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NOTE

From:	Presidency
To:	Permanent Representatives Committee
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Subject:	Review of EU legislation on design protection: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the legal protection of designs (recast) - **Analysis of the final compromise text with a view to agreement**

Delegations will find attached the compromise text of the above-mentioned proposal as it results from the provisional agreement reached at the trilogue on 5 December 2023.

ANNEX

2022/0392 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the legal protection of designs (recast)

(Text with EEA relevance)

PUBLIC

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the functioning of the European Union, and in particular Article 114(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[1],

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) A number of amendments are to be made to Directive 98/71/EC of the European Parliament and of the Council[2]. In the interests of clarity, that Directive should be recast.

(2) Directive 98/71/EC has harmonised key provisions of substantive design law of the Member States which at the time of its adoption were considered as most directly affecting the

[1] OJ C […], […], p. […].

[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).

functioning of the internal market by impeding the free movement of goods and the freedom to provide services in the Union.

(3) Design protection in national law of the Member States coexists with protection available at Union level through European Union designs ('EU designs') which are unitary in character and valid throughout the Union as laid down in Council Regulation (EC) No 6/2002[3]. The coexistence and balance of design protection systems at national and Union level constitutes a cornerstone of the Union's approach to intellectual property protection.

(4) In line with its Better Regulation agenda[4] to review Union policies regularly, the Commission carried out an extensive evaluation of the design protection systems in the Union, involving a comprehensive economic and legal assessment, supported by a series of studies.

(5) In its conclusions of ***10*** November 2020 on intellectual property policy and the revision of the industrial design system in the Union[5], the Council called on the Commission to present proposals for the revision of Regulation (EC) No 6/2002 and Directive 98/71/EC. The revision was requested due to the need to modernise the industrial design systems and to make design protection more attractive for individual designers and businesses, especially small and medium-sized enterprises. In particular, that revision was requested to address and consider amendments aiming at supporting and strengthening the complementary relationship between the Union, national and regional design protection systems, and involve further efforts to reduce areas of divergence within the design protection system in the Union. ▌

(6) Based on the final results of the evaluation, 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'[7]

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

4 Communication from the Commission: Better regulation for better results – An EU agenda, COM(2015) 215 final.

5 Council conclusions on intellectual property policy and the revision of the industrial designs system in the Union 2020/C 379 I/01 (OJ C 379I, 10.11.2020, p. 1).

7 Communication (COM/2020/760 final) from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Making the most of the EU's innovative potential. An intellectual property action plan to support the EU's recovery and resilience.

that it ***would*** revise ▌ Union legislation on design protection, following the successful reform of ▌ Union trade mark legislation***, with a view to simplifying the system and making it more accessible and efficient, and with a view to updating the regulatory framework in the light of the developments in relation to new technologies on the market***.

(7) In its ***resolution of 11*** November 2021 on ***an*** intellectual property action plan ***to support the EU's recovery and resilience***[1] the European Parliament welcomed the Commission's willingness to modernise the Union legislation on design protection ***in order to better support the transition to the digital, sustainable and green economy***, called on the Commission to further harmonise the application and invalidation procedures in the Member States, and suggested to reflect upon aligning Directive 98/71/EC and Regulation (EC) No 6/2002 with a view to creating greater legal certainty. ***In that resolution the European Parliament also stated that the EU design protection system should be aligned with the EU trademark system in order to allow for design holders to prevent design infringing goods to enter into the EU's customs territory and called on the Commission to make it possible for brand owners to put a stop to design counterfeits transiting through the Union. It also noted that design protection for parts used for the repair of complex products was only partially harmonised and that this was creating fragmentation in the internal market and legal uncertainty.***

[1]European Parliament resolution of 11 November 2021 on an intellectual property action plan to support the EU's recovery and resilience (OJ C 205, 20.5.2022, p. 26).

(8) Consultation and evaluation have revealed that, in spite of the previous harmonisation of national laws, there are still areas where further harmonisation could have a positive impact on competitiveness and growth ***and, in particular, in terms of the increased accessibility SMEs would have to the design protection system***.

(9) In order to ensure a well-functioning internal market, and to facilitate, where appropriate, acquiring, administering and protecting design rights in the Union for the benefit of the growth and the competitiveness of businesses within the Union, in particular small and medium-sized enterprises, while taking due account of the interests of consumers, it is necessary to extend the approximation of laws achieved by Directive 98/71/EC to other aspects of substantive design law governing designs protected through registration pursuant to Regulation (EC) No 6/2002.

PUBLIC

(10) Furthermore, it is also necessary to approximate procedural rules in order to facilitate acquiring, administering and protecting design rights in the Union. Therefore, certain principal procedural rules in the area of design registration in the Member States and in the EU design system should be aligned. As regards procedures under national law, it is sufficient to lay down general principles, leaving the Member States free to establish more specific rules.

(11) This Directive does not exclude the application to designs of ▌ legislation providing for protection other than that conferred by registration or publication as ***a*** design, such as ***Union*** legislation relating to unregistered design rights, ***or national or Union legislation relating to*** trade marks, patents and utility models, unfair competition or civil liability.

(12) It is important to establish the principle of cumulation of protection under specific registered design protection law and under copyright law, whereby designs protected by design rights should also be eligible for being protected as copyright works, provided that the requirements of ▌ copyright law are met.

(13) The attainment of the objectives of the internal market requires that the conditions for obtaining a registered design right be ***harmonised*** in all the Member States.

(14) To ***this*** end it is necessary to give unitary definitions of the notions of design and product, which are clear, transparent, and technologically up-to-date considering also the advent of new designs not being embodied in physical products. Without the list of relevant products being an exhaustive one, it is appropriate to distinguish products embodied in a physical object, visualised in a graphic, or that are apparent from the spatial arrangement of items intended to form ***an interior or exterior*** environment. In this context, it should be recognised that ***animations, such as*** the movement ***or the transition, of the features of a product,*** can contribute to the appearance of designs, in particular those not embodied in a physical object.

(15) Furthermore, there is a need for a unitary definition of the requirements regarding novelty and individual character with which registered design rights must comply.

(16) In order to facilitate the free movement of goods, it is necessary to ensure in principle that registered design rights confer upon the right holder equivalent protection in all Member States.

(17) Protection is conferred by way of registration upon the right holder for those design features of a product, in whole or in part, which are shown visibly in an application and made available to the public by way of publication or consultation of the relevant file.

(18) ***Apart from being shown visibly in an application,*** design features do not need to be visible at any particular time or in any particular situation in order to benefit from design protection**.** As an exception to this principle, protection should not be extended to those component parts which are not visible during normal use of a complex product, or to those features of such part which are not visible when the part is mounted, or which would not, in themselves, fulfil the requirements as to novelty and individual character. Therefore, those features of design of component parts of a complex product which are excluded from protection for these reasons should not be taken into consideration for the purpose of assessing whether other features of the design fulfil the requirements for protection.

(19) Although product indications do not affect the scope of protection of the design as such, alongside the representation of the design they may serve to determine the nature of the product in which the design is incorporated or to which it is intended to be applied. Furthermore, product indications improve the searchability of designs in the register of designs kept by an industrial property office. Therefore, accurate product indications facilitating search and increasing the transparency and accessibility of a register should be ensured prior to registration without undue burden on applicants.

(20) The assessment as to whether a design has individual character should be based on whether the overall impression produced on an informed user viewing the design differs from that produced on him by any other design that forms part of the existing design corpus, taking into consideration the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs and the degree of freedom of the designer in developing the design.

(21) Technological innovation should not be hampered by granting design protection to designs consisting exclusively of features or the arrangement of features dictated solely by a technical function. It is understood that this does not entail that a design must have an aesthetic quality. A registered design right may be declared invalid where no considerations other than the need for that product to fulfil a technical function, in particular those related to the visual aspect, have played a role in the choice of the features of appearance.

(22) Likewise, the interoperability of products of different makes should not be hindered by extending protection to the design of mechanical fittings.

(23) The mechanical fittings of modular products may nevertheless constitute an important element of the innovative characteristics of modular products and present a major marketing asset and therefore should be eligible for protection.

(24) A design right should not subsist in a design which is contrary to public policy or to accepted principles of morality. This Directive does not constitute a harmonisation of national concepts of public policy or accepted principles of morality.

(25) It is fundamental for the smooth functioning of the internal market to unify the term of protection afforded by registered design rights.

(26) The provisions of this Directive are without prejudice to the application of the competition rules under Articles 101 and102 of the Treaty on the Functioning of the European Union .

(27) ***For reasons of legal certainty,*** the substantive grounds for non-registrability and the substantive grounds for the invalidation of registered design rights in all the Member States should be exhaustively enumerated ▌

(27a) In order to prevent the improper use of symbols of particular public interest in a Member State, other than those referred to in Article 6ter of the Paris Convention for the Protection of Industrial Property, Member States should however be free to provide for specific grounds for non-registrability. In order to prevent the improper registration and misappropriation of elements belonging to cultural heritage that are of national interest, Member States should also be free to provide for specific grounds for non-registrability and invalidity. Such elements of cultural heritage, considered within the meaning of the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage or, to the extent they constitute tangible manifestation of intangible cultural heritage, within the meaning of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, include, for example, monuments or a group of buildings, artefacts, handicrafts, costumes.

(28) In view of the growing deployment of 3D printing technologies in ***different areas of industry, including with the help of AI, as well as*** the resulting challenges for design right holders to effectively prevent ▌ illegitimate ▌ copying of their protected designs, it is

appropriate to provide that the creation, downloading, copying and making available of any medium or software recording the design, for the purpose of reproduction of a product that infringes the protected design, amounts to use of the design being subject to the right holder's authorisation.

(29) In order to strengthen design protection and combat counterfeiting more effectively, and in line with international obligations of the Member States under the World Trade Organisation (WTO) framework, in particular Article V to the General Agreement on Tariffs and Trade on freedom of transit, and, as regards generic medicines, the Declaration on the TRIPS Agreement and Public Health, the holder of a registered design right should be entitled to prevent third parties from bringing products from third countries into the Member State where the design is registered without being released for free circulation there, where without authorisation the design is identically incorporated in or applied to these products, or the design cannot be distinguished in its essential aspects of the appearance from such products.

(30) To this effect, it should be permissible for registered design right holders to prevent the entry of infringing products and their placement in all customs situations, including, in particular transit, transhipment, warehousing, free zones, temporary storage, inward processing or temporary admission, also when such products are not intended to be placed on the market of the Member State concerned. In performing customs controls, the customs authorities should make use of the powers and procedures laid down in Regulation (EU) No 608/2013 of the European Parliament and of the Council[8], also at the request of the right holders. In particular, the customs authorities should carry out the relevant controls on the basis of risk analysis criteria.

(31) In order to reconcile the need to ensure the effective enforcement of design rights with the necessity to avoid hampering the free flow of trade in legitimate products, the entitlement of the design right holder should lapse where, during the subsequent proceedings initiated before the judicial or other authority competent to take a substantive decision on whether the registered design right has been infringed, the declarant or the holder of the products is able

[8] Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003 (OJ L 181, 29.6.2013, p. 15).

to prove that the owner of the registered design right is not entitled to prohibit the placing of the products on the market in the country of final destination.

(32) The exclusive rights conferred by a registered design right should be subject to an appropriate set of limitations. Apart from private and non-commercial use and acts done for experimental purposes, such list of permissible uses should include acts of reproduction for the purpose of making citations or of teaching, referential use in the context of comparative advertising, and use for the purpose of comment or parody, provided that those acts are compatible with fair trade practices and do not unduly prejudice the normal exploitation of the design. Use of a design by third parties for the purpose of artistic expression should be considered as being fair as long as it is at the same time in accordance with honest practices in industrial and commercial matters. Furthermore, this Directive should be applied in a way that ensures full respect of fundamental rights and freedoms, and in particular the freedom of expression.

(33) The purpose of design protection is to grant exclusive rights to the appearance of a product, but not a monopoly over the product as such. Protecting designs for which there is no practical alternative would lead in fact to a product monopoly. Such protection would come close to an abuse of the design protection regime. If third parties are allowed to produce and distribute spare parts, competition is maintained. If design protection is extended to spare parts, such third parties infringe those rights, competition is eliminated and the holder of the design right is de facto given a product monopoly.

(34) The differences in the laws of the Member States on the use of protected designs for the purpose of permitting the repair of a complex product so as to restore its original appearance, where the product incorporating the design or to which the design is applied constitutes a form-dependent component part of a complex product, directly affect the establishment and functioning of the internal market. Such differences distort competition and trade within the internal market and create legal uncertainty. ***The reparability of products is at the core of a sustainable economy, as highlighted in the European Green Deal.***

(35) It is therefore necessary for the smooth functioning of the internal market and in order to ensure fair competition therein to approximate the design protection laws of the Member States as concerns the use of protected designs for the purpose of repair of a complex

product so as to restore its original appearance through the insertion of a repair clause similar to that already contained in Regulation (EC) No 6/2002 and applicable to EU designs at Union level but explicitly applying to form-dependent component parts of complex products only. As the intended effect of such repair clause is to make design rights unenforceable where the design of the component part of a complex product is used for the purpose of the repair of a complex product so as to restore its original appearance, the repair clause should be placed among the available defences to design right infringement under this Directive. In addition, in order to ensure that consumers are not mislead but are able to make an informed decision between competing products that can be used for the repair, it should also be made explicit in the law that the repair clause cannot be invoked by the manufacturer or seller of a component part who have failed to duly inform consumers about the ***commercial*** origin***, and the identity of the manufacturer,*** of the product to be used for the purpose of the repair of the complex product. ***That detailed information should be provided through a clear and visible indication on the product or, where that is not possible, on its packaging or in a document accompanying the product, and should include at least the trade mark under which the product is marketed, and the name of the manufacturer.***

(35a) With a view to preserving the effectiveness of the liberalisation of the spare parts aftermarket sought by this Directive and in line with the case law of the Court of Justice of the European Union, in order to be able to benefit from the repair clause exemption from design protection, the manufacturer or seller of a component part of a complex product is under a duty of diligence to ensure, through appropriate means, in particular contractual means, that downstream users do not intend to use the component parts at issue for purposes other than that of repair so as to restore the original appearance of the complex product. This however should not require the manufacturer or seller of a component part of a complex product to guarantee, objectively and in all circumstances, that the parts they make or sell, are, ultimately, actually used by end users for the sole purpose of repair so as to restore the original appearance of that complex product.

(36) In order to avoid that divergent conditions in the Member States regarding prior use cause differences in the legal strength of the same design in different Member States, it is appropriate to ensure that any third person who can establish that before the date of filing of a design application, or, if a priority is claimed, before the date of priority, it has in good faith commenced use within a Member State, or has made serious and effective preparations to that end, of a design included within the scope of protection of a registered design right,

which has not been copied from the latter, should be entitled to a limited exploitation of that design.

(37) In order to improve and facilitate access to design protection and to increase legal certainty and predictability, the procedure for the registration of designs in the Member States should be efficient and transparent and should follow rules similar to those applicable to EU designs.

(38) To this effect, it is necessary to provide ***essential*** common rules regarding the requirements and technical means for the ▌ representation of designs in any form of visual reproduction at filing stage, taking into account technical advance for the visualisation of designs and the needs of the Union industry in relation to new (digital) designs. In addition, Member States should establish harmonised standards by means of convergence of practices.

(39) For greater efficiency it is also appropriate to allow design applicants to combine several designs in one multiple application and to do that without being subject to the condition 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.

(40) The normal publication following registration of a design could in some cases destroy or jeopardise the success of a commercial operation involving the design. The facility of a deferment of publication affords a solution in such cases. For the sake of coherence and greater legal certainty, thereby helping businesses reduce costs in managing design portfolios, deferment of publication should be subject to the same rules in the Union.

(41) In order to ensure a level playing field for businesses, and provide the same level of access to design protection across the Union by keeping to a minimum the registration and other procedural burdens to applicants, all central industrial property offices of the Member States ***and the Benelux Office for Intellectual Property*** should limit, as the European Union Intellectual Property Office (EUIPO) does at Union level, their substantive examination ex officio to the absence of the grounds for non-registrability exhaustively enumerated in this Directive.

(42) For the purpose of offering ***another*** means of declaring design rights invalid, Member States should ***be allowed to*** provide for an administrative procedure for declaration of invalidity

PUBLIC

which is aligned to the extent appropriate to that applicable to registered EU designs at Union level.

(43) It is desirable that Member States' central industrial property offices and the Benelux Office for Intellectual Property cooperate with each other and with the EUIPO in all fields of design registration and administration in order to promote convergence of practices and tools, such as the creation and updating of common or connected databases and portals for consultation and search purposes. The Member States should further ensure that their central industrial property offices and the Benelux Office for Intellectual Property cooperate with each other and with the EUIPO in all other areas of their activities which are relevant for the protection of designs in the Union.

(44) Since the objectives of this Directive, namely to foster and create a well-functioning internal market and to facilitate the registration, administration and protection of design rights in the Union to the benefit of growth and competitiveness where appropriate, cannot be sufficiently achieved by the Member States but can rather, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(45) The European Data Protection Supervisor was consulted in accordance with Article 42(1) of Regulation (EU) 2018/1725 of the European Parliament and of the Council[9] and delivered an opinion on ….

(46) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive amendment as compared with Directive 98/71/EC. The obligation to transpose the provisions which are unchanged arises under that earlier Directive.

(47) This Directive should be without prejudice to the obligations of the Member States relating to the time-limit for the transposition into national law of the Directive set out in Annex I,

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[9] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER 1
GENERAL PROVISIONS

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Article 1

Scope

1. This Directive applies to:

   (a) design rights registered with the central industrial property offices of the Member States;

   (b) design rights registered at the Benelux Office for Intellectual Property;

   (c) design rights registered under international arrangements which have effect in a Member State;

   (d) applications for the design rights referred to under points (a), (b) and (c).

2. For the purpose of this Directive, design registration shall also comprise the publication following filing of the design with the industrial property office of a Member State in which such publication has the effect of bringing a design right into existence.

Article 2

Definitions

For the purposes of this Directive ▌, the following definitions apply ▌:

(1) 'office' means the central industrial property office ***of the Member State or the Benelux Office for Intellectual Property, entrusted with the registration of designs***;

(2) 'register' means the register of designs kept by an office;

(3) ‘design’ means the appearance of the whole or a part of a product resulting from the features ▌ , in particular, the lines, contours, colours, shape, texture, materials of the product itself and/or its decoration ▌ , including the movement, transition or any other sort of animation of those features ▌ ;

(4) ‘product’ means any industrial or handicraft item other than computer programs ▌ , regardless of whether it is embodied in a physical object or materialises in a ***non-physical form***, including ▌ :

(a) packaging, sets of articles, spatial arrangement of items intended to form ***an interior or exterior*** environment, and parts intended to be assembled into a complex product;

(b) graphic works or symbols ▌ , logos, surface patterns, typographic typefaces, and graphical user interfaces ▌ ;

(5) ‘complex product’ means a product that is composed of multiple components which can be replaced permitting disassembly and reassembly of the product.

CHAPTER 2
SUBSTANTIVE LAW ON DESIGNS

Article 3

Protection requirements

1. Member States shall protect designs solely through the registration of the designs, and shall confer exclusive rights upon their holders in accordance with the provisions of this Directive.

2. A design shall be protected by a design right if it is new and has individual character.

3. A design applied to or incorporated in a product which constitutes a component part of a complex product shall only be considered to be new and to have individual character:

(a) if the component part, once it has been incorporated into the complex product, remains visible during normal use of the latter; and

(b) to the extent that those visible features of the component part fulfil in themselves the requirements as to novelty and individual character.

4. 'Normal use' within the meaning of paragraph (3), point (a), shall mean use by the end user, excluding maintenance, servicing or repair work.

Article 4

Novelty

A design shall be considered new if no identical design has been made available to the public before the date of filing of the application for registration or, if priority is claimed, the date of priority. Designs shall be deemed to be identical if their features differ only in immaterial details.

Article 5

Individual character

1. A design shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public before the date of filing of the application for registration or, if priority is claimed, the date of priority.

2. In assessing individual character, the degree of freedom of the designer in developing the design shall be taken into consideration.

Article 6

Disclosure

1. For the purpose of applying Articles 4 and 5, a design shall be deemed to have been made available to the public if it has been published following registration or otherwise, or exhibited, used in trade or otherwise disclosed, except where these events could not

PUBLIC

reasonably have become known in the normal course of business to the circles specialised in the sector concerned, operating within the Union, before the date of filing of the application for registration or, if priority is claimed, the date of priority. The design shall not, however, be deemed to have been made available to the public for the sole reason that it has been disclosed to a third person under explicit or implicit conditions of confidentiality.

2. A disclosure shall not be taken into consideration for the purpose of applying Articles 4 and 5 if the disclosed design, which is identical or does not differ in its overall impression from the design for which protection is claimed under a registered design right of a Member State, has been made available to the public:

(a) by the designer, his successor in title, or a third person as a result of information provided or action taken by the designer, or his successor in title; and

(b) during the 12-month period preceding the date of filing of the application or, if priority is claimed, the date of priority.

3. Paragraph 2 shall also apply if the design has been made available to the public as a consequence of an abuse in relation to the designer or his successor in title.

Article 7

Designs dictated by their technical function and designs of interconnections

1. A design right shall not subsist in features of appearance of a product which are solely dictated by its technical function.

2. A design right shall not subsist in features of appearance of a product which must necessarily be reproduced in their exact form and dimensions in order to permit the product in which the design is incorporated or to which it is applied to be mechanically connected to or placed in, around or against another product so that either product may perform its function.

3. Notwithstanding paragraph 2, a design right shall, under the conditions set out in Articles 4 and 5, subsist in a design serving the purpose of allowing multiple assembly or connection of mutually interchangeable products within a modular system.

Article 8

Designs contrary to public policy or morality

A design right shall not subsist in a design which is contrary to public policy or to accepted principles of morality.

Article 9

Scope of protection

1. The scope of the protection conferred by a design right shall include any design which does not produce on the informed user a different overall impression.

2. In assessing the scope of protection, the degree of freedom of the designer in developing his design shall be taken into consideration.

Article 10

Commencement and term of protection

1. Protection ***of a*** design right ***shall*** arise with registration by the office.

2. A ▌ design shall be registered ***for*** a period of five years calculated from the date of filing of the application for registration ▌ . The right holder may ***renew the registration, in accordance with Article 32,*** for one or more periods of 5 years each, up to a total term of 25 years from the date of filing of the application for registration ▌ .

Article 11

Right to the registered design

1. The right to the registered design shall vest in the designer or his successor in title.

2. If two or more persons have jointly developed the design, the right to the registered design shall vest in them jointly.

PUBLIC

3. However, ***the right to the registered design shall vest in the employer*** where a design is developed by an employee in the execution of his duties or following the instructions given by his employer, ***unless otherwise agreed between the parties concerned*** or laid down in national law.

Article 12

Presumption in favour of the registered holder of the design

The person in whose name the design right is registered, or prior to registration the person in whose name the application is filed, shall be deemed to be the person entitled to act in any proceedings before the office in the territory of which protection is claimed as well as in any other proceedings.

Article 13

Grounds for non-registrability

1. A design shall be refused registration where:

(a) the design is not a design within the meaning of Article 2, point (3);

(b) the design does not fulfil the requirements of Article 8***;***

(ba) the design constitutes an improper use of any of the items listed in Article 6ter of the Paris Convention for the Protection of Industrial Property, unless the consent of the competent authorities to the registration has been given.

1a. Any Member State may provide that a design shall be refused registration where the design constitutes an improper use of badges, emblems and escutcheons other than those covered by Article 6ter of the Paris Convention and which are of a particular public interest in the Member State concerned, unless the consent of the competent authority to their registration has been given in conformity with the law of the Member State.

1b. Any Member State may provide that a design shall be refused registration where it contains a total or partial reproduction of elements belonging to cultural heritage that are of national interest.

Article 14

Grounds for invalidity

1. If the design has been registered, the design right shall be declared invalid in the following situations:

(a) the design is not a design within the meaning of Article 2, point (3);

(b) the design does not fulfil the requirements laid down in Articles 3 to 8;

(ba) the design has been registered in breach of Article 13(1)(ba) or of Article 13(1a);

(c) by virtue of a decision of the competent court or authority, the holder of the design right is not entitled to it under the law of the Member State concerned;

(d) the design is in conflict with a prior design which has been made available to the public ***prior to or after the date*** of filing of the application ▌ or***,*** if priority is claimed, the date of priority of the design***, and which is protected from a date prior to the said date***:

(i) by a registered EU design or an application for a registered EU design subject to its registration;

(ii) by a registered design right of the Member State concerned, or by an application for such a right subject to its registration;

(iii) by a design right registered under international arrangements which have effect in the Member State concerned, or by an application for such a right subject to its registration;

(e) a distinctive sign is used in a subsequent design, and Union law or the law of the Member State concerned governing that sign confers on the right holder of the sign the right to prohibit such use;

(f) the design constitutes an unauthorised use of a work protected under the copyright law of the Member State concerned;

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PUBLIC

1a. ***If the design has been registered, any Member State may provide that the design right shall be declared invalid, where it contains a total or partial reproduction of elements belonging to cultural heritage that are of national interest.***

2. The grounds for invalidity provided for in paragraph (1), points (a) and (b), may be invoked by the following:

(a) any natural or legal person;

(b) any group or body set up for the purpose of representing the interests of manufacturers, producers, suppliers of services, traders or consumers, if that group or body, has the capacity to sue and be sued in its own name under the terms of the law governing it.

2a. ***The ground for invalidity provided for in paragraph 1, point (ba), may be invoked solely by the person or entity concerned by the improper use.***

3. The ground for invalidity provided for in paragraph 1, point (c), may be invoked solely by the person who is entitled to the design right under the law of the Member State concerned.

4. The grounds for invalidity provided for in paragraph 1, points (d), (e) and (f), may be invoked solely by the following:

(a) the applicant for or the holder of the ***earlier*** right;

(b) the persons who are entitled under Union legislation or the law of the Member State concerned to exercise the rights in question;

(c) a licensee authorised by the proprietor of ***the earlier*** right.

[redacted]

6. A design right may not be declared invalid where the applicant for or a holder of a right referred to in paragraph 1, points (d) to ***(f)***, consents expressly to the registration of the design before submission of the application for a declaration of invalidity or the counterclaim.

7. A design right may be declared invalid even after it has lapsed or has been surrendered.

Article 15

Object of protection

Protection shall be conferred for those features of appearance of a registered design which are shown visibly in the application for registration.

Article 16

Rights conferred by the design right

1. The registration of a design shall confer on its holder the exclusive right to use it and to prevent any third party not having the consent of the holder from using it.

2. The following, in particular, may be prohibited under paragraph 1:

   (a) making, offering, putting on the market or using of a product in which the design is incorporated or to which it is applied;

   (b) importing or exporting a product referred to in point (a);

   (c) stocking a product referred to in point (a) for the purposes mentioned in points (a) and (b);

   (d) creating, downloading, copying and sharing or distributing to others any medium or software recording the design for the purpose of enabling a product referred to in point (a) to be made.

3. ▌The holder of a registered design right shall be entitled to prevent all third parties from bringing products, in the course of trade, from third countries into the Member State where the design is registered, that are not released for free circulation in that Member State, where the design is identically incorporated in or applied to those products, or the design cannot be distinguished in its essential aspects from such products, and an authorisation has not been given.

   The right referred to in the first subparagraph shall lapse, if, during the proceedings to determine whether the registered design right has been infringed, initiated in accordance with Regulation (EU) No 608/2013, evidence is provided by the declarant or the holder of the

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products that the holder of the registered design right is not entitled to prohibit the placing of the products on the market in the country of final destination.

Article 17

Presumption of validity

1. In infringement proceedings it shall be presumed, in the favour of the holder of the registered design right, that the requirements set for the legal validity of a registered design right referred to in Articles 3 to 8 are met***, and that the design right has not been registered in breach of Article 13(1)(ba)***.

2. The presumption of validity referred to in paragraph 1 shall be rebuttable by any procedural means available in the jurisdiction of the Member State concerned, including counterclaims.

Article 18

Limitation of the rights conferred by the design right

1. The rights conferred by a design right upon registration shall not be exercised in respect of:

   (a) acts carried out privately and for non-commercial purposes;

   (b) acts carried out for experimental purposes;

   (c) acts of reproduction for the purposes of making citations or of teaching;

   (d) acts carried out for the purpose of identifying or referring to a product as that of the design right holder;

   (e) acts carried out for the purposes of comment, critique, or parody;

   (f) the equipment on ships and aircraft registered in another country when these temporarily enter the territory of the Member State concerned;

   (g) the importation in the Member State concerned of spare parts and accessories for the purpose of repairing such craft;

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(h) the execution of repairs on such craft.

2. Paragraph 1, points (c), (d) and (e) shall only apply where the acts are compatible with fair trade practices and do not unduly prejudice the normal exploitation of the design, and in the case of point (c), where mention is made of the source of the product in which the design is incorporated or to which the design is applied.

Article 19

Repair clause

1. Protection shall not be conferred on a registered design which constitutes a component part of a complex product, upon whose appearance the design of the component part is dependent, and which is used within the meaning of Article 16(1) for the sole purpose of the repair of that complex product so as to restore its original appearance.

2. Paragraph 1 cannot be invoked by the manufacturer or the seller of a component part of a complex product who failed to duly inform consumers, through a clear and visible indication on the product or in another appropriate form, about the ***commercial*** origin ***and the identity of the manufacturer*** of the product to be used for the purpose of the repair of the complex product, so that they can make an informed choice between competing products that can be used for the repair.

2a. The manufacturer or seller of a component part of a complex product shall not be required to guarantee that the parts they make or sell are ultimately used by end users for the sole purpose of repair so as to restore the original appearance of the complex product.

3. Where at the time of ***entry into force*** of this Directive the national law of a Member State provides protection for designs within the meaning of paragraph 1, the Member State shall, by way of derogation from paragraph 1, continue until …[***OP please insert the date = eight years from the date of entry into force of this Directive***] to provide that protection for designs for which registration has been applied before the entry into force of this Directive.

Article 20

Exhaustion of rights

The rights conferred by a design right upon registration shall not extend to acts relating to a product in which a design included within the scope of protection of the design right is incorporated or to which it is applied, when the product has been put on the market in the Union by the holder of the design right or with his consent.

Article 21

Rights of prior use in respect of a registered design right

1. A right of prior use shall exist for any third party who can establish that before the date of filing of the application, or, if a priority is claimed, before the date of priority, the third party has in good faith commenced use within the Member State concerned, or has made serious and effective preparations to that end, of a design included within the scope of protection of a registered design right, which has not been copied from the latter.

2. The right of prior use shall entitle the third person to exploit the design for the purposes for which its use has been effected, or for which serious and effective preparations had been made, before the filing or priority date of the registered design right.

Article 22

Relationship to other forms of protection

The provisions of this Directive shall be without prejudice to any provisions of Union ***law relating to unregistered design rights, or to any provisions of Union law or*** the law of the Member State concerned relating to ▌ trade marks or other distinctive signs, patents and utility models, typefaces, civil liability or unfair competition.

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Article 23

Relationship to copyright

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 by copyright as from the date on which the design was created or fixed in any form provided that the requirements of ▌ copyright law are met ▌ .

Article 24

Registration symbol

The holder of a registered design right may inform the public that the design is registered by displaying on the product in which the design is incorporated or to which it is applied the letter D enclosed within a circle. Such design notice may be accompanied by the registration number of the design or hyperlinked to the entry of the design in the register.

CHAPTER 3
PROCEDURES

Article 25

Application requirements

1. An application for ***registration of a*** design shall contain at least all of the following:

   (a) a request for registration;

   (b) information identifying the applicant;

   (c) a ***sufficiently clear*** representation of the design ▌ permitting ▌ the subject matter for which protection is sought to be ***determined***;

   (d) an indication of the products in which the design is intended to be incorporated or to which it is intended to be applied.

2. The application for design registration shall be subject to the payment of a fee determined by the Member State concerned.

3. The indication of the products as referred to in paragraph 1, point (d), shall not affect the scope of protection of the design. That shall also apply to a description***, and to any verbal disclaimers included therein,*** explaining the representation of the design if such a description is provided for by a Member State.

Article 26

Representation of the design

1. ▌

2. ***The design*** shall ***be represented*** in any form of visual reproduction**,** either in black and white or in colour. The reproduction can be static, dynamic or animated and shall be effected by any appropriate means, using generally available technology, including drawings, photographs, videos, or computer imaging/modelling.

3. The reproduction shall show all the aspects of the design for which protection is sought in one or more views. In addition, other types of views may be provided with the purpose of further detailing specific features of the design**.**

▌ ▌

▌ ▌

▌ ▌

▌ ▌

4. Where the representation contains different reproductions of the design or includes more than one view, those shall be consistent with each other and the subject matter of the registration shall be determined by all the visual features of those views or reproductions in conjunction.

5. The design shall be represented alone, to the exclusion of any other matter. ▌

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6. Matter for which no protection is sought shall be indicated by way of visual disclaimers ▌. Any such visual disclaimers shall be used consistently.

▌ ▌

8. The Member States' central industrial property offices and the Benelux Office for Intellectual Property shall cooperate with each other and with the European Union Intellectual Property Office to establish common standards to be applied to the requirements and means of design representation, in particular as regards the types and number of views to be used, the types of acceptable visual disclaimers, as well as the technical specifications of the means used for the reproduction, storage and filing of designs, such as the formats and size of the relevant electronic files.

Article 27

Multiple applications

Several designs may be combined in one multiple application for registered designs. This possibility shall not be subject to the condition that the products in which the design 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.

Article 28

Date of filing

1. The date of filing of a design application shall be the date on which the documents containing the information specified in Article 25(1), points (a) to (c), are filed with the office by the applicant.

1a. Without prejudice to paragraph 1, the filing date may be accorded where one or more of the elements required by Article 26 are missing, provided that the representation of the design as a whole is sufficiently clear within the meaning of Article 25(1), point (c).

2. Member States may, in addition, provide that the accordance of the date of filing is to be subject to the payment of a fee as referred to in Article 25(2).

Article 29

Scope of substantive examination

The offices shall limit their examination of whether a design application is eligible for registration to the absence of the substantive grounds for non-registrability referred to in Article 13.

Article 30

Deferment of publication

1. The applicant for a registered design may request, when filing the application, that the publication of the registered design be deferred for a period of ***up to*** 30 months from the date of filing the application or, if a priority is claimed, from the date of priority.

2. When registered the design neither the representation of the design nor any file relating to the application shall be open to public inspection subject to provisions of national law safeguarding legitimate interests of third parties.

3. A mention of the deferment of the publication of the registered design shall be published.

4. At the expiry of the period of deferment, or at any earlier date on request by the right holder, the office shall open to public inspection all the entries in its register and the file relating to the application and shall publish the registered design.

4a. The right holder may prevent the publication of the registered design as referred to in paragraph 4, by submitting a request for surrender of the registered design.

4b. Member States may provide, by way of derogation from paragraphs 4 and 4a, that the office shall publish the registered design only on request of the right holder. Where a Member State provides for the payment of a publication fee, the receipt of payment of that fee may be deemed to constitute the request referred to in the first sentence of this paragraph.

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Article 31

Procedure for declaration of invalidity

1. Without prejudice to the right of the parties to appeal to the courts, Member States ***may*** provide for an efficient and expeditious administrative procedure before their offices for the declaration of invalidity of a registered design right.

2. The administrative procedure for invalidity ***referred to in paragraph 1*** shall provide that the design right is to be declared invalid at least on the following grounds:

   (a) the design should not have been registered because it does not comply with the definition laid down in Article 2, point (3), or with the requirements provided for in Articles 3 to 8;

   (aa) the design should not have been registered because it is in breach of Article 13(1)(ba);

   (b) the design should not have been registered because of the existence of a prior design within the meaning of Article 14(1), point (d).

3. The administrative procedure shall provide that ▌ the following persons are to be entitled to file an application for a declaration of invalidity:

   (a) in the case of paragraph 2, point (a), the persons, groups or bodies referred to in Article 14(2);

   (aa) in the case of paragraph 2, point (aa), the person or entity referred to in Article 14(2a);

   (b) in the case of paragraph 2, point (b), ***at least the persons*** referred to in Article ***14(4)(a) and (b)***.

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Article 32

Renewal

1. Registration of a design shall be renewed at the request of the holder of the design right or any person authorised to do so by law or by contract, provided that the renewal fees have been paid. Member States may provide that receipt of payment of the renewal fees is to be deemed to constitute such a request.

2. The office shall inform the holder of the registered design right of the expiry of the registration at least six months before the said expiry. The office shall not be held liable if it fails to give such information and such failure shall not affect the expiry of the registration.

3. The request for renewal shall be submitted and the renewal fees shall be paid at least ***within a period of*** six months ***immediately preceding*** the expiry of the registration. Failing that, the request may be submitted within a further period of six months immediately following the expiry of the registration or of the subsequent renewal thereof. The renewal fees and an additional fee shall be paid within that further period.

4. In the case of a multiple registration, where the renewal fees paid are insufficient to cover all the designs for which renewal is requested, registration shall be renewed ***for those designs in respect of*** which ***it is clear*** the amount paid is intended to cover.

5. Renewal shall take effect from the day following the date on which the existing registration expires. The renewal shall be recorded in the register.

Article 33

Communication with the office

Parties to the proceedings or, where appropriate, their representatives, shall designate an official address for all official communication with the office. Member States shall have the right to require that such an official address be situated in the European Economic Area.

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CHAPTER 4
ADMINISTRATIVE COOPERATION

Article 34

Cooperation in the area of design registration, administration and invalidity

The offices shall be free to cooperate effectively with each other and with the European Union Intellectual Property Office in order to promote convergence of practices and tools in relation to the examination, registration and invalidation of designs.

Article 35

Cooperation in other areas

The offices shall be free to cooperate effectively with each other and with the European Union Intellectual Property Office in all areas of their activities other than those referred to in Article 34 which are of relevance for the protection of designs in the Union.

CHAPTER 5
FINAL PROVISIONS

Article 36

Transposition

1. Member States shall bring into force the laws, regulations or administrative provisions necessary to comply with Articles 2 and 3, Articles 6, 10 to 19, 21, 23 to ***30 and 32 to*** 33 by ▌ [***OP please insert the date = 36 months after the date of entry into force of this Directive***] at the latest. They shall forthwith communicate the text of those measures to the Commission.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. They shall

also include a statement that references in existing laws, regulations and administrative provisions to the Directive repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 37

Repeal

Directive 98/71/EC is repealed with effect from … [OP please insert the date = the day after the date in the first subparagraph of Article 36(1)], without prejudice to the obligations of the Member States relating to the time- limit for the transposition into national law of the Directive set out in Annex I.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

Article 38

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Articles 4 and 5, Articles 7 to 9, Articles 20 and 22 shall apply from …[OP please insert the date = the day after the date in the first subparagraph of Article [38](1)].

Article 39

Addressees

This Directive is addressed to the Member States.

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Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*

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Annex I

Time-limit for transposition into national law (referred to in Article 37)

Directive	Time-limit for transposition
98/71/EC	28 October 2001

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Annex II

CORRELATION TABLE

Directive 98/71/EC	This Directive
Article 1, introductory wording	Article 2, introductory wording
-	Article 2, points (1) and (2)
Article 1, point (a)	Article 2, point (3)
Article 1, point (b)	Article 2, point (4)
Article 1, point (c)	Article 2, point (5)
Article 2	Article 1
Articles 3 to 10	Articles 3 to 10
-	Articles 11 and 12
Article 11	Articles 13 and 14
-	Article 15
Article 12(1)	Article 16(1) and (2), points (a), (b) and (c)
-	Article 16(2), point (d)
-	Article 16(3)
Article 12(2)	-
-	Article 17
Article 13(1), points (a), (b) and (c)	Article 18(1), points (a), (b) and (c)
-	Article 18(1), points (d) and (e)
Article 13(2), points (a), (b) and (c)	Article 18(1), points (f), (g) and (h)
-	Article 18(2)
Article 14	-
Article 15	Article 20
-	Article 21
Article 16	Article 22

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Article 17 - Article 18 Article 19 - Article 20 - -	Article 23 Articles 24 to 35 - Article 36 Article 37 Article 38 Annex I Annex II

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