



Design Protection in Europe

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Content

5	1. Requirements for design protection in Europe
5	2. Overlap of design law and other IP rights
6	3. Design law in Germany and international design law
6	4. Design protection through registration or use
7	5. Procedure for obtaining registered design rights
8	6. Invalidity proceedings against registered Community or German designs
9	7. Enforcing design rights in Europe (main proceedings)
9	7.1 Competent courts and jurisdiction
11	7.2 Main procedural principles
11	7.3 Claims on the merits in proceedings
13	7.4 Length of proceedings and time limits
14	7.5 Costs
14	8. Enforcing design rights in Europe (preliminary proceedings)
14	8.1 General remarks
15	8.2 Specific procedural principles and timing
16	8.3 Preliminary injunctions and main actions
16.	9. Brexit

Introduction

A design is defined in the Community Design regulation and in the Design directive as the outward appearance of a product or a part of a product which results from the lines, contours, colours, shape, texture, materials and/or its ornamentation. In order to qualify for protection, designs must be new and must have individual character. Furthermore, a design shall not subsist in features of appearance of a product which are solely dictated by its technical function. Designs make a product attractive and appealing; hence they may add significantly to the commercial value of a product and increase its marketability. Design protection is a significant element of IP law. Designs as unique creations with individual character require and deserve protection against imitators just as copyrighted works or trademarks.

1. Requirements for design protection in Europe

Design law in Europe consists of European Union design legislation providing for registered and unregistered Community designs, governed by Council Regulation (EC) No. 6/2002 of December 12, 2001 on Community designs (Community Design regulation – CDR) and national design laws in the 27 Member States of the European Union, as to a substantial degree harmonised by Directive 98/71/EC of the European Parliament and of the Council of October 13, 1998 on the legal protection of designs (Design directive). Registered Community designs are administered by the European Intellectual Property Office (EUIPO), located in Alicante, Spain, which also administers the European Union’s trademark law. In this presentation, we will cover European and German design law.

Key requirements for design protection in Europe are “novelty” and “individual character” as established under Article 5 and Article 6 CDR, and in the parallel provisions in the Designs directive. For establishing novelty, the new design needs to vary in more than just “immaterial details” from other existing designs. Whether or not it has individual character depends on whether the design, compared to earlier designs, creates overall the same impression on the “informed user”. This imaginary user is a person with knowledge of designs in the applicable field of activity. In contrast to trademark cases, where the average consumer will compare the asserted mark with other marks he has in mind

(“imperfect recollection”), the comparison in design law is performed with the design to be examined and the other designs side by side. In this respect, the informed user is “particularly observant and has some awareness of the state of the prior art, that is to say the previous designs relating to the product in question”.

2. Overlap of design law and other IP rights

A product design or an element of a product design may, at the same time, amount to both a design right and qualify for protection under other IP rights, particularly under copyright and trademark law. For example, a device mark may also be registered as a design (if new and individual), and the three-dimensional appearance of a product, which can be protected as a design, may also be registered as a trademark (provided it is distinctive). Likewise, logos, in principle, can be protected as designs and trademarks.

Designs may also be protected under copyright law. Whether they qualify depends on the applicable laws of the Member States of the European Union. Contrary to design and trademark law, no EU-wide copyright law exists and the requirements for copyright protection have not been harmonised. As a rule, for a design to constitute a “work” protected under copyright law, the design must be the result of a personal intellectual creation, containing the imprint of its author’s personality. This, in principle, implies a higher standard of originality than the requirements of “individual character” for design protection.

1. Requirements for design protection in Europe
2. Overlap of design law and other IP rights

3. Design law in Germany and international design law

4. Design protection through registration or use

Furthermore, when seeking patent protection for a specific product, it should always be considered whether this product shows features protectable under design law. This will regularly be the case (unless, from an objective point of view, the features have been chosen solely on the basis of considerations of functionality, which will rarely be the case).

3. Design law in Germany and international design law

The German Designs Act (“Geschmacksmustergesetz”) of 2004 has implemented the Design directive, as has been the case in all the 27 Member States of the European Union.

At the international level, design protection is available through the international registration of designs pursuant to the Hague Agreement on the International Registration of Designs (the most recent version being that of the 1999 Geneva Act). The Hague Agreement is administered by the International Bureau of the World Intellectual Property Organization (WIPO). Germany is a member of the Hague Agreement. The European Union is, since 2008, also a member of the Hague Agreement. Thus, protection for the European Union as a whole, as well as for all of its Member States which belong to the Hague Agreement, may be obtained through the registration of designs at the International Bureau of WIPO. In addition, the European Union as well as its Member States are members of the WTO and thus bound by the TRIPS Agreement,

which contains minimum standards on design protection.

4. Design protection through registration or use

Rights in designs are acquired through registration and through use. Community designs are protected as registered Community designs after filing at OHIM and registration, without examination as to the most relevant substantive conditions of protection (novelty, individual character). Protection through use for unregistered Community designs is acquired through the first publication or other use within the European Union of a design fulfilling the conditions of protection. First disclosure or use outside of the European Union does not create any rights in Europe. German design law provides for registration of designs. German law does not recognize unregistered designs. Of course, unregistered Community designs are also valid in Germany.

A registration gives the design proprietor the exclusive right to use the design in the course of trade. Protection extends to any later design creating a substantially identical impression on the informed user. Protection is available regardless of the category of product in which the design is incorporated. Registered designs are protected against both deliberate copying and the independent development of a similar design. Further advantages of a registered design compared to an unregistered design are a longer term of protection (up to 25 instead of

three years) and a stronger position in case of infringement litigation.

The Hague System of international registration of

As with a trademark, there are international and national registration procedures for designs:

- national registration with the German Patent and Trademark Office in Munich
- registration as a Community design with the EUIPO in Alicante
- international registration with the International Bureau of WIPO in Geneva

industrial designs is applicable among the countries party to the Hague Agreement. In 2018, 68 countries were members of the Hague Agreement (some important countries are not members, such as China, but it is possible to designate the EU). An international registration produces the same effects in each of the designated countries as if the design had been registered there directly, unless protection is refused by the competent office of that country. To file an international application, no prior national (basic) registration in a Member State of the Hague Agreement is required (contrary to international trademark registrations under the Madrid system).

The Community design gives the proprietor the exclusive right to prevent any third party from using an infringing design anywhere within the European Union. A single application grants

protection for five years, and protection may be renewed for additional periods of five years up to a maximum of 25 years. Unregistered Community designs are protected for three years from the date of disclosure of the design to the public within the European Union.

Community design protection is a preferred method of obtaining protection in Europe because it is easily accessible, relatively inexpensive, provides unitary protection throughout Europe and can be enforced Community-wide in specially designated Community design courts.

5. Procedure for obtaining registered design rights

To register a Community or German design, an application form must be filed, which has to contain a representation of the design that is suited for publication and an indication of at least one product in which the design is intended to be incorporated or to which it is intended to be applied. The goods are classified in accordance with an international classification system established by the Locarno Agreement, also administered by WIPO. A multiplicity of designs can be included in one multiple application (German designs: up to 100; Community designs: no limit, up to 99 in case of online filing) provided that, in particular, they have a common (main) class of goods.

Filing multiple designs in a single application helps saving fees. Since March 1, 2010 the German Patent and Trademark Office (GPTO) also

5. Procedure for obtaining registered design rights

offers online application, as does the EUIPO. After filing the application form, the EUIPO or GPTO examines whether or not the application contains formal defects, whether or not the design applied for is eligible for design protection at all and whether the design complies with public policy and accepted principles of morality. If these requirements are fulfilled, the design will be registered and published in the electronic designs gazette. The first five-year term of protection starts from the date of this publication. If the design was filed in Germany and the publication of the registration was the first disclosure of the design concerned, it is automatically protected as an unregistered Community design for three years through the publication of the registration of the German design in the designs gazette of the GPTO.

Substantive requirements for protection like novelty and individual character are not examined by the GPTO or the EUIPO. These requirements are examined only in case of a legal dispute. Requests for declaration of invalidity of a registered Community design may be filed directly at the EUIPO or by way of a counterclaim in infringement proceedings. Challenges to registered German designs are not dealt with by the GPTO, but may be brought before a competent civil court directly or as a counterclaim to an action for infringement.

To register an international design, applications must be filed at the International Bureau of WIPO. A single application may contain up to 100 separate designs. Applications may also be filed online. The application must designate the

members of the Hague Agreement in which the design is desired to be protected. The registration fee depends on the number of selected countries. Application forms are available in English and French.

6. Invalidity proceedings against registered Community or German designs

Community and German designs are not examined for novelty and individual character prior to registration. Thus, the potential invalidity of an asserted design right is of utmost importance when it comes to litigation. Different from trademark cases, according to common practice, in more or less all design infringement cases the accused defendant argues that the design-in-suit is invalid for lack of novelty or individual character. Even where validity of the design-in-suit is not challenged, the infringement court is called to assess the scope of protection of the asserted design right, which corresponds with the design's individual character ("concept of reciprocity"). Therefore, the degree of individual character must be determined in infringement proceedings and is often crucial when deciding whether the asserted and accused designs produce the "same overall impression".

Registered Community designs may also be challenged by bringing an invalidity action before the EUIPO. Until May 31, 2018, more than 2,000 decisions have been issued and approx. 60 % of the contested Community designs have been invalidated by the Invalidity Division. More than 900 decisions of the EUIPO's Board of Appeal

have been issued so far and approx. 30 % of the appealed decisions of the Invalidity Division have been confirmed. Case law from the General Court of the European Union or even the Court of Justice of the European Union is still not as differentiated as, for example, in trademark law. However, the Courts have already rendered some landmark decisions, helping to navigate through the still unchartered, but increasingly populated territory of European design law.

7. Enforcing design rights in Europe (main proceedings)

While German design rights, as well as international design registration covering Germany, provide protection only in Germany, Community designs have “unitary character” and “equal effect throughout the Community” (Article 1 [3] CDR) and therefore cover all Member States of the EU. Accordingly, it is established case law that a claim for cease-and-desist (injunctive relief) on the grounds of a Community design infringement applies, as a rule, to the entire territory of the EU, because an infringement committed anywhere in the European Union establishes, in principle, a risk of repeat infringement for the entire territory of the EU.

7.1 Competent courts and jurisdiction

Remedies in cases of design infringement are in practice primarily civil remedies (injunction, damages, etc.), although penal remedies exist as well, as do administrative remedies such as border seizure.

In Germany, organization of the courts is a matter for the 16 German federal states (“Länder”). Thus, the degree of specialization of the courts differs greatly from “Land” to “Land”. In many infringement cases the claimant has the choice of the court where proceedings are brought. He may choose the defendant’s domicile or, alternatively, any court where acts of infringement have been committed or threatened (*forum delicti commissi*). Design cases are heard in up to three instances: In first instance by the District Courts (“Landgericht”), in second instance by the Courts of Appeal (“Oberlandesgericht”) and in third instance by the Federal Supreme Court (“Bundesgerichtshof”). On the basis of the functional competence within the court, in first instance the case may be brought to a commercial chamber sitting with one professional judge and two lay judges. However, practitioners often choose to file a complaint with the civil chambers that sit with three professional judges.

Most German states have concentrated the jurisdiction for design matters on only one court in each state. Claimants have a tendency to go to the courts which are known for handling a large number of design cases, such as the

7. Enforcing design rights in Europe (main proceedings)

7.1 Competent courts and jurisdiction

District Courts of Dusseldorf, Hamburg, Frankfurt, Mannheim and Munich.

Judgments of the District Courts can be appealed to the Courts of Appeal. These courts of second instance basically evaluate whether the first instance judgment correctly considered the facts and evidence, and correctly applied the law. However, the appeal instance does not perform a full *de novo* trial. New facts may only be submitted under certain conditions, e.g., if the claimant or defendant did not act negligently when failing to introduce these facts in the first instance. Therefore, it is very important to assert all the relevant facts and defenses already in the first instance. New legal arguments may be submitted at any time, including in the second instance.

A further appeal to the Federal Supreme Court can be allowed by the Court of Appeal if the matter is of fundamental importance or can further develop the law. In practice, these requirements are high and are often not considered to be fulfilled. In consequence, only a few cases are heard in third instance.

If the appeal has not been allowed by the Court of Appeal, a special motion for admitting the appeal can be brought to the Federal Supreme Court. Only a very small percentage of these motions are successful. If the motion is granted or the appeal has been allowed by the Court of Appeal, the case will be taken to judgment by the Federal Supreme Court. This further appeal is for a review on issues of law only. The parties

mitted to act before the Federal Supreme Court. Very rarely, a case may be brought to the Federal Constitutional Court (“Bundesverfassungsgericht”) in Karlsruhe. The Constitutional Court does not serve as a regular court of appeals from lower courts or the Federal Supreme Court as a sort of “super appellate court” on any violation of federal laws. Its jurisdiction is limited to issues of constitutional law, including fundamental individual rights such as freedom of speech.

Infringement of Community designs (whether registered or not) belongs to the competence of Community design courts. These are national courts designated by the Member States to deal with Community design cases. In Germany, in principle, the same courts that are competent for hearing German design cases have also been designated as Community design courts. Community design courts have Community-wide competence when the case is brought in the Member State where the defendant is domiciled or established, or, failing this, where the claimant is domiciled or established. If neither claimant nor defendant are domiciled or have an establishment in the European Union, the Community design court in Alicante (the seat of EUIPO) has Community-wide competence. In addition, actions may also be brought before the courts of a Member State where acts of infringement have been committed or are threatened. In that situation the competence of the court is limited to the territory of the Member State where it is established (*forum delicti commissi*).

7.2 Main procedural principles

An infringement case is usually started by sending a warning letter with a cease-and-desist declaration containing a contractual penalty in case of violation. Should the matter not be resolved as a result of such a warning letter, the proprietor of a trademark, design or copyright will usually file proceedings for a preliminary injunction (see below).

A complaint must be filed at a competent District Court. The parties must be represented in infringement proceedings by an attorney-at-law (“Rechtsanwalt”) admitted to a German bar, optionally cooperating with a patent attorney (“Patentanwalt”). Non-EU nationals who act as claimants in proceedings brought before German courts must, upon application by the defendant, give security for costs and lawyers’ fees.

The claimant has to present evidence of all facts which are relevant for finding infringement. Discovery is generally not available in German court proceedings. Any facts which cannot be proven by documentary evidence may be dealt with in a taking of evidence by hearing witnesses in oral testimony. Rarely, the courts may require a design expert for considering novelty or individual character of the asserted design; this may especially happen in case of designs in densely occupied fields of design where even the average observer with an open mind to questions of design will find it difficult to assess differences as against the existing design

corpus, that it can be appropriate making use of an expert opinion. Many cases, however, are decided on the basis of written presentations by the parties and in subsequent oral hearings in which the presiding judge explains the views of the court and gives the parties an opportunity to present their arguments and observations. Formal taking of evidence is rather an exception in design infringement proceedings.

7.3 Claims on the merits in proceedings

The legal tools at the disposal of the claimant in infringement proceedings include claims for cease-and-desist (injunctive relief), for destruction of the infringing products and for detailed information and rendering of account about infringement activities by the defendant, as well as for damages which may be calculated based on the accounting rendered (account of sales, profits etc.).

As regards damages, the claimant may choose between three alternatives for calculating damages: lost profits, infringer’s profits, or reasonable royalty. Punitive damages are not awarded. While a reasonable royalty typically provides the least burdensome of these alternatives for calculating damages, the calculation according to the infringer’s profit is being applied more and more frequently, since the case law now allows the infringer to deduct costs and expenses from the sales figures only if (and to the extent that) they can, in exceptional cases, be directly attributed to the objects infringing the IP right.

7.2 Main procedural principles

7.3 Claims on the merits in proceedings

Furthermore, and following the implementation of the IP Rights Enforcement Directive (2004/48/EC) into German law, the German Design Law provides:

- claims for preservation of evidence;
- claims for recall and definitive removal of infringing products from the channels of commerce;
- claims for securing damages (submission of bank, financial or commercial documents) in certain circumstances;
- claims for the publication of judicial decisions;
- claims for inspection;
- an extension of existing claims for destruction of infringing products and implements principally used in the creation or manufacture of infringing products; and
- an extension of existing claims for information

As a consequence, only the variable costs of the manufacture and marketing of the product may be deducted from the infringer's amount of sales made. Additionally, in determining the amount of profit made from the infringement, the infringing party cannot claim that such profit is partly due to its own particular distribution activities. This means that general overhead costs are no longer allowed to be used to reduce the infringer's profits. However, the question remains whether the infringer's profits are caused by the design infringement or by other circumstances, like good client relationships, a dominant market position, effective advertising or good service. The same question arises if the design owner claims his lost profits, which would frequently permit the highest damages awards. Here, an additional obstacle occurs if the market included other competitors than the claimant and the defendant, so that a third party could to some extent have replaced the infringing sales of the defendant in the absence of defendant's infringing activities.

When actions for infringement of Community designs are brought, Article 89 CDR provides for the sanctions of injunctive relief, the seizure of infringing products and the seizure of materials and implements predominantly used in order to make the infringing products. In addition, the courts apply all the sanctions provided for in the law of the country where the infringement took place. If a German Community design court deals with infringements committed in Germany, the sanctions applicable in cases of infringement of German designs are applicable.

7.4 Length of proceedings and time limits

The length of proceedings in design infringement cases may differ from court to court and may vary with the court's workload. Main proceedings for design infringement are likely to take between six and nine months in first instance, from filing of the complaint until rendering of the judgment. Depending on the practice of the court, there may be one or two hearings in a typical case. If the court orders the taking of evidence, there may be one further session of the court for hearing witnesses or experts, and in that case the proceedings will typically take another three months. Appeal proceedings are likely to take approximately nine to twelve months on average, with usually only one court hearing. If evidence is taken at the appeal stage, approximately three months should be added. If a further appeal to the Federal Supreme Court is admitted, the proceedings before that Court would likely take one and a half to two years.

The first instance proceedings start with the claimant filing a comprehensive complaint, stating all relevant facts of the case. The defendant then has to reply within about six to eight weeks. An oral hearing will be held within another one or two months. The decision is typically rendered about one month after the oral hearing. There is no automatic enforcement of the decision if an appeal is lodged against it. A special order may authorize preliminary enforcement.

An appeal must be lodged within one month from the receipt of the written first instance decision. A comprehensive reasoning has to be filed within a further month. The Court of Appeal may extend this deadline. Typically, the appellee has a few months to respond to the appeal reasoning. A reply of the appellant is then to be expected about two months later. An oral hearing will be held about three months later. The decision is rendered within one more month. There is no automatic enforcement of the decision if a further (legal) appeal is lodged. A preliminary enforcement of the decision may be allowed, but its temporary execution usually requires the deposit of a security.

A further appeal on points of law can be lodged within one month from the notification of the second instance decision. A comprehensive reasoning has to be filed within one further month. The Federal Supreme Court may extend this deadline.

7.4 Length of proceedings and time limits

7.5 Costs

8. Enforcing design rights in Europe (preliminary proceedings)

8.1. General remarks

7.5 Costs

The cost risk in design litigation usually includes fees for both parties' attorneys and (optional) patent attorneys, plus the court fees and expenses for witnesses, travelling, etc. It is difficult to give a general estimate for litigation costs at first or second instance. To give an idea of the order of magnitude of the litigation costs, one should focus on statutory lawyer's fees, according to the German statutory fee regulation ("Rechtsanwaltsvergütungsgesetz") and court fees only. These fees are calculated on the basis of the value in litigation, which reflects the claimant's interest in the disputed matter. The value in dispute is fixed at the court's discretion, but is essentially based on the parties' sales figures. A typical case may be in the range of EUR 250,000. The sum of fees for both parties' representatives plus the court fees represents the statutory cost risk because the losing party has to pay the costs of the winning party as well. The statutory cost risk is approximately EUR 25,000 in first instance and approximately EUR 30,000 in second instance.

As most other firms in design and other IP matters, BARDEHLE PAGENBERG generally bills on an hourly basis, which can, depending on the actual work load, lead to attorney fees which may be higher than the attorney fees according to the statutory fee regulation. Since the losing party only needs to reimburse the statutory fees, the winning party may still incur an amount of costs which is not reimbursable.

8. Enforcing design rights in Europe (preliminary proceedings)

Enforcing IP rights in Germany including cross-border litigation has a long-standing tradition, particularly by way of proceedings for a preliminary injunction. Notably the interim enforcement of registered rights is very popular amongst rights owners. What follows applies equally to the enforcement of German design rights and of Community design rights.

8.1 General remarks

German courts still are generally prepared to grant a preliminary injunction *ex parte* if the petitioner shows evidence as to ownership and validity of his design right, sufficient likelihood of infringement and urgency of the matter, and hearing the alleged infringer first would defeat the purpose of the preliminary injunction. The petitioner may file declarations ("affidavits") as evidence in the specific procedure. Moreover, German courts also tend to grant preliminary injunctions on the grounds of unregistered rights if specific requirements are fulfilled. This applies, in particular, to the unregistered Community design.

The petitioner may assert claims for cease-and-desist as well as for the disclosure of information about the infringing act and a preliminary seizure order. Following the implementation of the IP Rights Enforcement Directive (2004/48/EC) into German law, preliminary proceedings, in general, allow to assert claims for preservation of evidence, inspection or securing damages

(submission of bank, financial or commercial documents).

This preliminary enforcement, however, renders petitioners potentially liable for any damage suffered by the defendant as a consequence of the preliminary enforcement if the case is later decided against the petitioner. For this reason, the petitioner is sometimes ordered to provide a bond (cash or bank guarantee) to cover this risk before the preliminary enforcement can take place. The amount of this bond will be determined by the court, depending on the value in litigation and potential damages which may be caused by preliminary enforcement.

8.2 Specific procedural principles and timing

In Germany, many contentious matters are decided in preliminary proceedings. Decisions of the District Courts may be appealed to the Courts of Appeal. There is no further appeal in such cases to the Federal Supreme Court.

A request for a preliminary injunction before an infringement court requires the matter to be considered “urgent”. Therefore, the petitioner must request preliminary relief shortly after becoming aware of the allegedly infringing activity, one or two months at the utmost, calculated from the time when the right holder first obtained knowledge of all the relevant circumstances.

Preliminary relief may be granted by the court *ex parte* without first holding a hearing to which the alleged infringer would be called as well. In

spite of the repeated rulings on the procedural right to equality of arms by the German Federal Constitutional Court, *ex parte* injunctions are still possible, even though petitioners have to meet stricter requirements. Petitioners should ensure that their submission in the request for the preliminary injunction is also entirely covered in the preceding warning letter. Once the court’s order has been issued *ex parte*, the petitioner must serve the injunction within another month in order not to lose the rights flowing from the order. Furthermore, as the preliminary injunction does not have permanent character, the petitioner is required to file for a main action if the defendant does not accept the interim injunction as final.

The potential infringer, who may be aware of an impending request for preliminary relief, for example as the result of having been served with a warning letter, may consider the option of filing a so-called protective brief (“Schutzschrift”) with the German courts.

Once a preliminary injunction has been issued by the court, the alleged infringer is obliged to comply with the injunction, but has the opportunity to file an objection with the court having issued the injunction in order to achieve a review and possibly a revocation of the preliminary injunction. The decision taken on review as well as any preliminary judgment issued after an oral hearing may be appealed to the Court of Appeal.

8.2 Specific procedural principles and timing

8.3 Preliminary injunctions and main actions

The concept of enforcing IP rights in Germany by way of proceedings for a preliminary injunction is, for obvious reasons, very attractive for the rights holder, as demonstrated by numerous decisions taken by German courts of first instance and the appeal courts. How, then, does a preliminary injunction compare to a main action? The fundamental conceptual difference between the two proceedings is that main proceedings provide for a conclusive and final resolution of the matter (including information on account of profits and damages), whereas, in contrast, the preliminary injunction focuses on a preliminary and selected result with the consequence that infringements are stopped immediately. In broad terms, a preliminary injunction does not require extensive evidence (such as hearing of witnesses), while complex cases should be brought to court by way of a main action.

9. Brexit

In the context of Brexit, the EU and the United Kingdom agreed on a Trade and Cooperation Agreement on December 24, 2020. The agreement includes, *inter alia*, provisions on the protection of intellectual property, on trademarks and designs in particular. The transition period previously governed by the Withdrawal Agreement (cf. Official Journal of the European Union, C 66 I/1 of February 19, 2019) expired

on December 31, 2020. Since January 1, 2021, for proprietors or applicants of Community

Designs, this has meant that Community Designs already registered by December 31, 2020 were converted into registered national Designs regarding protection in the United Kingdom *ex officio*; their date of priority, application and seniority in the EU have been maintained. For applications and registered Community Designs that are still pending and have not yet been published, a national Design application claiming the EU priority, application and seniority date can be filed by September 30, 2021. Unregistered Community Designs will be converted *ipso iure* into comparable national Designs for the remainder of their term. EU representatives who were registered with the EUIPO on December 31, 2020, have been registered as the representatives regarding the new IP rights in the United Kingdom. Thus, communications pertaining to the extension of registered Community Designs will be sent to the EU representatives by the Trademark Office of the United Kingdom (UKIPO). Proprietors of registered Community Designs who still receive communications from the UKIPO should contact a lawyer as fast as possible – not least because, unfortunately, fraudulent extension notifications are to be expected. For further information on Brexit and its implications for IP rights, please visit the section “IP News & Knowledge” of our website bardehle.com. For more background information on Brexit and IP rights, please see our [IP Reports on Brexit and Address for Service](#) and on [Brexit and Trademarks and Designs](#).



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