malta is missing.

Option 1.1: ***Full liberalisation for all designs***. Under this option a repair clause would apply to all cars that are currently on the market, including 123 million cars in markets without a repair clause, bringing full potential savings between EUR 415 and EUR 664 million to consumers.

Option 1.2: ***Instant full liberalisation for new designs followed by full liberalisation for old designs after transitional ten-year period.*** Under this option, during the transition period of 10 years only spare parts for 'redesigned' or 'facelifted' models would be covered under a repair clause. To proxy the number of 'redesigned' cars, it is assumed that spare parts for one out of six cars would be subject to a repair clause (7.2 million * 1/6 = 1.2 million), which amounts to 1% of the total passenger car fleet. At the end of the 10-year transition period, 10% of the car fleet would benefit from a repair clause. This share increases to 20% if 'facelifted' cars are accounted for. Therefore, during the transition period the benefits to consumers would be very limited.

Option 1.3: ***Full liberalisation of new designs*****.** Applying the same assumption as in the case of Option 1.2, after ten years between 10 and 20% would benefit from a repair clause, after 15 years this share would go up to between 15 and 30% respectively, and after 20 years between 20 and 40%.

ANNEX 5: PROPOSALS TO BE COVERED BY THE REVISION OF THE REGULATORY FRAMEWORK

1. Introduction of a repair clause into the DDir in alignment with Article 110 CDR *(addressed in the problem definition)*

2. Updating and streamlining provisions and procedures related to the RCD, to the extent relevant in alignment with reformed EUTMR *(addressed in the problem definition)*

- Definitions of a design and product (Article 3 CDR, Article 1 DDir).
- Filing of RCD applications through national offices (Article 35 CDR): The option to apply for a RCD through a national IP office has been foreseen by the CDR as temporary measure (see Article 35(4) CDR). The number of applications received through national offices have become near extinct. Therefore, in alignment with the reformed EUTMR, the option of filing a RCD through national offices should be abolished.
- Align other procedural rules of the CDR with the reformed EUTMR, such as regards the persons that can be proprietors of a RCD, the principles of professional representation, the means and rules of communicating with the EUIPO, the legal instruments available in proceedings (such as revocation of decisions as provided for in Article 103 EUTMR, or continuation of proceedings as provided for in Article 105 EUTMR) and their requisites.

3. Optimization and streamlining of the fee schedule and adjustment of the amount of fees to be paid for the RCD (*addressed in the problem definition*)

4. Further approximation of design laws and procedures (*addressed in the problem definition*)

4.1 Principal procedural rules to be added to the DDir in alignment with the CDR

- Regulate requirements for obtaining a filing date;
- Regulate the requirements and technical means for the clear and precise representation of designs;
- Regulate that it must be possible to combine several designs in a design application (multiple application) and without the need for the relevant products to belong to the same class of the International Locarno Classification;
- Regulate that it must be possible to request that the publication of a registered design be deferred for a period of 30 months from the date of filing (or the date of priority of) the application in alignment with Article 50 CDR;
- Regulate that ex-officio substantive examination of a design application does not cover prior art in alignment with Article 47 CDR;

- Regulate that it must be possible to request the invalidation of a registered design in proceedings before the office (mandatory administrative invalidity procedure).

4.2 Further substantive rules of the CDR to become part of the DDir

- Make explicit in the DDir that the scope of protection conferred by a registered design is not limited to any product specification in alignment with Article 36(6) CDR;

- Provide for rights of prior use in alignment with Article 22 CDR;

- Mirror the presumptions of ownership and validity of a design registration as laid down in Article 17 and Article 85 CDR.

5. Required other alignment of legislation with the reformed trade mark legislation *(not addressed in the problem definition)*

- Complement the rights conferred by both the RCD and registered national designs to explicitly extend to counterfeit design goods in transit in line with Article 9(4) EUTMR and Article 10(4) TMD.

6. Compliance with the Lisbon Treaty (*not addressed in the problem definition*)

- Update the terminology used in the legislation to refer to the EU and Union instead of the Community, etc.;

- Align the powers currently conferred upon the Commission to adopt necessary provisions for implementing its provisions (Article 107 CDR) to Articles 290 and 291 TFEU in alignment with the reformed EUTMR.

ANNEX 6: SPARE PARTS PROTECTION IN MEMBER STATES

The Table below provides an overview of the implementation of a repair clause across Member States. Italy introduced a repair clause in 2001 and Poland in 2007. Denmark and Sweden (*) offer a maximum term of design protection of 15 years, being shorter than that of 25 years in all other Member States providing protection.

In Germany, a repair clause was recently inserted into the national Designs Act and entered into force on 2 December 2020, affecting designs applied for registration after that date. In France (**), a partial repair clause, promulgated on 24 August 2021, will become applicable (only) as from 23 January 2023, extending as well to new designs.

Table A.5.1. Implementation of repair clause in the EU Member States

	Repair clause		Repair clause
Austria (AT)	no	Ireland (IE)	yes
Belgium (BE)	yes	Italy (IT)	yes (2001)
Bulgaria (BG)	no	Latvia (LV)	yes
Croatia (HR)	no	Lithuania (LT)	yes
Cyprus (CY)	no	Luxembourg (LU)	yes
Czech Republic (CZ)	no	Malta (MT)	no
Denmark (DK)*	no	Netherlands (NL)	yes
Estonia (EE)	no	Poland (PL)	yes (2007)
Finland (FI)	no	Portugal (PT)	no
France (FR)**	no	Romania (RO)	no
Germany (DE)	yes (2020)	Slovakia (SK)	no
Greece (EL)	yes	Slovenia (SI)	no
Hungary (HU)	yes	Spain (ES)	yes
		Sweden (SE)*	no

Source: Legal review on industrial design protection in Europe (2016) and Beldiman and Blanke-Roeser (2017)

ANNEX 7: EVOLUTION OF EUIPO BUDGET

I. Budgetary calculations applied to sub-options 3.1 and 3.2 for adjusting RCD fees

The two options for fee adjustment presented below foresee the reduction of the basic RCD registration fee.

Furthermore, in order to ensure equal treatment of applicants with smaller and larger filing volumes, both proposals also involve the introduction of a flat fee per additional design of a multiple application. This is complemented by the removal of the currently existing 'unity of class' requirement in the CDR applicable to multiple applications.

As a consequence, the considered options for adjustment of fees would allow easier access to RCD protection, in particular for SMEs and individual designers (cheaper acquisition of the right and first renewal), while safeguarding at the same time that only those RCDs utilised in the market place remain on the register by way of the renewal fee increments.

Table A.7.1 - Currently applicable fees and revenues

	Existing fees	2021	2022	2023	2024	2025
Applications	**Registration**[170] € 350 **2-10 design** € 175 **11 to design** € 80 **51 to inf.** € 80 **IR Individual designation** € 62	20 628 225.38	21 299 615.50	21 953 222.15	**22 627 392.56**	23 322 126.71
Renewals	**1st** € 90 **2nd** € 120 **3rd** € 150 **IR renewal** € 31	9 193 968.98	9 716 893.92	9 902 966.11	**11 802 446.11**	13 921 376.11
Other fees	**Deferment of publication** € 40 **2 to 10 design** € 20 **11 to inf.** € 10 **Miscellaneous fees** **RCD invalidity** € 350	1 221 060.00	1 249 160.00	1 276 370.00	**1 293 880.00**	1 311 730.00

[170] Includes publication and registration fees.

1. Sub-option 3.1 (Total loss of revenue - € 3 204 671.62)

According to sub-option 3.1, the headline fee to obtain a single RCD is reduced from € 350 to € 250. For each additional design forming part of a multiple application, the fee is € 125, leading to savings of € 125 vis-à-vis a single design application per design.

The fees for renewals under this option are as follows: first renewal – € 70; second renewal – € 140; third renewal – € 280; fourth renewal € 560. Thus, the fees for the first two renewals are equivalent to those under the current fee level, that is € 210 in total.

Table A.7.2 – applicable fees and revenues under sub-option 3.1

	Proposed fees	2021	2022	2023	2024	2025
Applications	**Registration**[171] € 250 **2-infinite design** € 125 **IR Individual designation** € 62	16 606 150.38	7 142 791.03	7 668 841.55	**18 211 440.94**	18 770 589.19
Renewals	**1st** € 70 **2nd** € 140 **3rd** € 280 **IR renewal** € 31	10 421 628.98	10 961 863.92	11 216 226.11	**13 638 926.11**	16 894 136.11
Other fees	**Deferment of publication** € 40 **2 to 10 design** € 20 **11 to inf.** € 10 **Miscellaneous fees RCD invalidity** € 350	1 221 060.00	1 249 160.00	1 276 370.00	**1 293 880.00**	1 311 730.00
Total loss of revenue[172]		-3 419 615.00	-3 537 54.47+	-3 596 20.60+	**- 3 204 671.62**	-2 203 977.52

2. Sub-option 3.2 (Total loss of revenue - € 3 164 565.16)

Under the second sub-option, the headline fee is also € 250 but each additional design of a multiple application further discounted to € 100 instead of the proposed € 125 under sub-option 3.1. This will further promote easy access to RCD protection. The fees for

[171] Includes publication and registration fees.
[172] The loss of € 625 200 generated due to the abolishment of transfer fee is added to the total loss of revenue figures every year.

renewals under this option are as follows: first renewal – € 80; second renewal – € 160; third renewal – € 320; fourth renewal € 640.

This option effectively allows applicants to register two RCDs for the same fee as currently required for a single RCD (€ 350). At the same time it safeguards by increasing subsequent renewals fees that only those RCDs utilised in the market place remain on the register.

Table A.8.3 – applicable fees and revenues under sub-option 3.2

	Proposed fees	2021	2022	2023	2024	2025
Applications	**Registration**[173] € 250 **2-infinite design** € 100 **IR Individual designation** € 62	14 924 125.38	15 404 414.03	15 877 120.79	**16 364 697.40**	16 867 143.86
Renewals	**1st** € 80 **2nd** € 160 **3rd** € 320 **IR renewal** € 31	11 856 618.98	12 478 003.92	12 756 976.11	**15 525 776.11**	19 246 016.11
Other fees	**Deferment of publication** € 40 **2 to 10 design** € 20 **11 to inf.** € 10 **Miscellaneous fees RCD invalidity** € 350	1 221 060.00	1 249 160.00	1 276 370.00	**1 293 880.00**	1 311 730.00
Total loss of revenue[174]		-3 666 650.00	-3 759 291.47	-3 847 291.36	**- 3 164 565.16**	-1 755 542.86

3. Calculation assumptions

The calculations of the EUIPO budget evolution use the following specific assumptions:

- Calculations are based on:

[173] Includes publication and registration fees.

[174] The loss of € 625 200 generated due to the abolishment of transfer fee is added to the total loss of revenue figures every year.

- the figures on RCD applications, renewals and other files presented to the EUIPO Budget Committee in November 2020. These figures are part of the approved Budget 2021 and Financial Outlook 2022 – 2025;
- the estimated number of files was performed assuming a growth rate of 3.1% per year for the period from 2021 until 2025;
- calculations related to multiple applications are based on the historical distribution of the number of RCDs filed. The historical distribution is applied to the total number of files allowing to produce the several different simulation scenarios;
- the renewals are calculated using the following logical steps:
  - number of RCD's subjected to renewal (RCD's files N-5) *historical renewal rate per wave of renewal;
  - the same logic is applied to IRCD's;
- the percentage of deferment is calculated as follows:
  - historical rate of deferred publication * RCD's fillings;
  - design invalidity is calculated as follows:
    - historical rate of invalidity * RCD's fillings.
  - the figures presented may not add-up due to a rounding effect during the several steps involved in the budget preparation.

- The fee adjustments are presumed to enter into force on 2024. Thus, the total impact and the loss of EUIPO revenue best to be considered is that of the year 2024.

- The fee adjustments are expected not to have a relevant impact on the RCD filing volumes in view of the filing figures following the latest fee reductions for EUTMs.

- Mirroring the fee reform for EUTMs, the transfer fee for RCDs is proposed to be abolished and therefore the resulting loss of EUIPO revenue of € 625.200 per year is included in the calculations.

- The deferment and miscellaneous fees remain unchanged.

- The fee structure is simplified by abolishing the separate publication fee and adding this fee to the registration fee.

- The same multiple application discount is granted for the designs contained in a multiple application, regardless of the number of such designs applied for (flat fee).

- The proposed limit of up to 50 designs forming part of a multiple application should slightly minimize the loss of EUIPO's revenue in the future. However, this proposed change is <u>not reflected in the calculations</u>, as not impactful.

- The revenue from a possible 4^{th} renewal period is <u>not considered in the calculations</u>, since no reliable figures are yet available.

- The highest number of RCD filings originated from the People's Republic of China in 2020. This country is preparing to join the Hague Agreement concerning the international registration of industrial designs. Thus, instead of RCD filings, the proportion of international registrations designating the EU (IRCDs) could rise sharply when filers from China opt for the international file route instead of direct RCD filings (following the evolution of international filings with effect for the EU from South Korea after this country joined the Hague Agreement). The EUIPO's fee revenue for IRCDs is well below that for direct filings. This expected future loss of revenue is not included in the calculations.

- Calculations foresee a 1.5% exchange rate for the IRCD individual designations and IRCD renewals.

II. Expected evolution of EUIPO budget according to revenues and expenditures

1. Current situation

a) Use of revenues: Table A.7.4 shows how the revenues are mobilised in terms of activities of the Office. The main conclusion is that the revenues are first used to cover the costs of EUTMs and RCDs but also to cross-subsidise all the "non-fee producing" activities. Because the balance is negative, the office makes actually use of the past accumulated budgetary results. Indeed, as mentioned in prior communications, the Office's contribution to EU policies (European school of Alicante, EU Funded projects and SME fund), is supported by the Office's accumulated surplus, in accordance with the provisions of the Office's Financial Regulation and the Court of Auditor's suggestion. While the entire contribution to EU policies comes from financial reserves, outside the operational budget, it is worth highlighting that the surplus amount generated in the year is insufficient to compensate it, leading to a net reduction of the accumulated result from previous years.

Table A.7.4 – Mobilisation of revenues in terms of activities of the Office

	2021	2022	2023	2024	2025
Current situation	Revenues (million EUR)	Revenues (million EUR)	Revenues (million EUR)	Revenues (million EUR)	Revenues (million EUR)
EUTM	251.5	262.1	278.5	289.8	307.7
RCD	31.0	32.2	33.0	35.6	38.5
Others	0.1	0.1	0.1	0.1	0.1
Total	282.6	294.4	311.7	325.6	346.3

	Expenditures (million EUR)	Expenditures (million EUR)	Expenditures (million EUR)	Expenditures (million EUR)	Expenditures (million EUR)
EUTM	-130.9	-134.1	-146.3	-157.6	-168.8
RCD	-10.8	-11.6	-12.1	-12.7	-13.2
EU Cooperation Projects	-39.2	-41.3	-45.5	-48.4	-51.9
Stratigic projects	-37.9	-47.8	-41.0	-33.2	-26.8
Observatory Activities	-15.5	-15.3	-15.3	-16.4	-18.6
litigations	-3.1	-3.1	-3.2	-3.3	-3.3
non-EU Cooperation	-4.0	-3.5	-3.1	-3.3	-5.7
EU network managment	-2.3	-2.3	-2.7	-2.8	-2.8
Reserve Fund adjustments (Title 10.2)	-3.7	-15.6	-10.5	-8.7	-13.7
Offsetting payments (Title 5)	-12.7	-13.6	-14.1	-14.7	-15.6
Contribution to EU policies	-37.0	-27.7	-28.6	-29.0	-29.3
Total	-297.1	-315.9	-322.3	-330.0	-349.7

Funded from accumulated result	14.5	21.5	10.6	4.4	3.5
Total Budget	0.0	0.0	0.0	0.0	0.0

b) Cross-subsidising result: In terms of RCDs, the cross-subsidising result is as shown in the following table.

Table A.7.5 – Cross-subsidising result in terms of RCDs

	Balance (million EUR)	Balance (million EUR)	Balance (million EUR)	Balance (million EUR)	Balance (million EUR)
RCD	31.0	32.2	33.0	35.6	38.5
RCD production	-10.8	-11.6	-12.1	-12.7	-13.2
Sub-total	**20.2**	**20.6**	**20.9**	**22.9**	**25.3**
Cross-subsidisation					
EU Cooperation Projects	-5.6	-5.9	-6.5	-6.9	-7.4
Stratigic projects	-5.4	-6.8	-5.9	-4.8	-3.8
Observatory Activities	-2.2	-2.2	-2.2	-2.3	-2.7
litigations	-0.4	-0.4	-0.5	-0.5	-0.5
non-EU Cooperation	-0.6	-0.5	-0.4	-0.5	-0.8
EU network managment	-0.3	-0.3	-0.4	-0.4	-0.4
Reserve Fund adjustments (Title 10.2)	-0.5	-2.2	-1.5	-1.2	-2.0
Offsetting payments (Title 5)	-1.8	-2.0	-2.0	-2.1	-2.2
Contribution to EU policies	-3.2	-0.2	-1.6	-4.2	-5.5
Sub-total	**-20.2**	**-20.6**	**-20.9**	**-22.9**	**-25.3**
Total	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

2. Situation under sub-option 3.1

The impact of sub-option 3.1 after 2024 is estimated in the following table.

Table A.7.6 – Impact of sub-option 3.1 on revenues

	Revenues (million EUR)	Revenues (million EUR)	Revenues (million EUR)	Revenues (million EUR)	Revenues (million EUR)
Option 3.1				-3.2	-2.2

The reduction of revenue will increase usage of past accumulated budgetary results.

Table A.7.7 – Usage of past accumulated budgetary results

	2021	2022	2023	2024	2025
Option 3.1	Revenues (million EUR)	Revenues (million EUR)	Revenues (million EUR)	Revenues (million EUR)	Revenues (million EUR)
EUTM	251.5	262.1	278.5	289.8	307.7
RCD	31.0	32.2	33.0	32.4	36.3
Others	0.1	0.1	0.1	0.1	0.1
Total	**282.6**	**294.4**	**311.7**	**322.4**	**344.1**
	Expenditures (million EUR)	Expenditures (million EUR)	Expenditures (million EUR)	Expenditures (million EUR)	Expenditures (million EUR)
EUTM	-130.9	-134.1	-146.3	-157.6	-168.8
RCD	-10.8	-11.6	-12.1	-12.7	-13.2
EU Cooperation Projects	-39.2	-41.3	-45.5	-48.4	-51.9
Stratigic projects	-37.9	-47.8	-41.0	-33.2	-26.8
Observatory Activities	-15.5	-15.3	-15.3	-16.4	-18.6
litigations	-3.1	-3.1	-3.2	-3.3	-3.3
non-EU Cooperation	-4.0	-3.5	-3.1	-3.3	-5.7
EU network managment	-2.3	-2.3	-2.7	-2.8	-2.8
Reserve Fund adjustments (Title 10.2)	-3.7	-15.6	-10.5	-8.7	-13.7
Offsetting payments (Title 5)	-12.7	-13.6	-14.1	-14.7	-15.6
Contribution to EU policies	-37.0	-27.7	-28.6	-29.0	-29.3
Total	**-297.1**	**-315.9**	**-322.3**	**-330.0**	**-349.7**
Funded from accumulated result	14.5	21.5	10.6	7.6	5.7
Total Budget	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

The contribution of RCDs for the cross-subsidising process is reduced.

Table A.7.8 – Contribution of RCDs for cross-subsidising process

	Balance (million EUR)	Balance (million EUR)	Balance (million EUR)	Balance (million EUR)	Balance (million EUR)
RCD	31.0	32.2	33.0	32.4	36.3
RCD production	-10.8	-11.6	-12.1	-12.7	-13.2
Sub-total	**20.2**	**20.6**	**20.9**	**19.7**	**23.1**
Cross-subsidisation					
EU Cooperation Projects	-5.6	-5.9	-6.5	-6.9	-7.4
Stratigic projects	-5.4	-6.8	-5.9	-4.8	-3.8
Observatory Activities	-2.2	-2.2	-2.2	-2.3	-2.7
litigations	-0.4	-0.4	-0.5	-0.5	-0.5
non-EU Cooperation	-0.6	-0.5	-0.4	-0.5	-0.8
EU network managment	-0.3	-0.3	-0.4	-0.4	-0.4
Reserve Fund adjustments (Title 10.2)	-0.5	-2.2	-1.5	-1.2	-2.0
Offsetting payments (Title 5)	-1.8	-2.0	-2.0	-2.1	-2.2
Contribution to EU policies	-3.2	-0.2	-1.6	-1.0	-3.2
Sub-total	**-20.2**	**-20.6**	**-20.9**	**-19.7**	**-23.1**
Total	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

3. Situation under Option 3.2

The conclusions are identical to sub-option 3.1 (lower level of revenues and therefore increasing funding from the past accumulated budgetary results), the impact being slightly lower after 2025.

Table A.7.9 – Implications of sub-option 3.2

	Revenues (million EUR)	Revenues (million EUR)	Revenues (million EUR)	Revenues (million EUR)	Revenues (million EUR)
Option 3.2				-3.2	-1.8

	2021	2022	2023	2024	2025
Option 3.2	Revenues (million EUR)	Revenues (million EUR)	Revenues (million EUR)	Revenues (million EUR)	Revenues (million EUR)
EUTM	251.5	262.1	278.5	289.8	307.7
RCD	31.0	32.2	33.0	32.5	36.7
Others	0.1	0.1	0.1	0.1	0.1
Total	**282.6**	**294.4**	**311.7**	**322.4**	**344.5**

	Expenditures (million EUR)	Expenditures (million EUR)	Expenditures (million EUR)	Expenditures (million EUR)	Expenditures (million EUR)
EUTM	-130.9	-134.1	-146.3	-157.6	-168.8
RCD	-10.8	-11.6	-12.1	-12.7	-13.2
EU Cooperation Projects	-39.2	-41.3	-45.5	-48.4	-51.9
Stratigic projects	-37.9	-47.8	-41.0	-33.2	-26.8
Observatory Activities	-15.5	-15.3	-15.3	-16.4	-18.6
litigations	-3.1	-3.1	-3.2	-3.3	-3.3
non-EU Cooperation	-4.0	-3.5	-3.1	-3.3	-5.7
EU network managment	-2.3	-2.3	-2.7	-2.8	-2.8
Reserve Fund adjustments (Title 10.2)	-3.7	-15.6	-10.5	-8.7	-13.7
Offsetting payments (Title 5)	-12.7	-13.6	-14.1	-14.7	-15.6
Contribution to EU policies	-37.0	-27.7	-28.6	-29.0	-29.3
Total	**-297.1**	**-315.9**	**-322.3**	**-330.0**	**-349.7**

Funded from accumulated result	14.5	21.5	10.6	7.6	5.2
Total Budget	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

	Balance (million EUR)	Balance (million EUR)	Balance (million EUR)	Balance (million EUR)	Balance (million EUR)
RCD	31.0	32.2	33.0	32.5	36.7
RCD production	-10.8	-11.6	-12.1	-12.7	-13.2
Sub-total	**20.2**	**20.6**	**20.9**	**19.8**	**23.5**

Cross-subsidisation					
EU Cooperation Projects	-5.6	-5.9	-6.5	-6.9	-7.4
Stratigic projects	-5.4	-6.8	-5.9	-4.8	-3.8
Observatory Activities	-2.2	-2.2	-2.2	-2.3	-2.7
litigations	-0.4	-0.4	-0.5	-0.5	-0.5
non-EU Cooperation	-0.6	-0.5	-0.4	-0.5	-0.8
EU network managment	-0.3	-0.3	-0.4	-0.4	-0.4
Reserve Fund adjustments (Title 10.2)	-0.5	-2.2	-1.5	-1.2	-2.0
Offsetting payments (Title 5)	-1.8	-2.0	-2.0	-2.1	-2.2
Contribution to EU policies	-3.2	-0.2	-1.6	-1.1	-3.7
Sub-total	**-20.2**	**-20.6**	**-20.9**	**-19.8**	**-23.5**

Total	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

ANNEX 8: MEMBER STATE FEES

Abbreviations:

D: Design; **E**: Electronic; **GP**: Grace Period; **MA**: Multiple Applications; **P**: Paper; **surch.**: surcharge

	Filing	Costs(175)	Deferment	Renewals
AT see also here and here	82(E) / 87(P) + 15.50 per class MA: 142(E) / 147(P) + 20 for 2nd - 10th + 18.50 as of 11th	97.50(E) / 102.50(P) – 322(E) / 327(P)	50% surch. of filing fee	130 (GP: 156) MA: 88 (GP: 105.6)
BLX	150(E) / 172(P) + 42(E) / 48(P) adding a characteristic feature + 12(E) / 13(P) registration of priority declaration MA: + 75(E) / 86(P) for 2nd - 10th D + 38(E) / 43(P) for 11th - 20th D + 32(E) / 36(P) for 21st - 50th D	192(E)(176) / 220(P)(177) – 825(E)(178) / 994(P)(179)	40	102 (GP: 12) MA: 51 for 2nd - 10th D 25 for 11th - 20th D 21 above 21st D
BG	20 (40 BGN) filing fee + 35 (70 BGN) examination fee + 90 (180 BGN) registration fee + 25 (50 BGN) registration certificate + 15 (30 BGN) publication fee per view + 10 (20 BGN) for priority claim MA: + 17.50 (35 BGN) examination fee as of 2nd	170 (340 BGN)(180) – 1542,50 (3085 BGN)(181)	25 (50 BGN) 1st D 45 (90 BGN) composition/set of products MA: 12.50 (25 BGN) as of 2nd D	Registered for 10 yr. – 135 (270 BGN) – 180 (360 BGN) – 250 (500 BGN) (GP: 125 (250 BGN))
HR	6.63 (50 HRK) filing fee + 26.43 (200 HRK) administrative fee + 52.87 (400 HRK) maintenance /	68.72(E) (520 HRK) / 85.91(P) (650 HRK) – 325.6(E) / 407(P)	47.64 (60 HRK + 300 HRK)	60.88 (60 HRK + 400 HRK) (GP: 100% surch.)

(175) For 1 and 10 designs, including 1 class, colour / characteristic features, publication and registration.
(176) Claiming a characteristic feature.
(177) Claiming a characteristic feature.
(178) Claiming characteristic features.
(179) Claiming characteristic features.
(180) Claiming priority (without registration certificate, one view).
(181) Claiming priority (without registration certificate, one view per design).

	publication fee + 2.65 (20 HRK) publication of description 20% (E) discount Designer: 50% discount MA: Per D: + 2.65 (20 HRK) filing fee + 6.63 (50 HRK) administrative fee + 26.52 (200 HRK) publication fee			MA: 29.78 (25 HRK + 200 HRK) per D
CY	85.43 filing fee + 51.26 registration fee + 68.34 publication fee	205.03	42.72	– 85.43 – 136.69 – 170.86 – 256.29
CZ	39.19 (1 000 CZK) Designer: 50% discount MA: + 23.51 (600 CZK) as of 2nd D	39.19 – 250.82	No surch.	– 117.57 (3 000 CZK) – 235.15 (6 000 CZK) – 352.73 (9 000 CZK) – 470.33 (12 000 CZK) The fee is also per MA, irrespective of how many designs are included.
DK	161.14 (1 200 DKK) + 53.71 (400 DKK) publication fee for each reproduction (view) as of 2nd MA: + 94 (700 DKK) as of 2nd D	161.14([182]) – 1 007.14([183])		295.42 (2 200 DKK) (GP: 20% surch.) MA: 147.71 (1 100 DKK) per D
EE	105 + 26 as of the 3rd variant([184]) Natural persons: 26	105 – 339		– 130 – 260 – 260 – 260 (GP: 45 surch.)
FR See	39 filing fee for 5 yr. registration + 23 publication fee b&w	86([185]) – 509([186])	No surch. (payment of publication fee	52 (GP: 50% surch.)

([182]) 1 view.
([183]) each 1 view.
([184]) Industrial designs may have variants. The variants of an industrial design are such modifications of the industrial design which produce a similar overall impression on persons skilled in the art.
([185]) In colour.
([186]) In colour.

also here	+ 47 publication fee colour		can be delayed)	
FI	250(E) / 300(P) + 55 as of 2nd class + ? publication fee per additional view MA: + 130 per D as of 2nd	250(E) / 300(P) – 1 420(E) / 1 470(P)		380 + 55 as of 2nd class MA: + 130 as of 2nd D
DE	60(E) / 70(P) MA: + 60(E) / 70(E) as of 2nd D for up to 10 D together + 6(E) / 7(P) as of 11th D	60(E) / 70(P) – 120(E) / 140(P)	30 MA: + 30 for 2 - 10 D together + 3 as of 11th D	– 90 – 120 – 150 – 180 (GP: 50 surch.)
EL	100 + 30 publication fee MA: + 10 as of 2nd D + 10 publication fee as of 2nd D	130 – 310	30 MA: + 10 as of 2nd D	– 100 – 150 – 200 – 250
HU	89.84 (32 000 HUF) Designer: 22.20 (8 000 HUF) MA: + 17.97 (6 400 HUF) as of 2nd D Designer: + 4.40 (1 600 HUF) as of 2nd D	89.84 – 251.57		– 179.69 (64 000 HUF) – 239.77 (85 400 HUF) – 300.41 (107 000 HUF) – 449.22 (160 000 HUF) 50% discount on all these fees for designer.
IE	70 MA: + 25 as of 2nd D	70 – 295	35	– 50 – 70 – 80 – 100 (GP: 100 surch.)
IT	50(E) / 100(P) + 40(P) + fee and photocopy fees MA: 100(E) / 200(P) per MA (up to 100 incl.) + 40 fee when filed via chamber of commerce	50 – 140	No surch.	– 30 – 50 – 70 – 80 (GP: 100 surcharge) The fee is also per MA, irrespective of how many designs are included.
LV	36(E) / 40(P) + 58.5(E) / 65(P) publication and registration fee	94,5(E) / 105(P) – 364.5(E) / 375(P)	40	– 170 – 225 – 280 – 335

	+ 9(E) / 10(P) for each additional view Designers pay 40% of fee Pupils, students, pensioners, disabled pay 20% of fee MA: + 27(E) / 30(P) for 2^{nd} - 10^{th} D + 18(E) / 20(P) for 11^{th} - 20^{th} D			(GP: 70 surcharge)
LT	69 + 69 registration and publication fee Natural persons: 50% MA: + 26 as of 11^{th} design	138 – 1380	34 "resumption"	– 86 – 115 – 144 – 173 (GP: 50% surch.)
MT	46.59	46.59 – 465.9		34.94 (GP: 100% surch.)
PL	67.08 (300 PLN) – filing fee per design covering up to 10 forms of an industrial design with the same essential features + EUR 22.36 EUR (PLN 100) priority claim per design + EUR 15.65 (PLN 70) publication fee + EUR 33.54 (PLN 150) registration fee	138.63 – 1386.3		– 55.76 (250 PLN) – 111.52 (500 PLN) – 223.04 (1000 PLN) – 446.08 (2000 PLN) (fees were reduced in 2016)
PT	107.62(E) / 215.24(P) for ≤ 5 D incl. MA: + 10.77(E) / 21.53(P) per D	107.62(E) / 215.24(P) – 161.47(E) / 322.89(P)	32.29(E) / 64.57(P)	– 32.29(E) / 64.57(P) – 43.05(E) / 86.10(P) – 53.81(E) / 107.62(P) – 64.57(E) / 129.15(P)
RO	30 filing fee + 50 examination fee + 20 publication fee for b&w + 100 publication fee for colour + 10 publication fee for words + 20 for priority claim MA: + 10 as of 2^{nd} D + 10 examination fee as of 2^{nd} D	180 – 1260	20	100 for 1-20 designs 125 for 21-50 designs 150 for 51-100 designs Plus costs for the renewal certificate
SK	40 Designer: 20 MA: + 20 as of 2^{nd} D	40 – 220	20	– 100 – 200 – 300 – 400 (GP: 100% surch.)

	Designer: + 10 as of 2nd D			
SI	80 MA: 65 as of 2nd D	80 – 665		70
ES	64.96(E) / 76.43(P) for ≤ 10 D incl. + 7.75 per priority claim(P) MA: + 56.86(E) / 66.88(P) for 11th - 20th D + 47.21(E) / 55.54(P) for 21st - 30th D + 37.77(E) / 44.45(P) for 31st - 40th D + 30.25(E) / 35.58(P) for 41st - 50th D	72.71(E) / 84.18(P) – 72.71(E) / 84.18(P)		83.85(E) / 98.65(P) (GP: 41.50(E) / 48.82(P)) MA: – 67.09(E) / 78.93(P) each D 11th - 20th – 53.66(E) / 63.13(P) each D 21st - 30th – 42.94(E) / 50.52(P) each D 31st - 40th – 34.34(E) / 40.40(P) each D 41st - 50th
SE	196.05(E) (2000 SEK) / 244.40(P) (2 500 SEK) + 48.88 (500 SEK) as of 2nd class + 19.55 (200 SEK) – publication fee as of the 2nd view per D MA: + 136.87 (1 400 SEK) – registration fee as of 2nd D	196.05(E) (2 000 SEK) / 244.40(P) (2 500 SEK) – 1 421.98(E) (14 600 SEK) / 1 470.67(P) (15 100 SEK)		244.40(E) (2 500 SEK) / 295.20(P) (3 000 SEK) (GP: 48.89 (500 SEK))

ANNEX 9: IMPACT OF FEE CHANGES AND OTHER SIMPLIFICATIONS

9.1 Proposed changes and summary of impacts

The table below presents the current and proposed fee structure for the Registered Community Design.

Table A.9.1. Overview of current and proposed structure for RCD (in EUR)

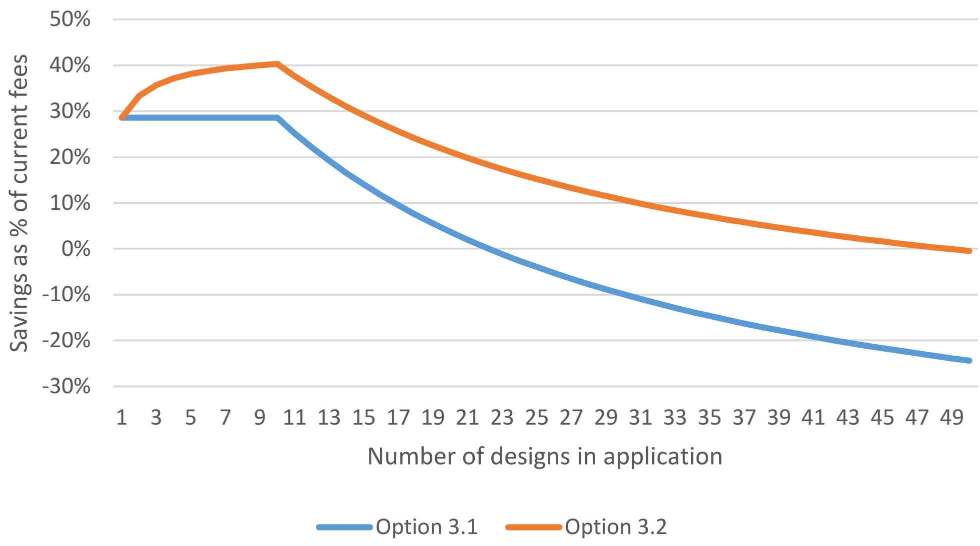
First 5 year period No of designs per application	**Current**	**Option 3.1**	**Option 3.2**
1	350	250	250
2-10	175	125	100
11 and more*	80	125	100
Cost of each renewal (each for 5 years)			
1st	90	70	80
2nd	120	140	160
3rd	150	280	320
4th	180	560	640

** No limit currently, in case of Option 3.1 and 3.2 limit of 50 designs per application*
Source: Own assessment

9.2 Changes in basic registration fee

The new fee structure will benefit designers who include up to 22 designs in a single application in case of Opt 3.1 and up to 48 designs in case of Opt. 3.2 (see Figure A.9.1). The largest cost saving in case of Opt. 3.1. amounts to 29% for those including from 1 to 10 designs per application. Opt. 3.2. delivers higher saving than Opt. 3.1, with maximum of 40% for those including 8-10 designs in a single application.

Figure A.9.1. Percentage savings from proposed option per number of designs included in application



Source: Own assessment.

For 2019 and 2020 the average number of designs per application was 3.4 for all applicants, 3.7 for companies, and 2.4 for individuals. Therefore, an average applicant will save around EUR 142 in case of Opt. 3.1 and EUR 203 in case of Opt. 3.2. The average saving for individuals will be EUR 132 and EUR 166 in case of Opt. 3.1 and Opt. 3.2 respectively. The average savings for companies arrive at EUR 144 and EUR 211 respectively in case of Opt. 3.1 and Opt. 3.2 (see table 9.2).

Table A.9.2. Application fee saving by option and average number of designs per application in 2019-2020.

	Companies		**Individuals**		**All**	
Average number of designs per application	3.7		2.3		3.4	
Avg. fee current system	729		551		695	
Avg. fee Opt. 3.1	585		419		552	
Avg. fee Opt. 3.2	518		385		492	
Opt 3.1 savings (EUR, %)	144	20%	132	24%	142	20%
Opt 3.2 savings (EUR, %)	211	29%	166	30%	203	29%

Source: Own assessment based on EUIPO data, numbers based on whole distribution see next table, numbers rounded

Taking into account the historical distribution of number of designs per application, 97.7% of applications will experience cost saving on the basic fee in case Opt 3.1 is selected and 99% in case of Opt. 3.2 (see table 9.3).

Table A.9.3. Application fee saving by option and number of designs per application

No. of designs per application	**% of applications (2019-2020)**	**Cumulative %**	**Option 3.1 savings**		**Option 3.2 savings**	
			EUR	**% from current**	**EUR**	**% from current**
1	54.8%	54.8%	100	29%	100	29%
2	15.8%	70.7%	150	29%	175	33%
3	7.7%	78.4%	200	29%	250	36%
4	5.5%	83.9%	250	29%	325	37%

No. of designs per application	% of applications (2019-2020)	Cumulative %	Option 3.1 savings		Option 3.2 savings	
			EUR	% from current	EUR	% from current
5	3.0%	87.0%	300	29%	400	38%
6	2.6%	89.6%	350	29%	475	39%
7	1.4%	90.9%	400	29%	550	39%
8	1.5%	92.4%	450	29%	625	40%
9	0.9%	93.3%	500	29%	700	40%
10	1.0%	94.3%	550	29%	775	40%
11	0.5%	94.8%	505	25%	755	38%
12	0.6%	95.4%	460	22%	735	35%
13	0.4%	95.8%	415	19%	715	33%
14	0.3%	96.1%	370	16%	695	31%
15	0.3%	96.4%	325	14%	675	29%
16	0.3%	96.7%	280	12%	655	27%
17	0.2%	96.9%	235	9%	635	26%
18	0.2%	97.2%	190	7%	615	24%
19	0.2%	97.3%	145	5%	595	22%
20	0.2%	97.5%	100	4%	575	21%
21	0.1%	97.6%	55	2%	555	20%
22	0.1%	97.7%	10	0%	535	19%
23	0.1%	97.9%	-35	-1%	515	17%
24	0.1%	98.0%	-80	-3%	495	16%
25	0.1%	98.1%	-125	-4%	475	15%
26	0.1%	98.2%	-170	-5%	455	14%
27	0.1%	98.2%	-215	-7%	435	13%
28	0.1%	98.3%	-260	-8%	415	12%
29	0.1%	98.4%	-305	-9%	395	11%
30	0.1%	98.5%	-350	-10%	375	11%
31	0.1%	98.5%	-395	-11%	355	10%
32	0.1%	98.6%	-440	-12%	335	9%
33	0.0%	98.6%	-485	-13%	315	8%
34	0.1%	98.6%	-530	-14%	295	8%
35	0.0%	98.7%	-575	-15%	275	7%
36	0.0%	98.7%	-620	-15%	255	6%
37	0.0%	98.8%	-665	-16%	235	6%
38	0.0%	98.8%	-710	-17%	215	5%
39	0.0%	98.8%	-755	-18%	195	5%
40	0.0%	98.9%	-800	-18%	175	4%
41	0.0%	98.9%	-845	-19%	155	4%
42	0.0%	98.9%	-890	-20%	135	3%
43	0.0%	98.9%	-935	-20%	115	3%
44	0.0%	99.0%	-980	-21%	95	2%
45	0.0%	99.0%	-1025	-22%	75	2%
46	0.0%	99.0%	-1070	-22%	55	1%
47	0.0%	99.0%	-1115	-23%	35	1%
48	0.0%	99.0%	-1160	-23%	15	0.3%
49	0.0%	99.1%	-1205	-24%	-5	-0.1%
50	0.9%	100.0%	-1250	-24%	-25	-0.5%
Weighted average savings			**142**	**20%**	**203**	**29%**

*Notes: * Currently there is no limit for designs per application. A cap at 50 would apply in Opt 3.1 and 3.2. Applications above 50 added to the 50 bracket. Note: Negative saving is an increase in costs.*
Source: Own assessment based on EUIPO data

9.3 Changes in renewal fees

The new renewal fees will affect both new and current users of design protection. The basic protection period lasts five years. It is possible to renew up to four times, each time for a five-year period (for the total maximum period of protection of 25 years).

Table A.9.4. Overview of current and proposed renewal fees for RCD (in EUR)

renewal	Current		Option 3.1		Option 3.2	
	nominal	PV	nominal	PV	nominal	PV
1st (after 5 years)	90	82	70	63	80	72
2nd (after 10 years)	120	98	140	115	160	131
3rd (after 15 years)	150	111	280	208	320	238
4th (after 20 years)	180	121	560	377	640	431

Note: PV – present value, ECB inflation target of 2% per year used as the discount rate
Source: Own assessment

The proposed structure lowers the first renewal fee as compared to the current system and increases subsequent renewal fees, with the most dramatic raises for the 3rd and 4th renewal. For all calculations below, and to ease comparison, the present value of future fees is used (see Table A.9.4).

The following table presents savings and cost increases from Opt 3.1.

Table A.9.5. Total cost difference of protection for a given period of time between Opt. 3.1 and current fees dependent on number of designs. In present value in EUR (left) and as percentage of current fees (right).

	5 yrs.	10 yrs.	15 yrs.	20 yrs.	25 yrs.		5 yrs.	10 yrs.	15 yrs.	20 yrs.	25 yrs.
1	-100	-118	-102	-5	251		-29%	-27%	-19%	-1%	33%
2	-150	-186	-153	40	551		-29%	-27%	-17%	4%	41%
3	-200	-254	-205	85	852		-29%	-27%	-17%	5%	44%
4	-250	-322	-257	130	1,152		-29%	-27%	-16%	6%	46%
5	-300	-391	-309	174	1,453		-29%	-27%	-16%	7%	47%
6	-350	-459	-360	219	1,754		-29%	-27%	-16%	7%	47%
7	-400	-527	-412	264	2,054		-29%	-27%	-15%	8%	48%
8	-450	-595	-464	309	2,355		-29%	-27%	-15%	8%	48%
9	-500	-663	-515	354	2,656		-29%	-27%	-15%	8%	49%
10	-550	-731	-567	399	2,956		-29%	-27%	-15%	8%	49%
11	-505	-704	-524	539	3,352		-25%	-24%	-13%	10%	51%
12	-460	-677	-480	679	3,747		-22%	-22%	-11%	12%	53%
13	-415	-650	-437	818	4,143		-19%	-20%	-10%	14%	55%
14	-370	-624	-394	958	4,539		-16%	-18%	-8%	15%	57%
15	-325	-597	-351	1,098	4,934		-14%	-17%	-7%	16%	58%
16	-280	-570	-307	1,238	5,330		-12%	-15%	-6%	18%	59%
17	-235	-543	-264	1,378	5,725		-9%	-14%	-5%	19%	60%
18	-190	-516	-221	1,518	6,121		-7%	-13%	-4%	19%	61%
19	-145	-489	-177	1,658	6,517		-5%	-12%	-3%	20%	62%
20	-100	-462	-134	1,798	6,912		-4%	-11%	-2%	21%	63%
21	-55	-435	-91	1,938	7,308		-2%	-10%	-1%	22%	64%
22	-10	-409	-48	2,077	7,703		0%	-9%	-1%	22%	64%
23	35	-382	-4	2,217	8,099		1%	-8%	0%	23%	65%
24	80	-355	39	2,357	8,495		3%	-7%	1%	23%	66%
25	125	-328	82	2,497	8,890		4%	-6%	1%	24%	66%
26	170	-301	126	2,637	9,286		5%	-6%	2%	24%	67%
27	215	-274	169	2,777	9,682		7%	-5%	2%	25%	67%
28	260	-247	212	2,917	10,077		8%	-4%	3%	25%	68%
29	305	-220	255	3,057	10,473		9%	-4%	3%	26%	68%
30	350	-193	299	3,197	10,868		10%	-3%	3%	26%	68%
31	395	-167	342	3,336	11,264		11%	-3%	4%	26%	69%
32	440	-140	385	3,476	11,660		12%	-2%	4%	27%	69%
33	485	-113	429	3,616	12,055		13%	-2%	4%	27%	69%
34	530	-86	472	3,756	12,451		14%	-1%	5%	27%	70%
35	575	-59	515	3,896	12,846		15%	-1%	5%	28%	70%
36	620	-32	559	4,036	13,242		15%	0%	5%	28%	70%

	5 yrs.	10 yrs.	15 yrs.	20 yrs.	25 yrs.		5 yrs.	10 yrs.	15 yrs.	20 yrs.	25 yrs.
37	665	-5	602	4,176	13,638		16%	0%	6%	28%	70%
38	710	22	645	4,316	14,033		17%	0%	6%	28%	71%
39	755	49	688	4,455	14,429		18%	1%	6%	29%	71%
40	800	75	732	4,595	14,825		18%	1%	6%	29%	71%
41	845	102	775	4,735	15,220		19%	1%	7%	29%	71%
42	890	129	818	4,875	15,616		20%	2%	7%	29%	72%
43	935	156	862	5,015	16,011		20%	2%	7%	29%	72%
44	980	183	905	5,155	16,407		21%	2%	7%	30%	72%
45	1,025	210	948	5,295	16,803		22%	3%	7%	30%	72%
46	1,070	237	991	5,435	17,198		22%	3%	8%	30%	72%
47	1,115	264	1,035	5,575	17,594		23%	3%	8%	30%	72%
48	1,160	290	1,078	5,714	17,989		23%	3%	8%	30%	73%
49	1,205	317	1,121	5,854	18,385		24%	4%	8%	30%	73%
50	1,250	344	1,165	5,994	18,781		24%	4%	8%	30%	73%

Source: Own assessment, present value of future fees used as per Tab. A.9.4.

In case Opt 3.1 is selected, those having one design per application (55%) will be able to protect their designs at lower cost than currently for up to 20 years. Those with between 2 and 23 designs (43%) will be able to protect them at lower cost than currently for a period of up to 15 years. Those with 24 to 37 designs (1%) will pay less for protection of up to 10 years. The remaining 1% will pay more than currently.

Table A.9.6. Total cost difference of protection for a given period of time between Opt. 3.2 and current fees. *In present value in EUR (left) and as percentage of current fees (right).*

	5 yrs.	10 yrs.	15 yrs.	20 yrs.	25 yrs.		5 yrs.	10 yrs.	15 yrs.	20 yrs.	25 yrs.
1	-100	-109	-76	50	360		-29%	-25%	-14%	8%	47%
2	-175	-193	-127	125	744		-33%	-28%	-14%	11%	55%
3	-250	-277	-179	200	1,129		-36%	-29%	-14%	13%	58%
4	-325	-361	-230	275	1,514		-37%	-30%	-14%	13%	60%
5	-400	-445	-281	350	1,898		-38%	-31%	-14%	14%	61%
6	-475	-529	-332	425	2,283		-39%	-31%	-14%	14%	62%
7	-550	-613	-384	500	2,667		-39%	-31%	-14%	15%	62%
8	-625	-697	-435	576	3,052		-40%	-31%	-14%	15%	63%
9	-700	-782	-486	651	3,437		-40%	-31%	-14%	15%	63%
10	-775	-866	-537	726	3,821		-40%	-32%	-14%	15%	63%
11	-755	-855	-494	896	4,301		-38%	-29%	-12%	17%	66%
12	-735	-844	-450	1,066	4,781		-35%	-28%	-11%	19%	68%
13	-715	-833	-406	1,236	5,260		-33%	-26%	-9%	21%	70%
14	-695	-822	-362	1,406	5,740		-31%	-24%	-8%	22%	72%
15	-675	-811	-319	1,576	6,220		-29%	-23%	-6%	24%	73%
16	-655	-800	-275	1,746	6,699		-27%	-22%	-5%	25%	74%
17	-635	-789	-231	1,916	7,179		-26%	-20%	-4%	26%	76%
18	-615	-778	-187	2,086	7,658		-24%	-19%	-3%	27%	77%
19	-595	-767	-144	2,256	8,138		-22%	-18%	-2%	28%	78%
20	-575	-756	-100	2,426	8,618		-21%	-17%	-2%	28%	79%
21	-555	-745	-56	2,596	9,097		-20%	-16%	-1%	29%	79%
22	-535	-734	-12	2,767	9,577		-19%	-16%	0%	30%	80%
23	-515	-723	31	2,937	10,057		-17%	-15%	0%	30%	81%
24	-495	-712	75	3,107	10,536		-16%	-14%	1%	31%	81%
25	-475	-701	119	3,277	11,016		-15%	-14%	2%	31%	82%
26	-455	-690	163	3,447	11,496		-14%	-13%	2%	32%	83%
27	-435	-680	206	3,617	11,975		-13%	-12%	3%	32%	83%
28	-415	-669	250	3,787	12,455		-12%	-12%	3%	33%	83%
29	-395	-658	294	3,957	12,934		-11%	-11%	3%	33%	84%
30	-375	-647	338	4,127	13,414		-11%	-11%	4%	34%	84%
31	-355	-636	381	4,297	13,894		-10%	-10%	4%	34%	85%
32	-335	-625	425	4,467	14,373		-9%	-10%	5%	34%	85%
33	-315	-614	469	4,637	14,853		-8%	-10%	5%	35%	85%

	5 yrs.	10 yrs.	15 yrs.	20 yrs.	25 yrs.		5 yrs.	10 yrs.	15 yrs.	20 yrs.	25 yrs.
34	-295	-603	513	4,807	15,333		-8%	-9%	5%	35%	86%
35	-275	-592	556	4,977	15,812		-7%	-9%	5%	35%	86%
36	-255	-581	600	5,147	16,292		-6%	-8%	6%	36%	86%
37	-235	-570	644	5,318	16,772		-6%	-8%	6%	36%	87%
38	-215	-559	688	5,488	17,251		-5%	-8%	6%	36%	87%
39	-195	-548	732	5,658	17,731		-5%	-7%	6%	36%	87%
40	-175	-537	775	5,828	18,210		-4%	-7%	7%	36%	87%
41	-155	-526	819	5,998	18,690		-4%	-7%	7%	37%	88%
42	-135	-515	863	6,168	19,170		-3%	-7%	7%	37%	88%
43	-115	-504	907	6,338	19,649		-3%	-6%	7%	37%	88%
44	-95	-494	950	6,508	20,129		-2%	-6%	8%	37%	88%
45	-75	-483	994	6,678	20,609		-2%	-6%	8%	37%	88%
46	-55	-472	1,038	6,848	21,088		-1%	-6%	8%	38%	89%
47	-35	-461	1,082	7,018	21,568		-1%	-5%	8%	38%	89%
48	-15	-450	1,125	7,188	22,048		0%	-5%	8%	38%	89%
49	5	-439	1,169	7,358	22,527		0%	-5%	8%	38%	89%
50	25	-428	1,213	7,528	23,007		0%	-5%	9%	38%	89%

Source: Own assessment, present value of future fees used as per Tab. A.9.4.

In case Opt 3.2 is selected, those having from 1 to 22 designs per application (98%) will be able to protect their designs at lower cost than currently for up to 15 years. Those with between 22 and 50 designs (2%) will be able to protect them at lower cost than currently for a period up to 10 years.

Not all designs that are filed are registered and even fewer are renewed. For instance, some products are short-lived and basic protection is sufficient, some designs might not have been a commercial success and their protection is not extended. Based on historical data and projections of EUIPO the following table shows average percentages of applications that are renewed. Natural persons (so also firms not having legal entity) renew designs from 2.5 to 3.5 times less often than companies, and do so for shorter periods (mainly additional 5 years).

Table A.9.7. Percentages of applications renewed

	% of applications renewed after			
Renewal by	5 years	10 years	15 years	20 years*
All	49%	29%	18%	13%
companies	55%	32%	20%	14%
individuals	22%	10%	6%	4%

** forecast*

Source: Own calculations based on EUIPO data

The following table presents weighted average present value of savings/additional costs from considered options based on distribution of applications and propensity to renew.

Table A.9.8. Change in average fee paid per application by type of applicant and propensity to renew (in EUR per application)

	Option 3.1				
	Protection for:				
Application/ renewal by	**5 yrs.**	**10 yrs.**	**15 yrs.**	**20 yrs.**	**25 yrs.**
All	-142	-101	-42	33	132
companies	-144	-116	-49	42	163
individuals	-132	-39	-13	5	28

	Option 3.1				
	Protection for:				
Application/ renewal by	**5 yrs.**	**10 yrs.**	**15 yrs.**	**20 yrs.**	**25 yrs.**
	Option 3.2				
	Protection for:				
renewal by	**5 yrs.**	**10 yrs.**	**15 yrs.**	**20 yrs.**	**25 yrs.**
All	-203	-115	-35	56	171
companies	-211	-135	-40	69	210
individuals	-166	-41	-11	11	37

Weighted average present value of total fees paid. Assumed distribution of designs in case of renewal to be the same as in case of first application. Percentages of renewals from Table A.9.7.
Source: Own calculations based on EUIPO data

The largest savings will accrue to those that protect for the basic or 10 years term. Protection for up to 25 years will become considerably more expensive.

Table below shows the distribution of savings and cost changes for each protection period. For instance 99.5% of individuals will save on average EUR 39 for protecting their designs for 10 years under Option 3.1, while 0.5% of individuals will have to pay EUR 0.3 more.

Table A.9.9. Change in average fee paid by type of applicant and propensity to renew (in EUR per application) with % of applications affected

	Option 3.1				
	Protection for:				
Application/ renewal by	**5 yrs.**	**10 yrs.**	**15 yrs.**	**20 yrs.**	**25 yrs.**
All					
Saving: EUR (%)	159 (97.7%)	102 (98.8%)	47 (97.9%)	1 (54.8%)	0 (0%)
Loss: EUR (%)	17 (2.3%)	2 (1.2%)	5 (2.1%)	33 (45.2%)	132 (100%)
companies					
Saving: EUR (%)	164 (97.4%)	118 (98.6%)	55 (97.6%)	1 (51.9%)	0 (0%)
Loss: EUR (%)	20 (2.6%)	2 (1.4%)	6 (2.4%)	42 (48.1%)	163 (100%)
individuals					
Saving: EUR (%)	140 (99%)	39 (99.5%)	14 (99%)	0.2 (67%)	0 (0%)
Loss: EUR (%)	7 (1%)	0.3 (0.5%)	1 (1%)	5 (33%)	28 (100%)
	Option 3.2				
	Protection for:				
Application/ renewal by	**5 yrs.**	**10 yrs.**	**15 yrs.**	**20 yrs.**	**25 yrs.**
All					
Saving: EUR (%)	203 (99%)	115 (100%)	39 (97.7%)	0 (0%)	0 (0%)
Loss: EUR (%)	0.2 (1%)	0 (0%)	5 (2.3%)	56 (100%)	171 (100%)
companies					
Saving: EUR (%)	212 (98.8%)	135 (100%)	46 (97.4%)	0 (0%)	0 (0%)
Loss: EUR (%)	0.3 (1.1%)	0 (0%)	6 (2.6%)	69 (100%)	210 (100%)
individuals					
Saving: EUR (%)	166 (99.7%)	41 (100%)	12 (99%)	0 (0%)	0 (0%)
Loss: EUR (%)	0.1 (0.3%)	0 (0%)	1 (1%)	11 (100%)	37 (100%)

Weighted average present value of total fees paid. Assumed distribution of designs in case of renewal to be the same as in case of first application. Percentages of renewals from Table A.9.7
Source: Own calculations based on EUIPO data

9.4 Annual EU-wide impacts of fee changes

The changes in fees are expected to be fully in force from 2024. It is important to note that current RCD owners will also have to pay new renewal fees.

Below an estimation is presented on the number of design applications affected and global savings in the first year of the new fee structure. It is based on the past behaviour patterns of applicants regarding renewal rates. In the subsequent years this behaviour might change following the new structure – for instance the long term protection of 20 to 25 years might decrease due to higher fees, while there might be more companies choosing to protect for the basic or 10 years period.

The most accurate data from EUIPO is collected at the level of designs. In particular renewal statistics are based on designs and not applications (one can renew individual designs and not necessarily all designs from a multiple application). Therefore, the numbers below are approximations and thus can differ from those presented in the impact on EUIPO budget (where also e.g. the fourth renewal is not considered). It is also to be noted that those applying, and those renewing each year might be different. There is no obligation to renew, so all fees are one-off dependent on preference of design owner. Impact each year will depend on the number of applications/renewals. The table below shows the expected impact in the first year of the new fee regime.

Table A.9.10. Impact of fee change in 2024

All applications					
		Option 3.1		Option 3.2	
	No of applications	Saving per application (EUR)	Total saving (EUR million)	Saving per application (EUR)	Total saving (EUR million)
Application	35,698	-142	-5.1	-203	-7.2
Renewal 1st period	14,988	-71	-1.1	-36	-0.5
Renewal 2nd period	7,689	72	0.6	144	1.1
Renewal 3rd period	3,289	468	1.5	612	2.0
Renewal 4th period*	1,708	1,374	2.3	1,663	2.8
Total	63,371	-27	-1.7	-29	-1.8
Total less 4th renewal	61,663	-66	-4.1	-75	-4.6
Application by companies (legal persons)					
		Option 3.1		Option 3.2	
	No of applications	Saving per application (EUR)	Total saving (EUR million)	Saving per application (EUR)	Total saving (EUR million)
Application	28,777	-144	-4.2	-144	-6.1
Renewal 1st period	13,753	-74	-1.0	-74	-0.5
Renewal 2nd period	7,220	74	0.5	74	1.1
Renewal 3rd period	3,094	478	1.5	478	1.9
Renewal 4th period	1,627	1,398	2.3	1,398	2.8
Total	54,471	-16	-0.9	-16	-0.8
Total less 4th renewal	52,844	-60	-3.2	-60	-3.6
Application by persons (natural persons, including firms not incorporated)					
		Option 3.1		Option 3.2	
	No of	Saving per	Total saving	Saving per	Total saving

	applications	application (EUR)	(EUR million)	application (EUR)	(EUR million)
Application	6,921	-132	-0.9	-166	-1.1
Renewal 1st period	1,235	-47	-0.1	-23	0.0
Renewal 2nd period	468	47	0.02	94	0.04
Renewal 3rd period	195	305	0.1	399	0.1
Renewal 4th period	81	893	0.1	1,081	0.1
Total	8,900	-92	-0.8	-109	-1.0
Total less 4th renewal	8,819	-101	-0.9	-120	-1.1

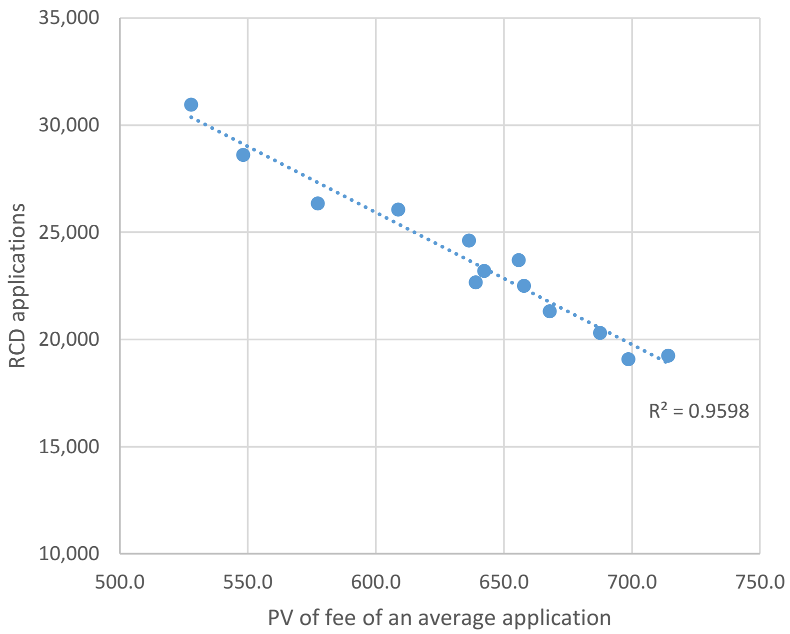
*Notes: * full assumption, there is no experience yet with 4th renewal. Weighted average present value of total fees paid. Assumed distribution of designs in case of renewal to be the same as in case of first application.*
Source: Own calculations based on EUIPO data.

9.5 Impacts of fee changes on number of designs applications

Based on experience with past trade mark fee decreases, the EUIPO concluded that there should be no significant impact on the number of designs applications from RCD fee decreases proposed by options 3.1 and 3.2. Consequently, for their budgetary planning as explained in Annex 7 they estimated a historic growth rate for the number of designs[187] at 3.1% for the years 2021 to 2025 (so covering two years of the potential new fee regime).

Looking at the relationship between the present value of fees and number of applications, a strong negative correlation can be seen (which does not necessarily mean causality). The chart below plots the present value of fees paid for an average application in the given year and the number of applications in that year during the period 2008 and 2020.

Figure A.9.2. Relationship between the number of applications and the present value of fees for an average application between 2008 and 2020.



[187] Please note this is based on designs and not applications.

HICP – annual inflation data (average index and rate of change) [prc_hicp_aind] used as deflator
Source: Own assessment base on EUIPO data and Eurostat (for deflator)

This allows for computing a simplified prediction of the number of applications in the near future following the fee change. If the above relationship would hold, it can be expected that in 2030 Opt. 3.1 will result in around 15% more design applications than under the current fee structure, and Opt. 3.2 in around 21% more applications. This could translate into additional 2,300-2,500 design owners (Opt. 3.1) to 3,200 to 3,400 (Opt 3.2) in 2030 (to proxy the number of affected owners the average number of applications per owner is used).

Robustness and limitations of these calculations:

This is a very simplified prediction based on a low number of available observations. Therefore, the results should be treated with caution.

We have additionally checked the relationship between the number of RCD applications and a) real GDP, and b) real GDP and present value of fees. In case a) coefficient of determination was equal only to R^2=58%, while in case b) it was R^2=95%, so still lower than in case the PV of fees is used as the sole explanatory variable. Logarithmic equations have been also tried which also resulted in lower R^2. Thus, it was decided to use only the PV of fees as an explanatory variable.

It is entirely possible that the growth in design applications is determined by other factors which change in the same way as inflation. E.g. real productivity growth of firms applying for design protection. If this is the case, the lowering of fees is unlikely to affect firms overall productivity, and consequently will not significantly change the demand for design protection. Nevertheless, due to lack of data describing applicant firms it has to be relied on the PV of fees as the best proxy explanatory variable.

9.6 Impact of elimination of transfer fee

The elimination of the transfer fee should produce savings of around EUR 200 per each transferred design. It is expected to affect in 2024 around 3,000 designs (around 3% of all designs filed annually). This translates to around 375 owners affected in 2024 (to proxy the number of affected owners we use the average number of designs per owner).

9.7 Impact of limiting multiple submissions to 50 designs per application

The current RCD system allows for an unlimited number of designs to be combined in a single multiple application. Based on 2019-2020 data, 0.46% of applications had 51 or more designs. A cap of 50 designs per application is proposed to limit potential abuses of bundling designs in absence of the transfer fee. The cap for those applicants would constitute an increase in cost, as instead of one application they would have to submit on average almost two. Thus, the number of applications in the last 50 bracket in the above tables/calculations was increased by 0.45% for all applications, by 0.53% for companies and 0.16% for individuals.

Taking the 2024 application projections, the increase of fees due to the cap would affect around 173 applications who would need to spend additional EUR 1,000 on average. The total additional burden of those applicants would increase by around EUR 180,500; for companies by EUR 167,000 and for individuals by around EUR 13,500.

Table A.9.11. Cost increase due to 50 cap in 2024

	No of applications in 50+ bracket	Additional cost per application	Total cost increase
All	173	1,043	180,438
companies	160	1,044	166,971
natural persons	13	1,022	13,467

Source: Own assessment

9.8 Comparison to national registration fees

The new few structure will affect the attractiveness of national protection in several Member States as an alternative to EUIPO EU-wide protection.

Detailed national fees are presented in Annex 8, below just an extract concerning basic paper and electronic fees and fees for multiple applications.

Table A.9.12. National IP offices fees for the basic protection (EUR)

Office	Paper - fee	Electronic fee	Electronic 2-10 design
AT	102.50	97.50	20.00
BG	170.00	170.00	17.50
BLX	220.00	192.00	75.00
CY	205.03	205.03	0.00
CZ	39.19	39.19	23.51
DE	70.00	60.00	60.00
DK	161.14	161.14	94.00
EE	105.00	105.00	0.00
ES	84.18	72.71	72.71
FI	300.00	250.00	130.00
FR	86.00	86.00	86.00
GR	130.00	130.00	10.00
HR	85.91	68.72	35.80
HU	89.84	89.84	17.97
IE	70.00	70.00	25.00
IT	100.00	50.00	100.00
LT	138.00	138.00	26.00
LV	105.00	94.50	27.00
MT	46.59	46.59	46.59
PL	138.63	138.63	138.63
PT	215.24	107.62	10.77
RO	180.00	180.00	10.00
SE	244.40	196.05	136.87
SI	80.00	80.00	65.00
SK	40.00	40.00	20.00

Source: EUIPO data

In all cases the electronic fee is cheaper, thus it is used for further calculations. In all cases the EUIPO current fee and proposed new fee is more expensive than any individual Member State fee (except for FI paper fee).

Under the current system of basic fee of EUR 350, it was more cost efficient to choose national protection when one sought it in on average 4 (ranging from 3 to 5) other EU Member States. Under the proposed basic fee of EUR 250 national protection would be most efficient when protecting in 2.9 Member States (ranging from 1.5 to 3.6) on average.

It is assumed that in particular smaller businesses would seek design protection solely in the neighbouring countries. In such case, under the current fee structure, it is cheaper to seek basic protection of a single design at the EUIPO in case of 16 Member States. Under the new fee structure, it will be cheaper in case of 23 Member States (preference will change in case of BE-NL-LU, CY, ES, IT, LV). Taking into account that in 2020 the average number of designs per application was 3.3, and that several Member States offer discounts for multiple filings, the EUIPO option is preferred to multiple national protections in 19 Member States currently, in 23 Member States under Opt. 3.1 (preference will change for BG, ES, LV, RO) and in 25 Member States under Opt. 3.2. (+HR) (see table below).

Table A.9.13. Cost of design protection (electronic filing) just in neighbouring countries (EUR)

MS	Neighbours	Cost of 1 design protection (EUR)	RCD fee more attractive for 1 design		Cost of 3.3 designs (EUR)	RCD fee more attractive for application with 3.3 designs		
			Current €350	Opt. 3.1 and 3.2 €250		Current €752.5	Opt. 3.1 €537.5	Opt. 3.2 €480
AT	DE CZ SK HU SI IT	456.53	yes	yes	1187.93	yes	yes	yes
BG	RO GR	480	yes	yes	566.25	no	yes	yes
BE-NL-LU	DE FR	338	no	yes*	846.30	yes*	yes*	yes*
CY	GR	335.03	no	yes	829.60	yes	yes	yes
CZ	SK PL DE AT	375.32	yes	yes	1004.74	yes	yes	yes
DE	AT BLX FR DK PL CZ	774.46	yes	yes	1944.38	yes	yes	yes
DK	SE DE	417.19	yes	yes	1086.19	yes	yes	yes
EE	FI LV	449.5	yes	yes	1052.10	yes	yes	yes
ES	PT FR	266.33	no	yes	656.13	no	yes	yes
FI	SE EE	551.05	yes	yes	1406.35	yes	yes	yes
FR	DE ES BLX IT	460.71	yes	yes	1366.24	yes	yes	yes
EL	CY BG	505.03	yes	yes	1039.85	yes	yes	yes
HR	SI HU	238.56	no	no	511.73	no	no	yes
HU	AT SK RO HR SI	556.06	yes	yes	970.73	yes	yes	yes
IE	FR	156	no	no	411.30	no	no	no
IT	FR AT SI	313.5	no	yes	963.30	yes	yes	yes
LT	LV PL	371.13	yes	yes	811.88	yes	yes	yes
LV	LT EE	337.5	no	yes	700.90	no	yes	yes
MT	IT	96.59	no	no	433.75	no	no	no
PL	CZ SK LT DE	415.82	yes	yes	1032.54	yes	yes	yes
PT	ES	180.33	no	no	372.33	no	no	no
RO	HU BG	439.84	yes	yes	544.42	no	yes	yes

MS	Neighbours	Cost of 1 design protection (EUR)	RCD fee more attractive for 1 design		Cost of 3.3 designs (EUR)	RCD fee more attractive for application with 3.3 designs		
			Current €350	**Opt. 3.1 and 3.2** €250		**Current** €752.5	**Opt. 3.1** €537.5	**Opt. 3.2** €480
SE	DK FI	607.19	yes	yes	1437.19	yes	yes	yes
SI	HR IT AT HU	386.06	yes	yes	961.73	yes	yes	yes
SK	CZ PL AT HU	405.16	yes	yes	937.91	yes	yes	yes
Number of instances when RCD fee more attractive			16	23		19	23	25

** Be-NL-LX (BLX) counted as three.*
Source: Own analysis based on EUIPO data

It is important to note that in certain situations it may be easier to protect designs in several countries through the Hague system (WIPO) which allows securing protection in several countries with a single application[188].

9.9 Impact of abolition of unity of class requirement (Option 2)

The current RCD system allows for multiple applications only when designs belong to the same Locarno class. As explained in the problem definition section, this leads to splitting applications that would otherwise go together.

As requested by the Commission, the EUIPO analysed 2020 applications. The assumption was that all applications filed within a two-month window of each other by the same owner could be grouped as one application. The length of the window selected was based on the analysis of filings in different classes by the same filers.

The finding was that in 2020 around 2400 owners filed on average three applications instead of just one. Their filings were responsible for 22% of all applications in 2020.

If the unity of class requirement is lifted, the number of applications is expected to drop by 14% as owners would be able to apply only once, while the number of designs protected is not affected. The savings per owner/application are as follows:

Table A.9.14. Savings from abolition of unity of class requirement

	Current	**Opt. 3.1**	**Opt. 3.2**
Saving per owner (application) (EUR)	492	234	281
Year 2024 impact			
Applications affected	2746 (7.7% of all applications)		
Total savings (EUR million)	1.35	0.64	0.77

[188] International design applications are subject to the payment of three types of fees, all payable in Swiss francs: a) a basic fee (397 Swiss francs for one design; 19 Swiss francs for each additional design included in the same application); b) a publication fee (17 Swiss francs for each reproduction; 150 Swiss francs for each page on which one or more reproductions are shown); and c) a standard designation fee or an individual designation fee for each contracting party where protection is sought. Note: For standard designation fees, a three-level structure applies, reflecting the level of examination carried out by the contracting party. See WIPO fees here: https://www.wipo.int/hague/en/.

** Estimation*
Source: Own calculations based on EUIPO data

The abolition applied to the current fee system would bring benefits of around EUR 492 to the affected owners. These savings would reach almost EUR 234 in case the Opt. 3.1 fee system is introduced and EUR 281 in case Opt. 3.2 fees apply.[189]

The impact in 2024 – the first year when changes are expected to occur - ranges from EUR 1.35m in case the current system remains, to EUR 0.64m in case Opt. 3.1 is chosen and EUR 0.77 in case of Opt. 3.2.

9.10 Impact of simplification in requirements for the representation of designs (Option 2)

An EUIPO analysis based on 2019 applications found that 26% of applications had some deficiencies (e.g. being incomplete, not properly signed, not paid in full). Around half of those deficiencies (and 14% of all applications) related to issues connected with the representation of designs that Option 2 is intended to fix. These issues were:

Table A.9.15. Deficiencies in applications for RCD

Deficiency	% of applications 2019
The views do not relate to the same design	4.9%
Contains graphical elements which are not part of the design	4.7%
Neutral background	2.2%
Mixture of views in colour and B/W	0.9%
Graphic reproduction may contain only one view	0.7%
Bad representation quality	0.5%
Deficient representation of the design	0.3%
Views change the representation of design	0.03%
Total	14.3%

Source: EUIPO

EUIPO experts judged that fixing the above deficiencies requires around two hours of work of a lawyer. Moreover, after analysing the Commission proposal they concluded that the presented options could reduce deficiencies by about half. Further assumption is that 80% of the applicants use legal help and hourly cost of a lawyer is around EUR 200 to 250[190].

[189] Savings were calculated by comparing the fees paid under the current, Opt 3.1 and 3.2 fee regimes for multiple applications with the unity of class requirement with the fees that would have been paid under the respective fee regimes for one application only in case the unity of class requirement is abolished. The savings were calculated for each of around 2400 owners and the average is presented.
Due to data structure (information on the number of designs and the number of applications per owner), to calculate fees paid under Opt. 3.1 and 3.2 with the unity of class requirement the average number of designs per application for each owner was used.
[190] This is a quite conservative assumption. Already in studies from 2005 and 2009 an hourly fee of patent attorney was estimated at EUR 250 (e.g. Bruno van Pottelsberghe de la Potterie, Malwina Mejer (2009). The London Agreement and the cost of patenting in Europe, page 235; or Roland Berger. (2005). The cost of the sample European patent – new estimates.).

Based on the above average cost of correcting the deficiency affected by the Commission proposal is estimated at EUR160-200 per application concerned.

Table A.9.16 Savings from simplification in requirements for the representation of designs

Saving per owner (application) (EUR)	160 to 200
Applications affected	14.3%
Year 2024 impact	
Applications affected	5,112
Total savings (EUR million)	0.82 to 1.02

** Estimation*
Source: Own calculations based on EUIPO data

The simplification is expected to affect 14.3% of applications, so around 5000 in 2024. The total expected savings in that year amount to between EUR0.82 and EUR1.02 million.

9.11 Summary of impacts of Options 2 and 3

The table below summarizes total and per application impacts of simplification measures brought by policy options 2 and 3 in 2024 - the first year of the new fee structure. In subsequent years the impacts will depend on the number of applications and renewals.

Table A.9.17. Overview of maximum expected impact of options 2 and 3 in year 2024* per application

Fee structure:		Current		Option 3.1		Option 3.2	
	No of applications	per application (EUR)	Total (EUR million)	per application (EUR)	Total (EUR million)	per application (EUR)	Total (EUR million)
Application fee reduction	35,698	0	0	-142	-5.1	-203	-7.2
1st Renewal fee reduction	14,988	0	0	-71	-1.1	-36	-0.5
2nd Renewal fee increase	7,689	0	0	72	0.6	144	1.1
3rd renewal fee increase	3,289	0	0	468	1.5	612	2
4th renewal fee increase**	1,708	0	0	1,374	2.3	1,663	2.8
Cap at 50	173	1,043	0.18	1,043	0.18	1,043	0.18
No transfer fee	914	-684	-0.6252	-684	-0.6252	-684	-0.6252
abolition of unity of class requirement	2,746	-492	-1.35	-234	-0.64	-281	-0.77
simplification in requirements for the representation of designs	5,112	-200	-1.02	-200	-1.02	-200	-1.02
Total			*-2.82*		*-3.91*		*-4.04*
Total without 4th renewal			*-2.82*		*-6.21*		*-6.84*

** The first full year of functioning of the reform, impact in following years depends on the number of applications and renewals;*
*** Based on assumption only, there is no experience yet with 4th renewal*
Source: Own assessment

As one owner can make several applications, the below table shows an approximation of the number of owners affected. It is based on the average number of applications per owner which amounted to 2.44 in 2019-2020.

Table A.9.18. Overview of maximum expected impact of options 2 and 3 in year 2024* per owner

Fee structure:		Current		Option 3.1		Option 3.2	
	No of owners	per application (EUR)	Total (EUR million)	per application (EUR)	Total (EUR million)	per application (EUR)	Total (EUR million)
Application fee reduction	14,659	0	0.00	-345.79	-5.10	-494.34	-7.20
1st Renewal fee reduction	6,155	0	0.00	-172.90	-1.10	-87.67	-0.50
2nd Renewal fee increase	3,157	0	0.00	175.33	0.60	350.66	1.10
3rd renewal fee increase	1,351	0	0.00	1,139.66	1.50	1,490.33	2.00
4th renewal fee increase**	701	0	0.00	3,345.93	2.30	4,049.69	2.80
Cap at 50	71	2,540	0.18	2,539.88	0.18	2,539.88	0.18
No transfer fee	375	-1,665	-0.63	-1,665.18	-0.63	-1,665.18	-0.63
abolition of unity of class requirement	2,746	-492	-1.35	-234.00	-0.64	-281.00	-0.77
simplification in requirements for the representation of designs	2,099	-487	-1.02	-487.03	-1.02	-487.03	-1.02
Total			-2.82		-3.91		-4.04
Total without 4th renewal			-2.82		-6.21		-6.84

** The first full year of functioning of the reform, impact in following years depends on the number of applications and renewals;*

*** Based on assumption only, there is no experience yet with 4th renewal*

Source: Own assessment

ANNEX 10: DEFINITION OF SUBJECT MATTER OF PROTECTION

According to the definitions provided in Article 3 CDR and Article 1 DDir, a design refers to the appearance of a product resulting from certain features. A product is to be understood as any industrial or handicraft item. The Legal Study pointed to certain confusion in relation to the definition of the subject matter of protection, involving the potential of negatively influencing the accessibility of the design protection systems[191]. In view of the growing role of digital designs, several respondents to the First Public Consultation for the evaluation saw need for making the definitions future-proof by clarifying that virtual designs, animated designs, icons and graphical user interfaces are covered by those definitions. The issue of digital designs raises the question whether they can be understood as products and also whether their elements are covered by the design notion (e.g. is animation a feature?).

Also collaboration of the EUIPO and national IP offices showed that, for various types of designs, the subject matter of protection is either not clear or interpreted differently in different Member States. Divergent practices were noted for designs consisting of more than one item (a set of articles) and designs relating to 'get up' within the notion of product. According to the Locarno Classification (Class 32-00), the latter term "get up" is defined as referring to, amongst others, the "arrangement of shop interiors", "arrangement of window displays" or "arrangement of restaurant interiors". However, in common parlance the term "get-up" is also used to denote the form in which a brand owner presents its product overall, in particular the entire product packaging appearance. This double meaning is the reason for diverging practices. Different approaches at national level were also observed as regards the availability of design protection for interior design (e.g. can the interior of a shop be protected as a design?). Discussions held in liaison meetings in 2008, 2009 and 2010 showed that some Member States consider interior design as a kind of get up.

Proposed solution: Update and clarification of the current design and product notions to make eligibility of protection for the various design types more explicit and transparent.

[191] Legal Rview, p. 12 and pp. 57-60.

ANNEX 11: RELATIONSHIP TO COPYRIGHT PROTECTION

Legal context

Both the DDir and the CDR address the issue of the relationship between copyright and design protection.

Shortcoming

Both the DDir and the CDR address the issue of the relationship between copyright and design protection.[192] The current regime leaves a margin of manoeuvre to Member States[193] concerning the relationship between designs and copyright. Each Member State can determine the extent of copyright protection, and the conditions under which such protection can be conferred. As a result, whether a protected design can receive copyright protection may vary over time and from one Member State to another. This has led to divergent legal practices in the Member States. Some Member States allow the cumulation of design and copyright protection, whereas others do not allow full cumulation or have a willingness to demarcate copyright and design protection by using various legal tools and to lift competition barriers through preventing that copyright encroaches on applied arts, especially as regards the functional aspects of an object.

The divergent legal practices (e.g. principle of separability, theory of tiers, unity of art, different interpretation of the criteria of originality) cause legal uncertainty and are a source of confusion for the users. The legal uncertainty concerns the term of protection[194] and the scope of protection[195], including the geographical scope of protection. As a

[192] Article 17 of the DDir: "*A design protected by a design right registered in or in respect of a Member State in accordance with this Directive shall also be eligible for protection under the law of copyright of that State as from the date on which the design was created or fixed in any form. The extent to which, and the conditions under which, such a protection is conferred, including the level of originality required, shall be determined by each Member State*".
Recital 8 of the DDir: "*Whereas, in the absence of harmonisation of copyright law, it is important to establish the principle of cumulation of protection under specific registered design protection law and under copyright law, whilst leaving Member States free to establish the extent of copyright protection and the conditions under which such protection is conferred*".
Article 96(2) of the CDR: "*A design protected by a Community design shall also be eligible for protection under the law of copyright of Member States as from the date on which the design was created or fixed in any form. The extent to which, and the conditions under which, such a protection is conferred, including the level of originality required, shall be determined by each Member State*".
Recital 32 of the CDR: "*In the absence of the complete harmonisation of copyright law, it is important to establish the principle of cumulation of protection under the Community design and under copyright law, whilst leaving Member States free to establish the extent of copyright protection and the conditions under which such protection is conferred.*"
[193] As stated above, each Member State can determine the extent of copyright protection, and the conditions under which such protection can be conferred.
[194] More than 70 years for copyright-protected products against up to 25 years for design-protected products. The term of copyright protection is 70 years after the death of the author. (Directive 2006/116 on on the term of protection of copyright and certain related rights) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0116&from=EN.
[195] The scope of the rights are not the same in copyright and in design law.

result, it may happen under the current law that a product can no longer be protected under design law in a Member State but still receive copyright protection in another Member States. This can affect the free circulation of products in the single market: for instance, a bike could be freely copied and distributed in Belgium, but would still be protected in France due to the different legal practices.

The results of the public consultation held between 29 April and 22 July 2021 confirm that stakeholders believe that the most relevant problem to solve is the divergence in Member States' legal practices. As regards the question whether or not there is an overlap between copyright and design protection, which make the choice difficult, stakeholders' views were diverging, but more stakeholders considers that the overlap does not make the choice difficult.

Almost 2/3 of the stakeholders do not consider the concern serious that potential right holders opt for copyright protection instead of design protection, to such a degree that the design regime runs void. They do not consider the concern serious either that the conditions for granting copyright protection in addition to design protection leads to overreach of protection and distortion of competition.

However, almost 2/3 of the stakeholders consider that there should be changes to the current rules in the EU on the relationship between design and copyright protection in order to remove the margin of discretion for Member States to determine conditions for copyright protection. Stakeholders consider that the removal of the margin of discretion for Member States is necessary due to the recent CJEU case law, which clarified some key aspects of the copyright and design interface, creating sufficient clarity for Member States to harmonise their legal practices.

Although this margin of manoeuvre for Member States appeared justified at the time of the adoption of the Directive and the Regulation in the 1990s, this does not seem to be longer the case. EU copyright law, including the notions of work and originality, has been extensively harmonised. The harmonisation started with the enactment of the Infosoc Directive (2001/29/EC) and the prohibition therein of reproduction of the works of authors, and continued through the evolution of the CJEU case law[196]. The CJEU found that the 'notion of work' is an autonomous concept of EU law that needs to be interpreted and applied uniformly and this puts into question indeed whether the margin of manoeuvre currently left to the Member States remains justified.

The judgements in the cases *Flos*[197], *Cofemel*[198], and *Brompton*[199] also helped clarify the relationship between copyright and design law through further clarifying the notion of work.

[196] The case law (starting with CJEU Case C-302/10 Infopaq) found that a work eligible for copyright protection has to be an author's individual creation, resulting from free creative choices and reflecting the personality of the author. Furthermore, the case law also established that no protection applies when the object is dictated solely by technical considerations, rules or constraints, which leave no room for creative freedom and the subject matter is to be expressed in a manner, which makes it identifiable with sufficient precision and objectivity. It was unclear for some time whether those criteria also determine protection to be granted to works of applied art.

[197] Judgment of the Court, 27.1.2011, *Flos*, C-168/09, ECLI:EU:C:2011:29.

In its *Flos* decision, the CJEU clarified that Member States cannot exclude, not even for a certain period, copyright protection for designs. This decision has triggered changes in some national law or case law, widening the copyright protection for works of applied art and the possible overlap with design law.

In its recent *Cofemel* decision, the CJEU decided that cumulative application of copyright and design protection can be envisaged only in certain situations (i.e. no total cumulation is possible), with this limiting the possible overlap. The CJEU highlighted the differences between copyright and design law, emphasising that design law aims at protecting *"subject matter which, while being new and distinctive, is functional and liable to be mass-produced"*. The term of protection is therefore limited, but sufficient period to ensure a return on the investment in creating designs without excessively restricting competition. While copyright protection is reserved to subject matters that merit being classified as works and the duration of works is significantly longer. In contrast, the purpose of copyright law, from an economic perspective, is not to prevent restriction of competition but rather to facilitate the economic exploitation of the work, which justifies its longer term of protection. The CJEU stressed that copyright protection on a design cannot lead to that the respective objective or effectiveness of the two regimes are undermined. Building on the respective objective and rules of design and copyright law, the CJEU concluded that cumulative protection may only *"be envisaged in certain situations"* (Point 52) and the decision identified certain situations in which the cumulative protection may not apply. The CJEU precludes national legislation from conferring copyright protection to designs purely on the ground that, "*over and above their practical purpose, they generate a specific, aesthetically significant visual effect*". This follows from the reasoning that the aesthetic effect is the result of an "*intrinsically subjective sensation of beauty experienced by each individual*" and thus it does not equal to originality, which is one of the two preconditions to qualify for copyright protection. In the end, the criterion of the author's "*own intellectual creation reflecting its freedom of choice and personality*" remains the criterion for originality to be taken into account.

In its recent *Brompton* decision, the CJEU concluded that the shape of a product which is is solely dictated by its technical function cannot be covered by copyright protection and it is for the courts to decide whether the author, through choice of the shape has expressed his creative ability in an original manner by making free and creative choices and has designed the product in such a way that it reflects his personality[200].

Proposed solution

Due to the above recent developments in the CJEU case law, the current provisions are proposed to be maintained except for the margin of manoeuvre left to Member States as regards the conditions under which copyright protection can be conferred. This would

[198] Judgment of the Court, 12.9.2019, *Cofemel*, C-683/17, ECLI:EU:C:2019:721.

[199] Judgment of the Court, 11.6.2020, *Brompton Bicycle*, C-833/18, ECLI:EU:C:2020:461.

[200] "*copyright protection applies to a product whose shape is, at least in part, necessary to obtain a technical result, where that product is an original work resulting from intellectual creation, in that, through that shape, its author expresses his creative ability in an original manner by making free and creative choices in such a way that that shape reflects his personality, which it is for the national court to verify, bearing in mind all the relevant aspects of the dispute in the main proceedings*".

maintain the possibility to protect a design under both design law and copyright law. However, the margin of discretion left to Member States would be removed. The extent to which, and the conditions under which, copyright protection can be conferred, including the level of originality, should have to comply with Directive 2001/29/EC as interpreted by the CJEU. This would mean in practice that Member States will not be able to include in their national law specific conditions (as for instance a higher level of originality) to allow copyright protection for design.

ANNEX 12: AWARENESS RAISING ACTIVITIES

This annex presents the rationale for not including the lack of awareness as a problem driver in this impact assessment report.

Awareness of intellectual property (IP) rights is not an issue particular to designs, but rather one cutting across the entire portfolio of IP rights. The Commission started to act on designs awareness already during the stage of evaluation of the DDir and CDR, instantly after the problem had been identified.

In line with proportionality, it was concluded that significant awareness building actions could be conducted within the current legal/institutional framework – notably through the EUIPO which has it as part of the mandate as well as sufficient resources and, last but not least, the relevant experience.

EUIPO actions include promotion of both trade marks and designs. They include among others:

- User friendly websites; trainings on IP tools; trainings for IP advisors; empowering SMEs across and beyond the EU to protect and enforce their competitive advantage through IP rights (budget of almost EUR 50m in the coming three years);

- Grants for awareness raising (EUR 0.4m in 2021); Pan European Awareness Campaign, World Anti-Counterfeiting Day 2021 (EUR 0.25m), DesignEurope awards 2021 (EUR 0.49m);

- In addition, as announced in the EU IP Action plan, the Commission and the EUIPO will set up a platform accompanied with a coordination and capacity-building mechanism, which will be linked to the Your Europe Portal. It will be a one-stop-shop access to all relevant information and advice on existing intellectual property protection and enforcement services for EU SMEs (e.g. formalities, easy-to-use filing systems), including also information on industrial designs. The platform will mainstream the work of national IP offices on IP promotion and awareness activities as well as on the provision of IP-related services. It will also direct SMEs to the programmes existing at EU level. The tentative launch date is 2022.

These are relatively new developments and awareness building is a long process and it will take some time before results are seen. The proposed legal reform (including among others the renaming to "EU design" and introduction of a registration symbol[201]), and

[201] There is currently no commonly accepted symbol, such as the copyright notice © to indicate the fact that a product incorporates a RCD or a registered national design. For marketing purposes, it could prove valuable in particular for SMEs and individual designers to have a commonly accepted notice available. In

related media communication, would put designs more in the spotlight and assist in raising awareness further. The Commission should monitor the impact of all these new actions.

response to the Second Public Consultation, 72% of the stakeholders considered the introduction of a commonly recognized registration symbol a suitable means to raise awareness about the EU design system.

ANNEX 13: COEXISTENCE OF NATIONAL AND EU DESIGN PROTECTION SYSTEMS

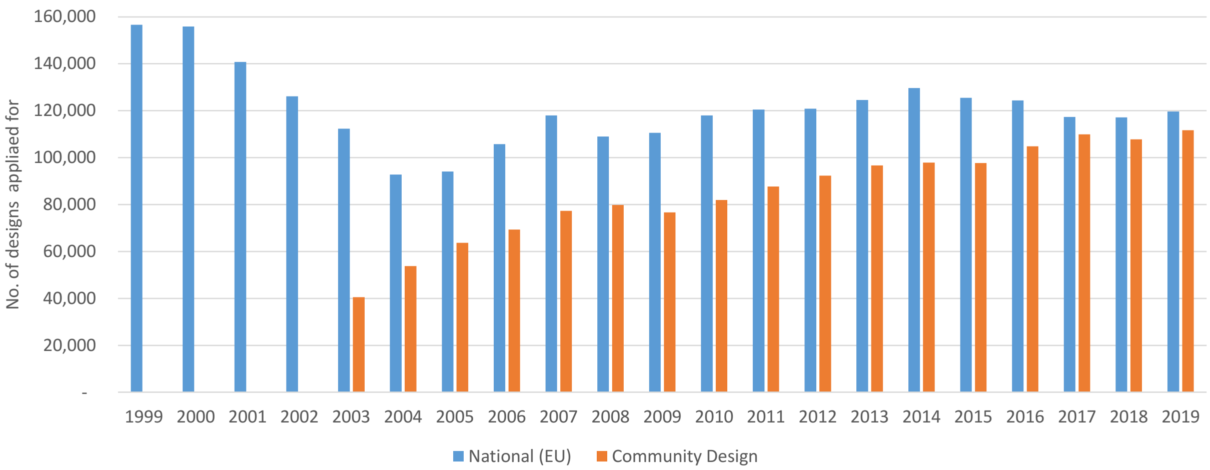
Coexistence has always been the method to build a single market in Intellectual Property (IP), and is in line with the principle of subsidiarity. It has also been politically the most operational way forward when it comes to IPR legislation. This model also works well in the area of trade marks.

EU-wide protection did not aim at replacing national laws but to serve as an alternative and complement in order for businesses in the EU to dispose of and freely choose between or combine different, tailored tools to best (strategically) protect their IP according to individual needs (incl. gradual shift from local to EU level).

National designs provide a suitable geographical scope of protection when (local) businesses focus on specific markets, in particular their own domestic markets.

Demand for such national designs remains significant and higher than the demand for Community Design protection - around 120 000 filings for designs each year for the past decade (see figure below).

Fig. 1. Filing volumes of national design rights



Source: EUIPO based on data provided by the Member States for DesignView

Coexistence and fluid choice for businesses makes also microeconomic sense. Designs are exclusive rights, whereby over-protection should be discouraged in the interest of both competitors and consumers. Accordingly, letting the RCD system 'compete' head-on with the national systems would not be appropriate. The economic value of an exclusive right covering the whole EU is greater than that of a right covering only the territory of a MS. This needs to be reflected in higher fees for the RCD and national fees should be lower.

The evaluation confirmed high support by stakeholders for maintaining coexistence in the designs area in line with the dual trade mark system. Particularly SMEs choose such protection as best suited to their needs, with adequate territorial coverage (see table below).

Table 13.1. Evaluation OPC - Q20. What are the reasons for registering your designs as national designs? (multiple choice; % of answers selected)*

	SME	All respondents
It is best suited to my needs	**57%**	36%
Adequate territorial coverage	**43%**	44%
Easy procedures	**43%**	22%
Lower fees	**29%**	27%
Other**	**29%**	47%
Better service quality	**14%**	2%
Speed in processing my application	**0%**	11%
no. of answers	**7**	45

**no opinion answers not included*
*** possibility to obtain priority documents from national offices, the possibility to combine designs not covering the same classes into one application, strategic reasons (e.g. declaration of invalidity is more difficult to obtain at national level) and enforcement reasons (Article 82(5) CDR being open to interpretations). Finally, some features of the national protection (e.g. possibility to defer publication, presumption of ownership and validity) were also mentioned as a reason for opting for national registered designs.*
Source: responses to open public consultations on designs

Identified inefficiencies of national systems will be remedied by the proposed amendments to the DDir, harmonising in particular procedural rules.

ANNEX 14: DICTIONARY

Applicant: The person or company who applies for a design registration, i.e. files an application, or the person or company on behalf of whom the application for registration is made.

Authorised spare parts distributor: A distributor of spare parts for motor vehicles operating within the distribution system set up by a supplier of motor vehicles. The concept of authorised distributor includes dealers and/or repairers that are authorised to distribute spare parts.

Automotive aftermarket: This is the auto industry's after-sale market. It includes, among others, parts and accessories used in the repair, maintenance or enhancement of a product.

Cancellation of a trade mark: Trade mark rights can be revoked (Article 51 CTMR/Article 12 TMD) or be declared invalid (Articles 52, 53 CTMR/Articles 3, 4 TMD). 'Cancellation' refers to both types of proceedings. A registered trade mark can inter alia be revoked in the absence of genuine use. Furthermore, it may be declared invalid on application to the Office where it has been registered contrary to absolute (including acting in bad faith when filing the application) or relative grounds for refusal. OHIM has exclusive jurisdiction with regard to direct revocation or invalidity applications. Courts in Member States of the European Union, however, may revoke or declare a CTM invalid when the issue is put to them as a counterclaim in an infringement action based on the CTM.

Complex product: Pursuant to Article 3 of the CDR and Article 1 of the DDir, a complex product means a product which is composed of multiple components which can be replaced permitting disassembly and re-assembly of the product.

Date of priority for designs: The right of priority was introduced by Article 3 of the Paris Convention for the Protection of Industrial Property, pursuant to which any person who has duly filed an application for an industrial design in one of the countries of the Paris Union enjoys for the purpose of filing in the other countries, a right of priority for a certain period defined in the Convention. Pursuant to Article 43 of the CDR, the effect of the priority right is that the date of priority counts as the date of the filing of the application for a registered Community design. If the design holder has applied for registration of the design in another country within the previous six months, he is granted a right of priority when applying for a new registration. That means that the date of the first application also applies to the new one. The concept of the priority right and priority date is also used by the EU Member States.

Deferment of publication: Pursuant to Article 50(1) of the CDR, the applicant for a registered Community design may request, when filing the application, that the publication of the registered Community design be deferred for a period of 30 months from the date of filing the application or, if a priority is claimed, from the date of priority. Pursuant to Article 50(2), the registered Community design is registered, but neither the representation of the design nor any file relating to the application is open to public inspection. Pursuant to Recital 26 CDR, the option of deferring the publication serves avoiding that the normal publication following registration of a design could in some cases destroy or jeopardise the success of a commercial operation involving a design.

Design: Pursuant to Article 3 of the CDR and Article 1 of the DDir, a design means the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation.

Design application: Entrepreneurs can file an application for design registration at the European Union Intellectual Property Office or before the national intellectual property offices. There are two ways of applying for registration of a Community design, that is, (i) either via a direct filing, with the EUIPO or with the central industrial property office of a Member State or, in Benelux countries, with the Benelux Office for Intellectual Property (Article 35 et seq. CDR) or (ii) via an international registration filed with the International Bureau of the World Intellectual Property Organization and designating the European Union (Article 106a et seq. CDR).

Design holder: The owner of a registered or unregistered design. This is the person or company in whose name the registration is listed in the Designs Register. A registration may have several owners.

Design registration: European Union Intellectual Property Office registers a design in the EU's Designs Register if the application meets the formal requirements. National intellectual property offices can also register a design in their national design register. Design registration is the formal procedure through which a new design is entered in the EU's Design Register or the national design register. The registration of a design has the effect of securing its proprietor the exclusive right in the EU or in the respective Member States to use it for the goods and/or services that it covers and to prevent third parties to use, without consent, the same or a similar design for identical or similar goods and/or services as those protected by his design.

Design renewal: Pursuant to Article 10 of the DDir and Article 12-13 of the CDR, a design registration is valid for five years and it can be extended by five-year periods, up to a maximum of 25 years at the request of the design holder or of any person expressly authorised by him, provided that the renewal fee has been paid.

Earlier design: A design which was entitled to exclusive rights based on a Community design, a national design or an international design prior to the filing date or the date of priority of the design application.

European Union Intellectual Property Network: it is network that brings together the national and regional IP offices of the EU, the EUIPO, international partners, and customers of the EUIPO to build a stronger IP network in the EU.

Fee: Legal term for a fee charged by the EUIPO with respect to an application to register a design, the renewal or modification of a registration. The amount of the fee is legally provided for in the Fee Regulation (EC) No 2246/2002. National intellectual property offices have their own fee regime for the registration, renewal or modification of a registration.

Filing date: The date of filing of an application for a registered Community design is the date on which documents containing the information specified in Article 36(1) of CDR are filed with the EUIPO by the applicant, or, if the application has been filed with the central industrial property office of a Member State or with the Benelux Design Office, with that office. The filing date for a national design is the date on which a design right is applied for and on which the application meets the statutory application requirements.

Genuine use requirement: Pursuant to Article 18 of the EUTMR, and Article 16 of the TMD, within a period of five years following registration, the proprietor of a trade mark has not put the trade mark to genuine use in the EU (if EU trade mark) or in the Member State (national trade mark) in connection with the goods or services in respect of which it is registered. Otherwise the trade mark proprietor may not invoke his rights against third parties and third parties may initiate the revocation of the trade mark.

Graphical user interfaces: A graphical user interface is a way to communicate instructions to a computer application or operating system without typing the instructions in. It consists of picture-like items (icons and arrows for example).

Icon design: In computing, an icon is a pictogram or ideogram displayed on a computer screen in order to help the user navigate a computer system.

Independent aftermarket (IAM) spare parts distributor: A distributor of spare parts for motor vehicles who has no affiliation with the motor vehicle manufacturer (VM), regardless of any affiliation with spare parts manufacturers.

Independent aftermarket (IAM) repairers: Independent repairers that operate as self-standing businesses.

Independent suppliers (non-OES): Manufacturers that do not have any business connection with original equipment manufacturers (OEMs). They produce spare parts based on reverse engineering only for the aftermarket. They sell their products under their own brand.

Invalidation of the design: A design is removed from the register either due to the voluntary withdrawal by the owner or due to a court order or an administrative decision taken by the intellectual property office. The grounds under which a Community design can be declared invalid are laid down in Article 25 of the CDR and the grounds under which a national design can be declared invalid is laid down in Article 11 of DDir.

Locarno Classification: The Locarno Classification, established by the Locarno Agreement in 1968, is an international classification used for the purposes of the registration of industrial designs. It includes a list of classes and subclasses, an alphabetical list of goods which constitute an industrial design, with an indication of the classes and subclasses into which they fall and explanatory notes.

Must-match spare part: The appearance of such parts is dependent on the appearance of the complex product to be repaired so that the exact reproduction is necessary for restoring the complex product's original appearance. Such parts must exactly match the specifications of the original part to be able to replace it in the context of repair.

Multiple application: A multiple application is a request for the registration of more than one design within the same application. Each of the designs contained in a multiple application or registration is examined and dealt with separately. In particular, each design may, separately, be enforced, be licensed, be the subject of a right *in rem*, a levy of execution or insolvency proceedings, be surrendered, renewed or assigned, be the subject of deferred publication or be declared invalid (Article 37(4) CDR).

OEM authorised repairers: Repairers that are owned by the car manufacturers or that belong to the contractual service partners of car manufacturers.

Original equipment manufacturer (OEM): A manufacturer of motor vehicles. Original equipment supplier (OES) A part(s) manufacturer that produces parts or equipment according to the specifications and production standards provided by the motor vehicle manufacturer (VM) for the production of components or equipment for the assembly of the motor vehicle in question. OEMs use these parts for vehicle assembly and for redistribution as spare parts in the aftermarket.

Prior use: Pursuant to Article 22 of the CDR, a right of prior use exists for any third person who can establish that before the date of filing of the application, or, if a priority is claimed, before the date of priority, he has in good faith started using within the EU, or has made serious and effective preparations to that end, of a design included within the scope of protection of a registered Community design, which has not been copied from the latter. The right of prior use entitles the third person to exploit the design for the purposes for which its use had been effected, or for which serious and effective preparations had been made, before the filing or priority date of the registered Community design.

Product: Pursuant to Article 3 of the CDR and Article 1 of the DDir, a product means any industrial or handicraft item, including inter alia parts intended to be assembled into a complex product, packaging, get-up, graphic symbols and typographic typefaces, but excluding computer programs.

Publication of a design: If a design meets the formal requirements, the EUIPO or a national intellectual property office publishes the design registration in the EU's Designs Register or in the case of national design, in the national design register. The publication date of a design is important because this is the date from which the design can be viewed by all in the public register. Pursuant to Article 49 of the CDR, the EUIPO has to publish the registered Community design in the Community Designs Bulletin. The contents of the publication shall be set out in the implementing regulation.

Representation of a design: Pursuant to Article 4 of the Community Design Implementing Regulation, the representation of the design consists in a graphic or photographic reproduction of the design, either in black and white or in colour.

The Hague Agreement: An international agreement, which provides for the international registration of designs. An applicant can obtain design protection in various countries that are parties to the Hague Agreement under a single application. International design registrations are administered by the World Intellectual Property Organisation.

Unitary protection: Pursuant to Article 3(1) of the CDR, a community design has to have a unitary character. The essence of a Community Design is that it is a uniform protection and that it has effect throughout the entire territory of the EU. A Community Design can only be registered, surrendered, transferred, revoked, or invalidated for the entire territory of the EU.

Unregistered Community Design: A Community design that is not registered. An Unregistered Community Design is protected for a period of three years as from the date on which the design was first made available to the public within the EU. Compared to the registered design right it confers less right on its holder, it constitutes a right only to prevent copying.

Visible spare parts: These are parts of a motor vehicle that are used for the purpose of repair so as to restore its original appearance. Within the automotive aftermarket, the following three spare parts segments are concerned: body parts, lighting and auto glass.