

Why a few Member States should no longer block the liberalisation of the vehicle spare parts market

ECAR - Analysis of the legal, economic and political status of the “Repairs Clause”

**Proposal of the European Commission to amend “Design” - Directive 98/71/EC
[COM(2004) 582 final 14.9.2004 – 2004/2003 (COD)]**

- January 2009 -

At present, the market for visible automotive spare parts is at a crucial crossroads. It rests with a minority of Member States as to whether this market will either be liberalised or be monopolised in favour of the car industry. Liberalisation indeed is long overdue and indispensable. It is a free and single market that alone:

- **ensures freedom of choice and competition-controlled prices for the consumer;**
- **safeguards competition throughout the European Union;**
- **prevents independent parts producers, distributors and repairers (overwhelmingly small and medium-sized enterprises) from being driven from the market; and**
- **stimulates efficiencies and employment within the EU.**

The EU “spare parts” issue – long overdue for a solution

It is an avowed policy objective of the European Union to “protect effective competition” in the automotive parts and service markets and to ensure that repairers and 270 million EU vehicle owners (consumers) can “choose between competing spare parts”¹. And that is exactly what the vehicle manufacturers want to prevent through an abusive use of design protection: They claim that the legitimate protection of their new cars body “design” should also be extended to the pertinent **spare parts** such as bumpers, wings, bonnets, lamps, windcreens (Figure 1). This would completely eliminate competition in spare parts. Instead of free competition a spare parts monopoly sanctioned by law would emerge in a huge EU market worth about €12 bn.²

Consequently and consistently, the Commission proposed a Community-wide **“Repairs Clause”** in design law.³ As regards the core business of vehicle manufacturers, the sale and marketing of new cars, the protection of automobile designs remains fully intact. The Repairs Clause merely prevents such protection from being extended to the corresponding spare parts in order to maintain competition in the spare parts sector – as competition, despite design protection, exists and is a matter of course in the new car market.

Many Member States covering somewhat more than half of the single market have already implemented a Repairs Clause ([Figure 2](#)). Over and above that there is now in the Council of Ministers an overwhelming majority in support of the Commission's proposal;⁴ and, speaking for the people of Europe, the European Parliament likewise has approved the proposal with a solid majority (subject to the slight modification that Member States that still protect spare parts may grant a transition period of up to 5 years).⁵

Despite this broad consensus, the dossier is currently blocked in the Council where consultations have stagnated resulting in a paralysing standstill. A few Member States have formed a blocking minority *against* the Commission's proposal. Their motive seems to be one of industrial policy aimed at granting the car industry external financial aid. Whatever the reasons, intellectual property legislation, no doubt, is not a legitimate instrument of implementation. As regards design protection in particular it is quite obvious after 17 years of intensive discussion that public interest and social benefits convincingly demand the introduction of the Repairs Clause.

Liberalisation must inevitably come – because:

The “Repairs Clause”

.... is *legally* the only accurate and “right” solution

The Repairs Clause strikes a fair and just balance between the legitimate protection of intellectual property rights [IPRs] and the essential maintenance of free trade and competition. The clause does not result in an “erosion” of IPRs but simply reveals and defines their inherent and natural “limitations” – as can best be demonstrated by the example “automobile” itself.

The proposed Repairs Clause ensures that each manufacturer enjoys design protection of the body styling of his new car models. Thus, competition in new cars, i.e. in the primary market, is not hampered but even enhanced by the variety of designs that are possible and the consumer remains free to choose between competing car models and to purchase his new car at a price fixed by competition. In the case of body-integrated spare parts the effects are exactly the opposite. Such parts must precisely “match” the original to be replaced in the course of repair; alternatives to their “design” are not possible. Thus, design protection here would force any competitor into the dreadful quandary of either infringing the law (subject to criminal sanctions) or staying away from the market altogether. In practice, any competition in this secondary market would be eliminated. The car owner would become a captive consumer forced to buy his spare part requirements exclusively from one source, the car manufacturer – who, in turn, becomes an unassailable monopolist capable of charging prices at his discretion⁶.

Such a consequence would noticeably exceed the essential purpose and true remits of design rights. To sanction them would constitute an “abuse” of the design regime⁷ and this is the prevailing opinion in legal doctrine⁸. In a recent paper Professors *Drexl, Hilty* and *Kur* of the Max-Planck-Institute for Intellectual Property (Munich) stated: Two crucial conditions which are inalienable for granting design protection “are not met with regard to spare parts” and therefore “the negative position” [of

Member States opposing the Repairs Clause] “hardly appears justified”⁹. This is in line with a robust body of case law where the European Court of Justice, based on the Treaty, developed the general principle that IPRs are liable to “limitations” wherever their use would hamper or (as inevitably happens in cases of design protection) would eliminate competition in secondary markets.¹⁰

Despite this “limitation” inherent in the IPR system, the car manufacturers nevertheless get a fair return on their design investment (which, in fact, is relatively modest¹¹). In purchasing a new car the consumer voluntarily (!) pays for the “design” of the car body and its components. The car manufacturer, at this stage, receives the “*design premium*” to which he is entitled.¹² If, however, design protection is extended to spare parts the consumer, whenever he needs a *spare wing* or a *spare lamp*, would be forced (!) to pay again and again for the same design – with a mark-up at the discretion of the car manufacturer. The Repairs Clause prevents the levy of such an unjustified “*monopoly premium*”.

... prevents economic harm and yields overall efficiency gains

The *economic* effects engendered by a monopolisation of the spare parts market are serious: The producers of body panels (such as bumpers, wings, bonnets) must simply close their business. The producers of lighting and automotive glass are also severely hit. As far as they are “OE” suppliers for a specific car brand or car model they can continue to supply the car manufacturer with the pertinent spare parts but are barred from selling these spares on their own directly to the aftermarket. If they are not “OE” suppliers (and even renowned “OE” parts producers are under contract for a limited number of car models only) they must stop their production – even if this production is intended for export¹³ to “liberal” countries where spare parts are not design protected. Independent parts distributors lose more than 25 % of their trade volume and independent repairers must buy the pertinent spare parts from their strongest competitors, the authorised dealers/repairers, at non-competitive tariffs which, in the long run, drives them out of business¹⁴. In fact, the competitiveness of the independent aftermarket as a whole is seriously weakened.¹⁵

Moreover, a further distortion of competition with a long-term effect is hidden behind this scenario: Car manufacturers can use - and already do use - the monopoly rents gained in the submarket of body-integrated spare parts to cross-subsidise their spare parts prices in the remaining and until now competitive market¹⁶ – a market edge resulting from design protection and not available to competing independent operators! Taking all these effects and their aggregate impact into account it is fairly obvious that the whole chain of the independent aftermarket which for decades has provided sterling service to Europe’s motorist consumers is put in mortal jeopardy. The renowned economist, *Professor Eekhoff*, after a thorough and lucid analysis, concludes that design protection of spare parts results in “considerable inefficiencies and significant losses to social welfare” whereas a Repairs Clause “increases the efficiency”¹⁷ in the automotive sector.

... prevents a severe blow against small and medium-sized enterprises (SMEs)

The parts producers, distributors and repairers operating in the independent aftermarket are overwhelmingly SMEs. Hence, a design-induced spare parts monopoly jeopardises an SME structure which, despite many obstacles, has for decades preserved a high degree of competitiveness. To en-

danger the existence of this sector is against the European Union's policy objective to promote the "extreme growth potential" and "employment opportunities" of SMEs through a "Small Business Act for Europe"¹⁸.

It is worthy of note that the SMEs affected by design protection do *not* ask for "protection" and do *not* ask for a subsidy (as the car industry does)¹⁹; they simply ask - as should be a matter of course - to be allowed to participate in competition. The Repairs Clause provides for this.

... protects 270 million EU vehicle owners, say: consumers, from excessive pricing

Competition, no doubt, is the best and the only means of ensuring consumer protection. Without a Repairs Clause vehicle owners are completely dependent on the prices the car industry dictates. The car industry has made an effort to question this using arguments²⁰ and data²¹ that do not stand up to scrutiny. Many official investigations²² amply demonstrate that car manufacturers had to decrease their spare parts prices by at least 30 - 40% whenever competition arose or was admitted²³. In preparing its proposal the Commission found that the prices in Member States with design protection were 6.4 - 10.3 % higher than in States with liberalised markets²⁴. Likewise, a recent market survey carried out by the German automobile club ADAC showed that consumers could make considerable savings if they purchase wings or lamps from the independent aftermarket and not from the car manufacturers.²⁵ It would be reprehensible to withhold such benefits, which are indeed even greater than the bare data suggest,²⁶ from the 270 million EU vehicle owners.

... sustains employment in the European Union

The car industry has also claimed that liberalisation would result in the loss of "50 000 jobs" within the European car industry (that is to say: within the EU) to parts producers in countries outside the EU.²⁷ This figure is palpably wrong, and it appears irresponsible of the car makers to launch such a scare scenario on so sensitive an issue which employment is.

First of all, in order to cover their current EU sales in body spare parts the car manufacturers (including their suppliers) employ fewer people than they claim, plausibly not more than somewhere around 16.000 altogether²⁸. Secondly, even these jobs would only be lost to the car industry (not: to Europe) if its current market share of 85%²⁹ slumped to zero. That is blatantly unrealistic and is at best "a sign of a surprisingly weak self-confidence"³⁰ of car manufacturers in their own competitiveness. A realistic, empirically-backed prognosis suggests that the independent aftermarket, if at all and in the best case, could gain an additional 10 - 15% market share as a result of liberalisation³¹ – which accordingly would affect between 1.600 and 2.400 production jobs in the car industry. Even these jobs, however, are not lost for Europe at all but will for the most part be passed on to competing EU parts producers. With the benefits of the Repairs Clause (investment certainty, increased economies of scale in a single market, access to export markets³²) they would gain in additional efficiency and competitiveness so that they can generate new jobs and meet any competition be it domestic or from abroad.

The sham battle about the nightmare scenario of 50.000 job losses has obscured a crucial principle, namely that IPRs are not there for shaping employment policy; this is undoubtedly not their function.³³ If, however, employment nonetheless is falsely made an issue in this context, the crucial problem is a totally different one; it is one that lies with the car industry and not with competing operators. Already today, car manufacturers import about 40% of the spare parts they are selling in the EU from outside, mainly from low-cost countries around the world³⁴. Most of the jobs involved have been relocated in a creeping process and are currently lost to Europe. The design issue will have a great impact on this trend – either in a positive or a negative way. A spare parts monopoly in a “fortress” Europe gives vehicle makers a strong incentive to intensify their profitable efforts to produce at low cost abroad and to charge high prices to consumers at home in Europe. Sad but true, design protection would be driving jobs out of the EU. Liberalisation, on the other hand, has the opposite effect: It allows EU parts producers to compete against the car industry’s imports and so to retain jobs in the EU or even bring some jobs home again. In short, the Repairs Clause definitely does not impair but rather sustains employment in the EU.

... has nothing to do with the safety of spare parts

The safety of road users is a high public good which has to be taken seriously. The car industry argument, however, that design protection is needed to ensure the safety of spare parts is evidently wrong. It has been clear from the outset that design protection by its very nature is not capable of ensuring overall safety because it is based on the outside appearance of a product and not on its material construction or performance.³⁵ Moreover, it is well known that the EU boasts a well tried and efficient legal regime that subjects safety-critical parts to a rigid type-approval or authorisation process.³⁶ As a study commissioned by the European Parliament in 2006 confirmed, this regime “is more than adequate to ensure the safety ... of spare parts”.³⁷ It is revealing in this context that, “given that it was the vehicle industry that advanced the charge of safety problems with non-original parts” (and thus got the study going), the vehicle makers were unable to produce and contribute any evidence of safety problems in the market place.³⁸

... is the sole road to eventually finalise a single market in spare parts

For many years there has been a single market for cars but still not for spare parts. Since the overwhelming majority of Member States whose will deserve to be respected³⁹ has or is planning a Repairs Clause it is totally impossible to reintroduce Community-wide design protection. Thus, the *only* way to finalise the single market in spare parts is to say “yes” to the Repairs Clause.

For all these reasons:

The present standstill must be resolved. Legal, economic and social considerations require a Repairs Clause and its adoption now.



The European Campaign
for the Freedom
of the Automotive Parts
and Repair Market

ECAR

Figure 1 **EU-15 market of body-integrated visible spare parts**

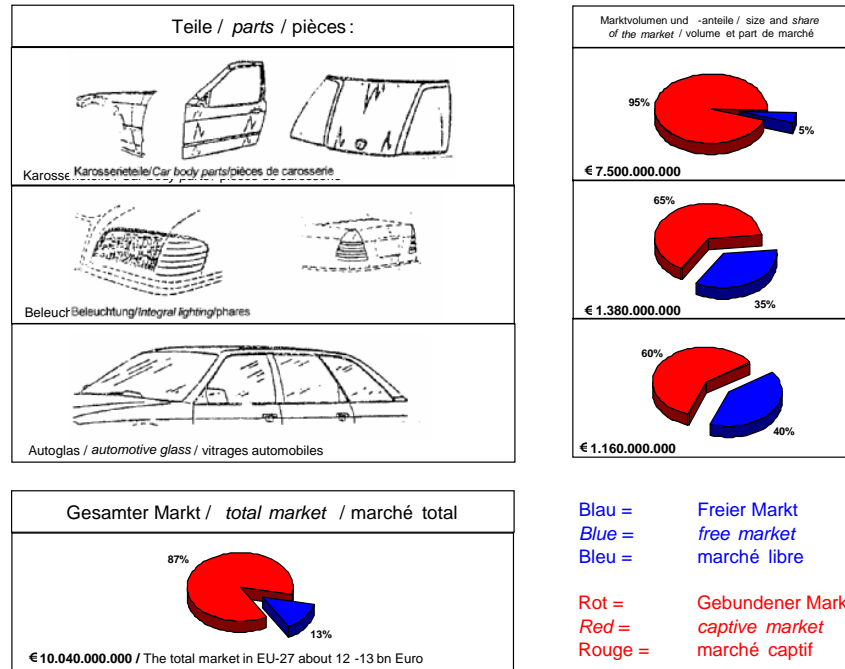
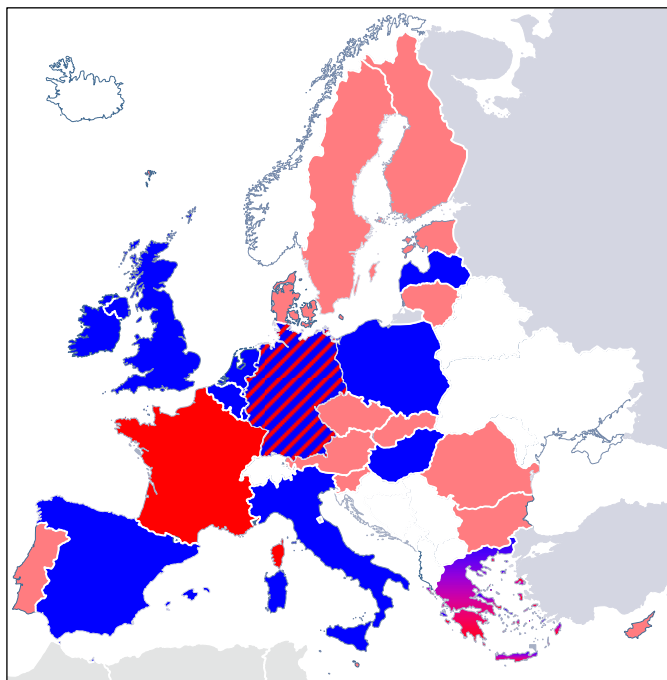


Figure 2 **The EU-27 „market“ of body-integrated visible spare parts - after transposition of Directive 98/71/EC and access of new Member States -**



Blue:
Member States with a Repairs Clause and thus free competition.

Dark Red:
France: no Repairs Clause and rigid implementation of design protection.

Red:
Member States without a Repairs Clause where, however, prior to harmonising the design law there were de facto no design interferences; former law had not finally answered the spare parts question.

Red/blue hatching:
Germany: Assurance of the vehicle makers to the German Government not to use (possible) design protection for hampering competition in the spare parts market until the spare parts issue is solved at EU level.

Appendix

About ECAR:

Established in 1993, the European Campaign for the Freedom of the Automotive Parts and Repair Market (ECAR) is an alliance of 10 independent EU organizations representing vehicle parts producers, distributors, independent repairers, the European motor insurance industry, a large cross section of small and medium-sized enterprises as well as the 270 million motoring consumers in the European Union. ECAR's main objective is to promote free competition and to prevent vehicle makers from monopolizing the vehicle spare parts market through abuse of design protection. For more information, visit www.ecar-eu.com.

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Documentation:

¹ See Recitals (23), (26) and (24) of Commission Regulation (EC) No. 1400/2002 of 31 July 2002 (OJ L 203/30 – 1.8.2002) = “Block-Exemption-Regulation” [BER] which is considered to be the “basic law” of the automotive sector. Since BER will expire in 2010 its future is currently under review (see also FN 15 below).

² The whole market for servicing and repairing vehicles in the EU-15 is estimated to be worth about € 84 bn, about € 42 - 45 bn being attributable to spare parts in general. About 25 % of that are body-integrated visible spare parts so that this submarket is worth about € 10 bn (EU-15), respectively € 12-13 bn (EU-27). The market shares of vehicle manufacturers here centres around 85% (see also below FN 29).

³ Proposal for a Directive of the European Parliament and of the Council amending Directive 98/71/EC on the legal protection of design, 14.9.2004, COM (2004) 582 final. In fact that is a second go. A first proposal of 1993 was vetoed by the Council of Ministers in 1998.

⁴ Just recently, in a resolution of 7 May 2008, the Committee of Economic Affairs of the Finnish Parliament and the Finnish Government agreed and decided that Finland will support the Commissions' proposal in Council.

⁵ Position adopted at first reading on 12 December 2007. The consolidated text [PE_TC1-COD(2004) 0203 EN] can be downloaded under www.europarl.europa.eu. The transition period is a “compromise” concession to the car industry. Actually, there is no cogent reason for it because it has been known since 1993 that such solution will come one of these days so that there was enough time for adjustment (if needed at all).

⁶ It is worthy of note that body-integrated spare parts, in terms of economic theory, are „brand specific“ (cf. *European Commission, DG Competition, “Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses”, December 2005, 68 et seq.*). Spare wings for „Ford“ cars are not suitable for „VW“ cars (and vice versa). This means that, although there is competition between Ford cars and VW cars in the primary market, this competition has no effective constraint on the (secondary) spare parts market (prevailing case law and opinion). The consumer can neither anticipate nor defend himself against after-sales (increases of) spare parts

prices („installed base opportunism“). The Commission goes even one step further and comes to the conclusion that “the provision of repair and maintenance services” and “the supply of technical repair information” are “brand-specific” too (Commission Decision of 13.10.2007, C(2007) 4275 final, Case COMP/E-2/39.140 – DaimlerChrysler).

⁷ In this sense see, for example, *Cohen Jehoram*, [1992] 3 EIPR 75, 76; *Govaere*, “The use and abuse of Intellectual Property Rights in E.C. law” [1996]; Proposal of the Commission (above FN 3), Recital (1): “Such protection [of spare parts] would come close to an abuse of the design regime”.

⁸ A comprehensive survey of the pertinent literature, case law and official investigations is provided by “The Position of ECAR” (2nd ed. 2006) 11 et seq. + Appendix 2 (www.ecar-eu.com).

⁹ See *Josef Drexler, Reto M. Hilty, Annette Kur*, “OPINION: Design Protection of Spare Parts and the Commission’s Proposal for a Repairs Clause”, IIC, Vol. 36 [2005], 448 et seq., 449, 457. A version in German language is published in GRUR Int 2005, 449.

¹⁰ See Case C-63/97 - 23.2.1999, BMW/Deenik, [1999] ECR I-905; Case C 112/99 - 25.10.2001, Toshiba/Katun, [2001] ECR I-7934; Case C-228/03 - 17.3.2005, Gillette/LA Laboratories, [2005] ECR I-2337; Case C-59/05 - 23.2.2006, Siemens/VIPA, [2006] ECR I-2147. For a detailed analysis of the judicature see *Riehle*, “Immaterialgüterschutz in Sekundärmärkten”, commemorative paper for Karl Peter Mailänder (2006), 175 et seq.

¹¹ The investment in body design amounts to about € 50 (per car sold) for a low volume luxury car like the *Mercedes S-Class* and may drop to about € 10 for a mass produced car like the *Renault Clio*. These figures correspond to about 0.08% of the sales price of a new car.

¹² Contrary to what is sometimes indistinctly said the IPR system does *not* guarantee that the right holder gets back what he has invested. Whether and to which extent a return on investment realises depends solely on the acceptance and preferences of the consumer in the marketplace. A legitimate “design premium” is exactly what consumers are prepared to pay (more) for design A than they are prepared to pay for design B.

¹³ This is so because „production“ on EU territory is an infringement according to Article 12 par.1 of “Design“-Directive 98/71/EC. This means in practice that in case of design protection an EU parts producer would have to shift his production to the “free” countries he wants to supply (the jobs involved this way being lost for the EU).

¹⁴ Since the cost of an average car repair is made up more than 60 % of spare parts (for typical „crash“ repairs even more) and 40 % of services, it is clear that the independent repairer cannot compete in the long run if he is not directly supplied by independent parts producers/distributors at tariffs which are at least roughly equal to those of the car makers’ authorised network.

¹⁵ In the course of reviewing Block Exemption Regulation No. 1400 / 2002 (see above FN 1) the Commission (DG Competition) complains anew that the sector of visible spare parts, due to design protection and thus exempt from antitrust interferences, remains “captive” and “has weakened the position of independent parts wholesalers and translated into higher overall repair prices” (Commission Evaluation Report of 28th May 2008, 12 + Staff Working Documents 2.333, 4.4.2, 4.6.2, 4.8). Concerned about the lack of consistency in the EU’s competition policy resulting from this DG Competition urges once more to eventually implement the Repairs Clause (*ibidem* 12 + 4.8).

¹⁶ Empirically confirmed by *London Economics*, „Developments in car retailing and after-sales markets under Regulation No. 1400/2002“, June 2006, Vol. I, 246 et seq., 260 and *Commission Evaluation Report* (above FN 15) 2.33, 4.4.2. Likewise, based on a market investigation the French distributors association *FEDA* found that Renault and PSA between February 2006 until May 2007 increased their prices for body spare parts in France (where there is rigid design and copyright protection) between 28.9 % and 119.5 % (!) whereas their prices of non-captive competitive parts remained stable or were even decreased. Confirming: *Wormald / autoPolis*, “Hot, thirsty and crowded: time for a model change”, 2008, 50.

¹⁷ See *Institute for Economic Policy at the University of Cologne (iwp)*, „A Repairs Clause Increases the Efficiency on the Market for Visible Automotive Spare Parts“, 29.11.2007 (can be downloaded under www.ecar-eu.com). This fully squares with the conclusion reached by the Australian Government after an extensive analysis of the spare parts issue that “there appears to be no evidence that design protection of motor vehicle parts yields net social benefits” (*Bureau of Industry Economics*, “The Economics of Intellectual Property Rights for Designs”, May 1995, 108). As a consequence Australia enacted a Repairs Clause in 2003.

¹⁸ See Press Releases of the Commission (IP/08/165) of 1.2.2008 and (IP/08/1003) of 25.6.2008.

¹⁹ Giving car manufacturers a design-induced spare parts monopoly is tantamount to granting them an (indirect) subsidy.

²⁰ Since the monopolistic mark-up on prices can reasonably not be argued away the car manufacturers dodge the issue and claim that the (obvious) price benefits do not reach the end-consumer but are absorbed by a) the insurance companies and b) the repair shops. Apart from the fact that insurers, in principle, do not control spare parts prices (but simply have to pay for crash damages) there is fierce competition in both sectors which rapidly thwarts any attempt to retain windfall profits.

²¹ Based on a study of *EurotaxGlass'* (December 2004) the European Automobile Manufacturers Association (ACEA) claimed that "spare parts prices were 7.3 % higher in countries without design protection than in countries with design protection" ("Design Rights for visible spare parts of motor vehicles: fair and necessary" / without date). This statement is utterly wrong in two respects. On the one hand Eurotax Glass' has not researched market prices but has based its computing on the recommended retail prices of the vehicle makers (or their importers); thus, what can best be inferred from this study is that vehicle makers charge different spare parts prices in different Member States (as they do with cars). Moreover, and there is the rub, the classification of Member States for comparison was defective: Hungary was classified "without protection" although the EurotaxGlass' prices originated from 2003 and early 2004 so that Hungary's Repairs Clause which came into force on 1 May 2004 could hardly have had an impact on the market; and in Germany, classified "with protection", there was at least de facto free competition (see [figure 2](#)). If these two countries are correctly reclassified a totally different result emerges; even the retail prices of the vehicle makers are then 3.6 % lower in countries without compared to countries with design protection.

²² A few examples: When 1991 in UK design protection expired Ford UK reduced its prices of spare wings by 39 % (see *ECAR* (above FN 8) App. 4). In Australia where a Repairs Clause was introduced in 2003 Holden/GM had to reduce its prices of body spare parts by 14.1 % - 39.5 % due to competition appearing on the scene (see *Bureau of Industry Economics* op.cit (above FN 17), 114). For the same reasons Toyota had to lower its prices of "Camry" wings in USA between 1992 and 1998 gradually by 42 % (see *Insurance Institute for Highway Safety*, Status Report Vol. 35 No. 2, February 2000). "Since the market of car windscreens threatens to collapse" due to competition of independent glass installers Mercedes-Benz in Germany reduced its prices between 4.81 % and 35.1 % (see MB service information of 14.2.1996).

²³ Revealing also the testimony of Ford before the UK Monopolies and Merger Commission. Asked how high the "compensation" would have to be in case design protection (then still existing in UK) will fall Ford replied: A licence fee of "about 60 %" of our sales prices (*The Monopolies and Merger Commission*, "Ford Motor Company Limited", February 1985, 36, 42). Thus Ford himself conceded that its monopoly rent amounted to 60 %.

²⁴ See Proposal of the Commission (above FN 3), 2. In assessing these figures it must be taken into account that competition could not develop its full effects at this stage because the markets in several Member States had only be liberalised for a short time when the Commission made its proposal and the IAM did not have (and still does not have) the economic benefits of a single market.

²⁵ The savings, for example, were € 103 for a wing (- 54 %) or up to € 113 for a front lamp (- 40 %). The full results of the investigation are published in *ADACmotorwelt* 7, 2007.

²⁶ See *Commission Evaluation Report* (above FN 15) 2.3.3: „If design protection of spare parts were removed, increased economies of scale due to an increased number of open markets would decrease the producers' costs, resulting in further price decreases. The overall costs that the European consumer bears as a result of the design protection of spare parts can therefore be assumed to be higher than the bare figures suggest" (emphasis added).

²⁷ See *ACEA* (above FN 21). The German car manufacturers association (*VDA*), somewhat more cautious, puts it this way: "It is safe to assume that some 50.000 people are employed in the manufacturing sectors of sheet metal components, glass and lamps. Loss of design protection here would mean considerable cuts and could drive production abroad" (Auto Annual Report 2007, 77 / emphasis added).

²⁸ The EU market of visible spare parts is worth about € 12 bn at retail prices (above FN 2); this corresponds at the most to € 6 bn „ex works“ (= turnover). Due to their market share of 85 % (see below FN 29) some € 5 bn must be allocated to the car manufacturers. According to the own figures of the industry the turnover per per-

son employed on average is about € 380.000 (manufacturers), € 230.000 (parts suppliers) = on (weighted) average about € 330.000 (see VDA, International Auto Statistics, Edition 2007). Accordingly, in order to generate a turnover of € 5 bn between 15.000 and 16.000 jobs are needed.

²⁹ See *Commission*, „Extended Impact Assessment“, 13, 25. Based on the (vague) figures the car industry itself presented its market share would be negligibly less, namely 82 % (*ibidem* 13).

³⁰ *Eekhoff*, op.cit. (above FN 17), 32.

³¹ In the U.S.A. where the market was liberalised from the very beginning the independent aftermarket [IAM] never succeeded in reaching a higher market share in body panels than 15 % (which in Europe at present is 5%). Taking into account that “due to a strong set of market, cultural and other factors that continue to support original equipment” the Commission realistically expects that the situation in Europe is unlikely to be materially different (*Commission*, Extended Impact Assessment, 32).

³² See text accompanying FN 13 (above).

³³ In an honest discussion there should be consensus that IPRs are no instruments to intervene with job markets. Are we really to permanently amend patent, trade mark and design law according to whether employment goes up, is stable or goes down?

³⁴ The 40 % are made up as follows: About 13 % come from car manufacturers in non-EU countries (Japan, Korea, USA etc.) which import their cars as well as the pertinent spare parts into the EU. Europe-based vehicle manufacturers import about 25 % to 30 % of *their* spare parts requirements from abroad. Volkswagen, for example, imports the spare wings for their popular models from Brazil, Mexico and South Africa.

³⁵ A bonnet the appearance of which displays a lot of fantasy and appeal to the eye but is poorly construed is granted design protection but it is not „safe“. Conversely, a bonnet the appearance of which is commonplace but is well construed does not enjoy design protection but is “safe“. As this example demonstrates specifically tailored *technical* regulations are needed to ensure safety for *all* road users.

³⁶ The EU legislation in this area goes back to the 1970s. Relevant today is Directive 2007/46/EC of September 2007 [“Framework Directive”] where type-approval (Articles 10 + 28) and authorisation (Article 31) of spare parts are provided for.

³⁷ Autopolis/Thatcham, „The consequences for the safety of consumers and third parties of the proposed directive amending Directive 98/71/EC on legal protection of design rights“, September 2006, 5, 66 (to be available under [http://www.europarl.europa.eu/meetdocs/2004_2009/organes\(juri/juri_20061002_1500.htm\)](http://www.europarl.europa.eu/meetdocs/2004_2009/organes(juri/juri_20061002_1500.htm)). See also *John Wormald/autoPolis*, op. cit. (above FN 16), 48 *et seq.* The safety discussion is said to be “a smokescreen to protect rents” (at 51).

³⁸ *Ibidem* (above FN 37) 33, 74.

³⁹ As EP rapporteur *Klaus-Heiner Lehne* rightly remarked in plenary on 11.12.2007: „If one wants to establish a single market in Europe it is not unusual to follow the principle the majority adheres to“.