



## ***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)]**

- July 2011 -

**At present, the EUR 13 billion market for visible automotive spare parts is at a crossroads. It rests with a minority of Member States as to whether this market will either be liberalised to the benefit of consumers, or whether 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 and cross-border trade throughout the European Union;**
- **prevents independent parts producers, distributors and repairers (predominantly small and medium-sized enterprises) from being driven from the market; and**
- **stimulates efficiencies and employment within the EU.**

#### **1. 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 vehicle owners (consumers) within the EU have the freedom to “choose between competing spare parts”.<sup>1</sup> And that is exactly what vehicle manufacturers want to prevent through an abuse of design protection: They claim that the legitimate protection of their new cars’ body “design” should also be extended to the corresponding **spare** parts such as bumpers, wings, bonnets, lights, windscreens (cf. [Figure 1](#)). This would 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 EUR 13 bn.<sup>2</sup>

Consequently and consistently, the Commission has proposed a Community-wide “**Repairs Clause**” in design law.<sup>3</sup> It does not impact the protection of vehicle designs. 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.

Associations such as ADAC / FIA (automobile associations), CLEPA (parts manufacturers), FIGIEFA (parts distributors), ZDK (repairers), as well as vbzv (consumer association) support the Repairs clause. Leading scholars in Europe, Australia and the United States also support it.<sup>4</sup>

Many Member States, covering more than half of the single market, have already implemented such a Repairs Clause (cf. [Figure 2](#)). Over and above, there is an overwhelming majority in support of the Commission's proposal within the Council of Ministers;<sup>5</sup> and, speaking for the people of Europe, the European Parliament had likewise approved the proposal with a solid majority already in 2007 (subject to the slight modification that Member States that still protect spare parts may grant a transition period of up to 5 years).<sup>6</sup> The European Economic and Social Committee also supports it, stressing that it would be a step towards reducing the cost of car ownership in the EU.<sup>7</sup>

## **2. The Commission's Proposal is blocked in the Council**

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 is not a legitimate instrument of granting state aid. As regards design protection in particular, it is quite obvious after 20 years of intensive discussion that the "right" law, public interest and social benefits imperatively demand the introduction of the Repairs Clause.

## **3. Liberalisation must inevitably come – because:**

### **The "Repairs Clause" ...**

#### **a) .... 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 for 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, if design protection was extended to these parts, this 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 discretion.<sup>8</sup>



Such a consequence would noticeably exceed the essential purpose and true remits of design rights, thereby constituting an “abuse” of the design regime.<sup>9</sup> As Professors *Drexl, Hilty* and *Kur* of the Max-Planck-Institute for Intellectual Property (Munich) have ascertained in a recent paper, 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”.<sup>10</sup> 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” whenever their use would hamper or (as inevitably happens in cases of design protection) would eliminate competition in secondary markets.<sup>11</sup> For all these reasons, legal scholars support the view that the introduction of the Repairs Clause is the right choice from a legal and economic perspective.<sup>12</sup>

Vehicle manufacturers nonetheless get a fair return on their design investment (which, in fact, is relatively modest<sup>13</sup>). In purchasing a new car, the consumer already pays for the “design” of the vehicle. The car manufacturer, at this stage, receives the “*design premium*” to which he is entitled.<sup>14</sup> If, however, design protection is extended to these components *as spare parts*, then the consumer, whenever he needs a *spare wing* or a *spare lamp*, would be forced (!) to pay for the same design again and again – with a mark-up at the discretion of the vehicle manufacturer. The Repairs Clause prevents the levy of such an unjustified “*monopoly premium*”.<sup>15</sup>

**b) ... prevents *economic* harm and yields overall efficiency gains.**

The *economic* effects engendered by a monopolisation of the spare parts market are severe:

- 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 export<sup>16</sup> to “liberal” countries where spare parts are not design protected. This inability to export to liberalised EU markets hinders the free trade of goods between EU member states, and thus implies an impediment to the realisation of the Common market.
- Independent parts distributors lose approximately 25 % of their trade volume and consequently their key competence as full-range providers, which impairs their competitiveness.
- 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 business.<sup>17</sup> In fact, the competitiveness of the independent aftermarket as a whole is seriously weakened.<sup>18</sup>

Moreover, a further distortion of competition with a long-term effect is hidden behind this scenario: Car manufacturers can 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 com-



petitive market<sup>19</sup> (leverage effect) – 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* therefore rightfully concludes that design protection of spare parts results in “considerable inefficiencies and significant losses to social welfare” whereas a Repairs Clause “increases the efficiency”<sup>20</sup> in the automotive sector.

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

The parts producers, distributors and repairers operating in the independent aftermarket are mostly 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 endanger 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”.<sup>21</sup>

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)<sup>22</sup>; they simply ask - as should be a matter of course - to be allowed to participate in competition. The Repairs Clause provides for this.

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

Competition, no doubt, is the best and 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 excessive pricing using arguments<sup>23</sup> and data<sup>24</sup> that do not stand up to scrutiny. Many official investigations<sup>25</sup> amply demonstrate that car manufacturers had to decrease their spare parts prices by at least 30 - 40% whenever competition arose or was admitted.<sup>26</sup> 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 markets.<sup>27</sup> 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.<sup>28</sup> It would be reprehensible to withhold such benefits, which are indeed even greater than the bare data suggest,<sup>29</sup> from the 270 million EU vehicle owners.<sup>30</sup>

Also, the car industry might argue that if there is vigorous competition in the market for a new, durable product that is sold to sophisticated customers who are fully informed as to all future additional costs of ownership, including prices of spare parts, then consumers are unlikely to be harmed significantly if the car manufacturer is the sole supplier of those parts since the car manufacturer would be constrained from raising its parts prices excessively due to a concern that this would reduce the demand for their new cars.<sup>31</sup> However, most economists would argue that there are at least three sufficient conditions under which a car manufacturer’s elimination of competitors from an aftermarket for its original equipment would cause significant harm to consumers:



- First, consumers may not be sufficiently sophisticated to fully take into account all elements of the total cost of ownership beyond the original purchase price, even if those costs could have been foreseen by a fully-informed consumer.
- Second, at the time of the original purchase, consumers may not have been able to foresee the subsequent exclusion of competitors and the resulting price increase for replacement parts.
- And, third, some of the higher cost of ownership may be born by individuals other than those who purchased or currently own that car manufacturer's product. The reason for this is that price increases by one car manufacturer due to monopolisation of its spare parts can be expected to harm all car owners through higher insurance premiums for all drivers.

The presence of any one of these factors alone would cause a less-than-competitive aftermarket to lead to significant harm to consumers. Allowing car manufacturers to exclude competitors from aftermarkets for their cars would indeed grant them a monopoly in the market for spare parts, without any significant offsetting benefit to their customers, even purchasers of new cars.

**e) ... 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, especially in the Far East.<sup>32</sup> 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 altogether.<sup>33</sup> Secondly, even these jobs would only be lost to the car industry (not: to Europe) if its current market share of 85%<sup>34</sup> slumped to zero. That is blatantly unrealistic and is at best “a sign of a surprisingly weak self-confidence”<sup>35</sup> 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 liberalisation<sup>36</sup> – which accordingly would merely 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 markets<sup>37</sup>) 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 should not be used as a means for shaping employment policy; this is undoubtedly not their function.<sup>38</sup> 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 world.<sup>39</sup> 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 “for-



gress” 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.

**f) ... 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.<sup>40</sup> 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.<sup>41</sup> As a study commissioned by the European Parliament in 2006 confirmed, this regime “is more than adequate to ensure the safety ... of spare parts”.<sup>42</sup> 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 whatsoever (!) of safety problems in the market place.<sup>43</sup>

With regard to price increases of spare parts, the contrary is true: With increased parts prices and insurance premiums, customers who cannot afford to pay those costs may forgo repairing their vehicles, resulting in a public safety risk. In some cases, the higher costs will lead to insurance companies declaring more damaged vehicles as “total wrecks”. As a result, these consumers may be forced to replace a repairable vehicle with a new car - a purchase that for many is not feasible.<sup>44</sup>

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

There has been a single market for cars for many years, but there is still none for spare parts. Since the overwhelming majority of Member States, whose will deserves to be respected<sup>45</sup>, 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.

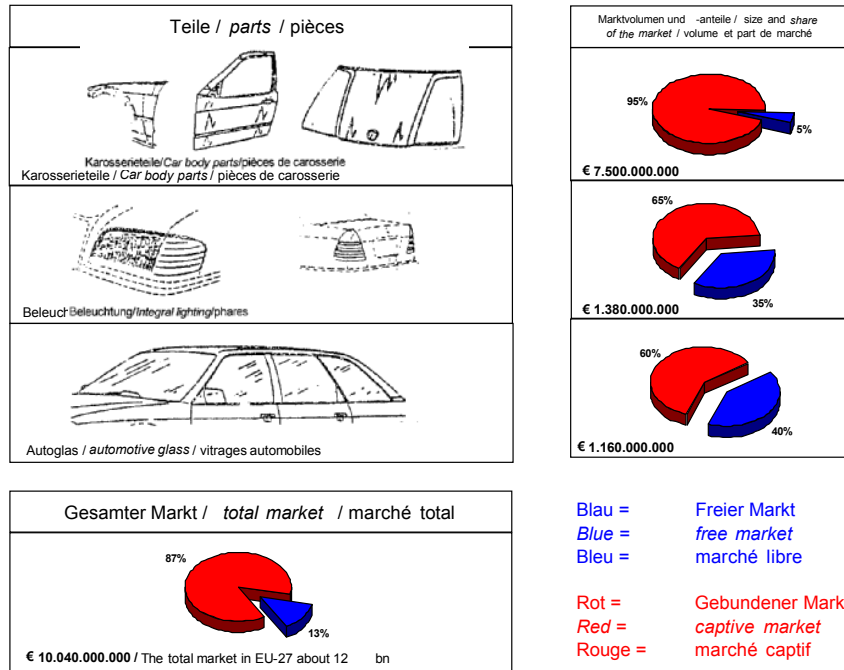
For all these reasons:

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



Figure 1

### EU-15 market of body-integrated visible spare parts



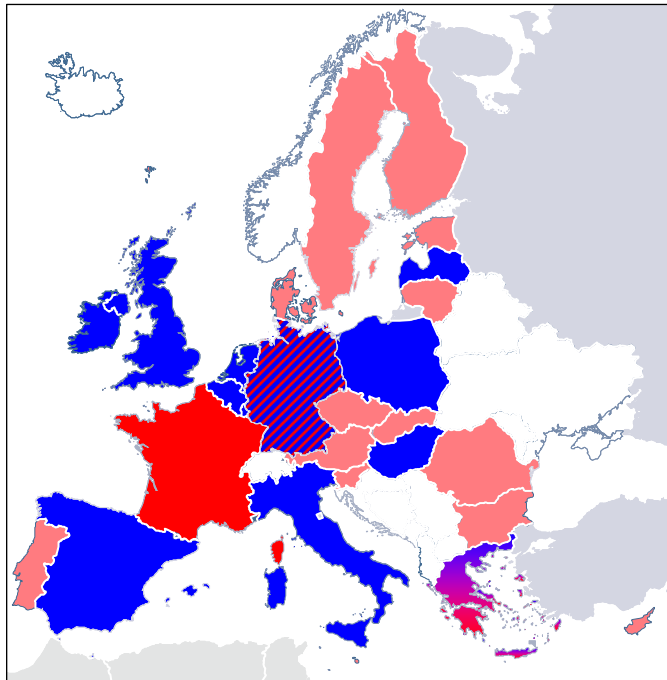


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Figure 2

**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.



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## 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](http://www.ecar-eu.com).

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### Contacts:

#### **Dr. Thomas Funke, LL.M.**

Chief Executive Officer

Innere Kanalstraße 15, DE-50823 Köln  
Fon + 49.221.5108 4304  
Fax + 49.221.5108 4111  
E-mail: [thomas.funke@ecar-alliance.eu](mailto:thomas.funke@ecar-alliance.eu)

#### **ECAR Coordination Secretariat**

c/o FIGIEFA

Bld. de la Woluwe 42, Bte. 5, BE-1200 Brussels  
Fon + 32.3.761 95 10  
Fax + 32.2.762 12 55  
E-mail: [Figiefa.secretariat@figiefa.eu](mailto:Figiefa.secretariat@figiefa.eu)



## Documentation:

- <sup>1</sup> 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] (see also FN 15 below).
- <sup>2</sup> The whole market for servicing and repairing vehicles in the EU-15 is estimated to be worth about EUR 84 bn, about EUR 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 EUR 10 bn (EU-15), respectively EUR 12-13 bn (EU-27). The market shares of vehicle manufacturers here is approx. 85% (see also below FN 29).
- <sup>3</sup> 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.
- <sup>4</sup> The American Antitrust Institute has stated, in its analysis of May 2009: “Without legislation competition in the market for body parts, other than from salvaged parts, cannot exist. There is no demand for a product that looks similar but not identical to the original body part. While design patents enable OEMs to compete in the primary market by differentiating their cars, design patents eliminate rather than enhance competition in the aftermarket.”
- <sup>5</sup> 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.
- <sup>6</sup> 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](http://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).
- <sup>7</sup> European Economic and Social Committee, Report INT/501, 2010.
- <sup>8</sup> 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).
- <sup>9</sup> 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”. A comprehensive survey of the pertinent literature, case law and official investigations is provided by “The Position of ECAR” (2<sup>nd</sup> ed. 2006) 11 et seq. + Appendix 2 ([www.ecar-eu.com](http://www.ecar-eu.com)).
- <sup>10</sup> 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.
- <sup>11</sup> 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.
- <sup>12</sup> See for instance *Armitage*, in: Commemorative Paper for Mathély (1990), Industrial Designs. The last Frontier, 33, 39; *Bartmann*, Grenzen der Monopolisierung durch Urheberrecht am Beispiel von Datenbanken und Computerprogrammen (2005), 130 et seq.; *Bechthold*, Die Kontrolle von Sekundärmärkten (2007), 68, 79 et seq.; *Blanken*, Wettbewerbsrechtliche und immaterialgüterrechtliche Probleme des Zubehör- und Er-



satzteilgeschäfts (2008), 171; *Cohen Jehoram*, [1992] 3 EIPR 75; *Conde Gallego*, GRUR Int 1996, 23 *et seq.*; *Dreier*, in: Schricker/Dreier/Kur (eds.), Geistiges Eigentum im Dienst der Innovation (2001), Primär und Folgemärkte, 75, 77; *Drexel*, Responding to the Challenges for Development with a Competition-Oriented Approach, ICTSD, Selected Issue Briefs no. 1, June 2007, 17; *Drexel/Hilty/Kur* (above FN 9); *Florida/Lamandini*, Ersatzteile: Die „Rückkehr“ zum Europäischen Gerichtshof, GRUR Int 1998, 994; *Gerster*, Wettbewerbsbeschränkungen auf dem Markt für Kraftfahrzeugersatzteile (1998), 262; *Govaere*, The Use and Abuse of Intellectual Property Rights in E.C. Law (1996), 195 *et seq.*; *Guizzardil*, Reparaturklauseln und Eintragungsfähigkeit von Ersatzteilen in Italien – Probleme und Perspektiven, GRUR Int 2005, 299; *Heinemann*, Immaterialgüterschutz in der Wettbewerbsordnung (2002), 551; *Horton*, Industrial Design Law: The Future for Europe, [1991] 12 EIPR 442, 446; *Hughes*, [1994] International Business Lawyer, 116; *Kur*, Gedanken zur Systemkonformität einer Sonderregelung für must-match Ersatzteile im künftigen europäischen Geschmacksmusterrecht, GRUR Int 1996, 876; *id.*, Limiting IP Protection for Competition Policy Reasons – A Case Study based on the Spare-Parts-Design Discussion, in: Drexel (ed.), Research Handbook on Intellectual Property and Competition Law (2008), 313; *Lützenrath*, Designschutz im Europäischen Binnenmarkt (1996), 200 *et seq.*; *Möschel*, Gibt es einen optimalen Schutzzumfang für ein Immaterialgüterrecht?, in: Lang/Klippel/Ohly (eds.), Geistiges Eigentum und Wettbewerb, 119, 128; *Passa*, Droit de la propriété industrielle, 2nd ed. 2009, no. 715 and no. 716; *Pentheroudakis*, GRUR Int 2002, 668; *Pilla*, Der Schutz von Ersatzteilen zwischen Geschmacksmuster- und Kartellrecht (2000), 307; *Posner*, Protection of Car Designs and Component and Spare Part Designs under Future Community Law, International Business Lawyer, 1994, 108114; *Quaedvlieg*, Anhörung des Rechtsausschusses des Europäischen Parlaments 1.2.1995, PE 211.057/13; *Riehle*, EG-Geschmacksmusterschutz und Kraftfahrzeug-Ersatzteile, GRUR Int 1993, 49; *id.*, Das künftige europäische Musterrecht und die „Ersatzteilfrage“, EWS Beilage 1 zu Heft 7/1996; *Ruhl*, GGV, 2nd ed. 2010, Art. 110, para. 9 *et seq.*; *Schovsbo*, As If Made for Each Other – Intellectual Property Rights and Protection of Compatible Products, IIC no. 5/1998, 510, 525 *et seq.*; *Steindorff*, Chancengleichheit im europäischen Wettbewerb und Solidarität, FIW-Schriftenreihe Heft 165 (1995), 23, 31 *et seq.*, *Ullrich*, in Schricker/Dreier/Kur (eds.), Grenzen des Rechtsschutzes: Technologieschutz zwischen Wettbewerbs- und Industriepolitik, 86, 107; *Wolf*, Vertikale Kontrolle von Sekundärmärkten (2007), 253 *et seq.*

<sup>13</sup> The investment in body design amounts to about EUR 50 (per car sold) for a low volume luxury car like the *Mercedes S-Class* and may drop to about EUR 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.

<sup>14</sup> 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.

<sup>15</sup> The study “Estimation of benefits for consumers from competition in the market for automotive parts” conducted by MiCRA for the US market concludes. “We would estimate that consumers receive aggregate benefits of around 1.5 billion dollars a year due to competition in the market for automotive parts.”

<sup>16</sup> 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).

<sup>17</sup> 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.

<sup>18</sup> 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 28<sup>th</sup> 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).



- <sup>19</sup> 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 for non-captive competitive parts remained stable or were even decreased. Confirming: *Wormald / autoPolis*, “Hot, thirsty and crowded: time for a model change”, 2008, 50.
- <sup>20</sup> 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](http://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.
- <sup>21</sup> See Press Releases of the Commission (IP/08/165) of 1.2.2008 and (IP/08/1003) of 25.6.2008.
- <sup>22</sup> Giving car manufacturers a design-induced spare parts monopoly is tantamount to granting them an (indirect) subsidy.
- <sup>23</sup> 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.
- <sup>24</sup> 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 re-classified 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.
- <sup>25</sup> 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).
- <sup>26</sup> 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 %.
- <sup>27</sup> 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.



- 28 The savings, for example, were EUR 103 for a wing (- 54 %) or up to EUR 113 for a front lamp (- 40 %). The full results of the investigation are published in *ADACmotorwelt* 7, 2007.
- 29 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).
- 30 The study "Estimation of benefits for consumers from competition in the market for automotive parts" conducted by MICRA for the US market concludes. "We would estimate that consumers receive aggregate benefits of around 1.5 billion dollars a year due to competition in the market for automotive parts."
- 31 This discussion is taken from the study "Consumer Benefits from a Competitive Aftermarket for Crash Parts", that was conducted by MiCRA (Microeconomic Consulting & Research Associates, Inc.).
- 32 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).
- 33 The EU market of visible spare parts is worth about EUR 12-13 bn at retail prices (above FN 2); this corresponds at the most to EUR 6 bn "ex works" (= turnover). Due to their market share of 85 % (see below FN 29) some EUR 5 bn must be allocated to the car manufacturers. According to the own figures of the industry the turnover per person employed on average is about EUR 380.000 (manufacturers), EUR 230.000 (parts suppliers) = on (weighted) average about EUR 330.000 (see VDA, International Auto Statistics, Edition 2007). Accordingly, in order to generate a turnover of EUR 5 bn between 15.000 and 16.000 jobs are needed.
- 34 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).
- 35 *Eekhoff*, op.cit. (above FN 17), 32.
- 36 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).
- 37 See text accompanying FN 13 (above).
- 38 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?
- 39 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.
- 40 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.
- 41 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.
- 42 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 smoke-screen to protect rents" (at 51).



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<sup>43</sup> *Ibidem* (above FN 37) 33, 74.

<sup>44</sup> This argument has been taken from a brochure of “Keep Auto Parts Affordable“, a campaign in the United States that is - just as ECAR - trying to convince the US Congress to support a legislative change to the design patent law. For further information, see <http://www.qualitypartscoalition.com>.

<sup>45</sup> 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”.