

The Consumer Voice in Europe

AN EU REPAIR CLAUSE – A MISSING PIECE OF THE RIGHT TO REPAIR

BEUC recommendations for reform of EU design protection
legislation



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EC register for interest representatives: identification number 9505781573-45



Co-funded by the European Union

Ref: BEUC-X-2023-077 - 09//2023

Why it matters to consumers

Consumers want to play their part in the green transition and repair their goods instead of throwing them away too quickly. However, this is not always easy in practice because of many obstacles in the way of doing so, the most important of which is high repair prices. One of the ways to reduce these costs would be to make spare parts more affordable and accessible by eliminating IP (intellectual property) law barriers and opening up the spare parts market to more competition. This is urgently needed for consumers to benefit in practice from the EU's intention to introduce a right to repair.

Summary

To introduce a meaningful right to repair for European consumers, unjustified IP barriers to repair must be eliminated. BEUC therefore strongly supports introducing an EU-wide repair clause into EU design protection legislation.

However, for such an EU repair clause to be effective in fulfilling its goals for a circular economy and fairer market, BEUC recommends that:

- the transitional period of 10 years, during which the repair clause would not apply to existing designs, must be deleted.
- the scope of the repair clause must not be limited to form-dependent spare parts.
- the obligation to provide information on the origin of spare parts, without which the repair clause would not apply, must be clarified in the text of the Directive and limited in scope to information about the producer of the spare part.

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Table of Contents

1. Right to repair – a complex package of EU proposals	2
2. A repair clause in EU design legislation	2
2.1. Background information and history of the discussions	2
2.2. Why do we need an EU repair clause?	3
3. BEUC recommendations	4
3.1. Transitional period	4
3.2. Information requirements	5
3.3. Limiting the scope of the repair clause to form-dependent spare parts only	5
4. Conclusions	6

1. Right to repair – a complex package of EU proposals

Already in March 2020, when the second Circular Economy Action Plan was published, the European Commission announced that it was going to work towards establishing a new 'Right to Repair'. Since then, it has proposed several new legislative initiatives to put this plan into effect.

As a first step, in March 2022 the Commission proposed the Ecodesign for Sustainable Products Regulation¹ that would strengthen EU design rules in order to make products more durable and repairable. At the same time, the Commission proposed a Directive on for empowering consumers for the green transition² that would introduce new pre-contractual information obligations on durability, reparability and availability of updates and also introduce new provisions into the Unfair Commercial Practices Directive to tackle premature obsolescence practices.

Last but not least, in March 2023 the Commission proposed a Directive on common rules promoting the repair of goods³, which was meant to be the last piece of the right to repair puzzle. However, this proposal does not cover important points: the prices of repairs, duration of repairs or the barriers to repair constituted by IP (intellectual property) law. **Without these elements there will be no comprehensive right to repair** in practice.

These missing elements are instead being currently tackled (at least partially in the context of the design legislation) by the proposal for a Directive on the legal protection of designs (recast)⁴ and the proposal for a Regulation on Community designs⁵. Both proposals include a repair clause, which is a tool that has great potential to improve consumer access to repair and to reduce the prices of spare parts by eliminating the monopoly of the original equipment manufacturers (OEMs).

The pending **revision of EU design legislation** should therefore also be considered in the context of the European Green Deal objectives of sustainable consumption and be seen as **a part of the legislative package introducing the right to repair**.

2. A repair clause in EU design legislation

2.1. Background information and history of the discussions

Discussions on introducing a repair clause into EU design protection legislation have been ongoing for almost 30 years. While Council Regulation (EC) No 6/2002⁶, setting up a stand-alone design protection system for Community designs, contained a (temporary⁷) repair clause from the start, this was not the case for Directive 98/71/EC⁸ harmonising national design protection rules. Diverging views on this point when the Directive was adopted led to a compromise commonly known as a "freeze plus" clause, allowing Member States to retain their existing laws until there was a subsequent amendment of the Directive while at the same time allowing them to introduce changes to their national legislation only if

¹ [COM\(2022\) 142 final](#)

² [COM\(2022\) 143 final](#)

³ [COM\(2023\) 155 final](#)

⁴ [COM\(2022\) 667 final](#)

⁵ [COM\(2022\) 666 final](#)

⁶ [Council Regulation \(EC\) No 6/2002](#) of 12 December 2001 on Community designs.

⁷ Article 110 of the Regulation 6/2002 introduced a transitional repair clause.

⁸ [Directive 98/71/EC](#) of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs.

such changes would lead to the liberalisation of the spare parts market. This lack of agreement on introducing a repair clause from the start has led to a **complicated patchwork of national rules⁹, lack of legal certainty** and most importantly has **delayed consumers' access to affordable spare parts for more than 20 years**.

The last attempt to introduce a repair clause into the Design Directive took place in 2004¹⁰. Unfortunately, despite strong support from the European Parliament, the Council was not in favour of this measure and ultimately the Commission withdrew its proposal.

In 2020, in its Intellectual Property Action Plan¹¹, the Commission announced that it would consider how to ensure that repair and re-use were not blocked by unfair and excessively restrictive IP practices. This was followed by a resolution of the European Parliament, which again called on the Commission to include a repair clause in its future proposal to revise the Design Directive.

Finally, on 28 November 2022, the Commission published a package of two proposals to revise both the Design Directive (Directive 98/71/EC) and the Community Design Regulation (Council Regulation (EC) No 6/2002) with the aim of liberalising the spare parts market by introducing (or confirming in the case of the Regulation) a repair clause. However, the repair clause proposed by the Commission is subject to certain limitations. The co-legislators must reconsider these limitations so as not to limit the application of the clause and most importantly, in the case of the Design Directive, not to delay the liberalisation of the spare parts market for another 10 years by introducing a transitional period of 10 years for existing designs.

2.2. Why do we need an EU repair clause?

Industrial design rights were introduced to protect the visual appearance of a product. This protection has an important impact on the spare parts market. Since visible spare parts must match the original components of the product, no alternative designs are possible. Any competitor that would like to enter the spare parts market is therefore obliged to offer parts identical to the original which would in turn breach the IP law protection of the original equipment manufacturer (OEM).

This **leaves consumers with no alternatives** to buying expensive spare parts from original equipment manufacturers. Holders of the design rights are in practice the only source of spare parts and enjoy full control over the spare parts market. This **totally excludes competition** and places such manufacturers in a *de facto* monopoly position, which results in high prices for consumers.

Moreover, **from an economic standpoint, continued design protection for spare parts is undesirable** as it leads to overcompensation¹². The investment made into the design of component parts has been already amortized at the level of the primary market (when the original good was first sold) with the design premium already collected at that stage. Moreover, when it comes to 'must-match' spare parts there is no room for innovation, and so no justification for such ongoing design protection.

These are the reasons why **an exception from design protection for spare parts used for the sole purpose of the repair** of the complex product so as **to restore its original**

⁹ [COM\(2004\) 582 final](#)

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](#)).

¹¹ European Parliament resolution of 11 November 2021 on an intellectual property action plan to support the EU's recovery and resilience ([2021/2007\(INI\)](#)).

¹² An international perspective on design protection of visible spare parts, Dana Beldiman and Constanting Blanke-Roeser, 2017.

appearance, in a form of an EU repair clause, is so much needed. Such clauses exist already in national legislation in many countries but attempts to introduce it at the EU level have so far been unsuccessful.

Finally, the fact is that the debate in recent years has been focused mainly around balancing the interests of fair competition and consumer benefit against the concepts of property rights and a strict view of the nature of IP rights. This time, however, the compelling need to finally achieve a more sustainable and green economy by making products longer lasting and more repairable must prevail.

3. BEUC recommendations

BEUC **strongly supports** the introduction of the repair clause into the proposal for a Directive on the legal protection of designs (recast)¹³ (later referred to as a proposal for a Directive) and the confirmation of the repair clause in the proposal for a Regulation on Community designs¹⁴ (later referred to as a proposal for a Regulation).

However, we see **several areas for improvement** of this exception from the design protection regime and most importantly a need to make sure it can be available as soon as possible also for existing designs.

3.1. Transitional period

3.1.1. The proposal

For existing designs, Article 19(3) of the proposal for a Directive foresees a **10-year transition period** (from the date of entry into force of the Directive) before the EU repair clause would become applicable.

3.1.2. BEUC position

Liberalisation and more competition on the spare parts market are **urgently needed and must not be delayed for existing designs**. If the availability of less expensive spare parts were delayed until the middle of the next decade, consumers would not enjoy a meaningful right to repair in practice.

Opponents of the repair clause claim that it might conflict with the fundamental right to property (Article 17 of the Charter of Fundamental Rights of the European Union) and the principle of protection of legitimate expectations¹⁵. However, according to the European Court of Human Rights¹⁶ interference with this fundamental right is possible as long as it is proportionate, “in the public interest”, “subject to the conditions provided by law and by the general principles of international law” and strikes a “fair balance” between protection of the individual’s fundamental rights and the demands of the general interest. As a result, these fundamental rights do not preclude a restriction of existing design rules. Without such a lengthy transitional period, which significantly delays the public interest goals related to liberalisation of the spare parts market and the introduction of the right to repair, there would still be a fair balance between IP right holders and consumers.

¹³ [COM\(2022\) 667 final](#)

¹⁴ [COM\(2022\) 666 final](#)

¹⁵ An international perspective on design protection of visible spare parts, Dana Beldiman and Constanting Blanke-Roeser, 2017

¹⁶ For example, ECHR Judgement of 30 May 2000, Alberghiera v. Italy, Application No. 31524/96, §55

According to existing studies¹⁷, a repair clause is also compatible with the EU's obligations under TRIPS¹⁸.

BEUC calls therefore on the co-legislators to delete the 10-year transitional period.

3.2. Information requirements

3.2.1. The proposal

According to Article 19(2) of the proposal for a Directive¹⁹, the repair clause could only be invoked if consumers were duly informed, through a clear and visible indication on the product or in another appropriate form, about **the origins of the product** to be used for the purpose of repair.

A similar obligation can be found in the Article 20a(2) of the proposal for the Regulation.

3.2.2. BEUC position

The proposal does not explain what exactly is meant by "information about the origins of the product". This **should be further clarified in the text** to improve legal certainty.

Most importantly, it should be clarified that the information about the origins of the product must allow consumers to easily determine whether a spare part was **produced, authorised or commissioned by the original equipment manufacturer, or not**. This condition could be fulfilled, for example, by labelling parts that do not fall under this category.

Providing information on whether spare parts were manufactured by the original producer of the complex product might give consumers an indication of their quality and therefore constitutes one of the most important factors, next to the price, that can affect consumers' transactional decisions. Different disclosure models have been implemented so far by national governments²⁰, either as part of the repair clause or separately. This proposal is a good opportunity to harmonise the situation on the spare parts market across the EU.

3.3. Limiting the scope of the repair clause to form-dependent spare parts only

3.3.1. The proposal

According to Article 19(1) of the proposal for a Design Directive recast, the application of the repair clause would be explicitly limited to the components "upon whose appearance the protected design is dependent" (form-dependent spare parts).

A similar restriction can be found in Article 20a(1) of the proposal for the revision of the Community Designs Regulation.

¹⁷ 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).

¹⁸ Article 26(2) of TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights) allows for limited exceptions to the protection of industrial designs "provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking into account of the legitimate interest of third parties".

¹⁹ 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](#)).

²⁰ An international perspective on design protection of visible spare parts, Dana Beldiman and Constanting Blanke-Roeser, 2017.

3.3.2. BEUC position

Such a limitation of the scope of the repair clause is notably absent from the Regulation on Community Designs (Article 110(1) the Regulation 6/2002), which was later confirmed in the *Acacia case*²¹ by the European Court of Justice. As the Court pointed out, while such a requirement did indeed appear in the initial Commission proposal it was later deliberately deleted by the Council during the legislative process and should therefore not apply.

Narrowing the scope of the repair clause to form-dependent spare parts would only allow for a *limited liberalisation* of the market, instead of the much-needed *full liberalisation*. BEUC therefore recommends **removing the explicit limitation of the EU repair clause to form dependent spare parts only**.

4. Conclusions

BEUC strongly supports the inclusion of a general Europe-wide repair clause into EU design protection legislation. Liberalisation of the spare parts market, leading to more affordable prices for consumers, is **crucial for introducing a genuine right to repair for European consumers** and must not be delayed for another 10 years by unjustified and disproportionate exemptions. This is all the more important in view of the compelling need to finally achieve a more sustainable and green economy by implementing the EU's circular economy priorities, *inter alia* by improving consumers' meaningful access to repairs. This aspect was not sufficiently taken into account during previous discussions but has now emerged as a very important additional point to consider when analysing the proportionality of the measure and the need to balance it with the interests of IP right holders.

END

²¹ Judgment of the Court in Joined Cases C-397/16 and C-435/16, *Acacia*.

