



Repairs Clause: the right solution

Free competition and fair prices for visible spare parts

Who is ECAR?

Established in 1993, ECAR is the **European Campaign for the Freedom of the Automotive Parts and Repair Market**, an alliance of 5 independent EU organisations representing vehicle parts producers and distributors, a large cross-section of SMEs as well as the interests of 285 million motoring consumers in the European Union.

ECAR's objective is the establishment of a harmonised, free and real European Internal Market of automotive visible replacement parts: body panels; integrated lighting; automotive glass; rear-view mirrors etc. These parts are also called **"must match"** visible replacement parts. What distinguishes this category of spare parts from others is that **the outside appearance of such spare parts, which is to be replaced in the course of a repair, must match the design of the original component exactly.**

What is at stake?

Product monopolies for vehicle manufacturers

or

Free and fair competition and freedom of repair for consumers?

What is currently at stake for ECAR is the **problem of the extension of design protection granted to a vehicle in the after-sales market of visible "must match" replacement parts.**

Competition, which enhances consumer rights, is clearly a public good. But it is threatened by an arcane dispute which risks robbing consumers of their rights: should vehicle manufacturers be able to legitimately invoke intellectual property rights – design rights – to enforce a product monopoly over the supply of visible spare parts?

The European Commission and the European Parliament actively and publicly supported the repairs clause.

The Commission has always been alert to the danger and always sought to rid Europe of monopolies wherever it could. Having once again considered all competition, legal moral and commercial imperatives on this issue of visible spare parts, it again conclusively supported consumer rights and benefits by in 2004 submitting a proposal to adopt a **Repairs Clause From Day 1** to amend the "Design" Directive 98/71/CE.

In doing so it emphatically choose the side of all European consumers, by deciding to give them the benefits of competition whilst encouraging the vehicle manufacturers, who dominate this markets anyway, to compete in the aftermarket in a free and fair manner.

The Repairs Clause: a fair and balanced solution

A Repairs Clause rightly gives vehicle manufacturers full protection over the design of their new cars. It merely ensures that this protection is not extended to the corresponding visible spare parts. It thus leaves consumers free to repair their vehicles as they wish and avoids creating deleterious spare parts monopolies. And it ensures the rights of spare parts makers to supply parts to consumers in all Member States and in no way restrains the vehicle manufacturers from free and fair completion in the repairs market through tied or independent garages and body shops.

Historical background

The European Commission already issued 3 legislative proposals (1993, 1997 and 2004) aiming at harmonising design law within the European Union.

Each time ECAR has endorsed and supported these legislative procedures and has vigorously defended the liberalisation of the visible spare parts market by organising meetings with and talking to Members of the European Parliament, with Commission's officials, with representatives of the Member States in Brussels and with the national administrations.

- 1) In 1993, the Commission proposed a clear and defined limitation in time of the protection (i.e. 3 years) for the entire product after its introduction on the market [COM(93)344 final]. Although the European Parliament supported the Repairs Clause, the Council of Ministers (on the side of the vehicle manufacturers) rejected this proposal on the grounds that the protection period envisaged was too short to recover the cost of design investments despite clear evidence to demonstrate that investment in the design of spare parts was negligible and that they recovered their investment when a consumer bought their car. ECAR too rejected the artificial limitation as vehicles may need repair from the first moment they are driven onto the road

In 1997, in the course of the same legislative procedure, the Commission, together with the European Parliament at second reading, proposed, as an alternative, a remuneration system: the spare parts producers should be able to produce corresponding visible spare parts as from day 1 for a fair and reasonable fee. Once more the Council of Ministers rejected the proposal on the grounds that the envisaged fee was insufficiently high. They could not and did not offer any evidence of why the fee was insufficient nor suggest any other fee. Ecar supported this proposal based on the same evidence that the design cost of the spare parts was negligible.

The results of this debate is the directive which is now into force (Directive 98/71/EC). In the absence of a consensus on a Repairs Clause, the Directive foresees in its **article 14** a “freeze plus” solution, providing that the Member States “*shall maintain their existing legal provisions relating to the use of the design of a component part used for the purpose of the repair of a complex product so as to restore its original appearance and shall introduce changes to those provisions **only if the purpose is to liberalise the market for such parts***”.

- 2) In 2004, on the basis of different studies and research, the Commission came to the same conclusion and finally proposed a revision of the Directive 98/71/EC, introducing a Repairs Clause as obligatory [COM(2004)582]. This proposal was supported by the European Parliament, voting in Plenary Session,

in November 2007. However, for the next 10 years, the Council of Ministers could not reach a majority to support the Repairs Clause: a blocking minority against the Repairs Clause paralysed the debate and the progress of the legislative proposal.

In May 2014, however, despite that fact that the Commission and the European Parliament majority had fully supported the Repairs Clause, the **European Commission withdrew its proposal to introduce a Europe-wide Repairs Clause in the Design Directive due to the 10 years of discussion, delay, postponement and blockage, from** some Member States in the Council of Ministers (France, Germany, Sweden, Czech Republic, Romania and Slovenia).

The consequence of this withdrawal today is a non-harmonised internal market for automotive visible spare parts, a patchwork of conflicting national laws. Member States which do not have a repairs clause in their design law will continue to allow protection and enforcement of the vehicle manufacturers' design rights on visible must match parts against producers or related spare parts; while in Member States with a repairs clause in their design law, the consumers can choose between competing suppliers of parts and repair services: the vehicle manufacturer network and the independent aftermarket, at prices kept low by competition.

Further to the withdrawal of its proposal, the European Commission announced in its Work Program for 2014 the intention to reassess this issue through the **on-going general review of the European design protection's regime**.

As a first step of this analysis, the Commission entrusted the consultancy Europe Economics with the preparation of an **economic study on industrial designs**, which builds on the results of an online questionnaire and interviews conducted among stakeholders. The **conclusion** of the authors is clear and again fully supports the ECAR position:

a European-wide repairs clause should be introduced and design protection should not be extended to visible automotive spare parts.

As a second step of the review, the Commission ordered a **legal study** to a consortium with the aim of, inter alia, examining whether harmonisation has facilitated the system of design protection in the internal market and whether further harmonisation is required and aiming also at determining whether there is a need for further harmonisation of national legislation which would bring benefits to users and consumers.

The Legal Study **concluded** in June 2016 that

a) *"legislative amendment at the EU level appears necessary"* and that b) **there is not a more acceptable solution on the horizon than the Repairs Clause proposal of the Commission which "commanded considerable support and has the merits of harmonising European and national design protection"**.

The Commission will now review these studies and assess how best address the issues highlighted by them. Meanwhile, the competitiveness of thousands of SMEs is still hampered by the application of design protection rights on automotive visible spare parts in the aftermarket in multiple Member States and by the lack of European legal harmonisation, ultimately depriving European consumers from prices flowing from the benefits of free and fair competition.

ECAR's argumentation

ECAR has always cohesively argued that the Repairs Clause protects innovation, competition and consumers' choice and rightly so.

Purpose of design protection

The purpose of design law is to protect the appearance of the product, not the product itself. If we consider the car market: protecting the design of a car does not hamper or exclude competition in new cars. Consumers can still choose between many different cars, all of them design-protected.

**Design protection therefore does not grant a product monopoly.
It fosters product competition by innovation.**

Spare parts are a very different market. To repair the "outer skin" of a car and thus restore its original appearance, the spare parts must look exactly like the component to be replaced (it is a "must match" spare part). No design alternatives are possible.

Therefore, if design protection is extended to must-match spare parts, competition in the spare parts market is completely eliminated. Unlike its effects on the market for new cars, applying design protection to must-match spare parts gives the vehicle manufacturer a product monopoly; deprives vehicle owners from any choice and makes them captive consumers.

Extending design protection to visible spare parts is an abuse of the rule's intent: instead of fostering competition, it leads to product monopoly and to monopoly pricing!

Legislation dictates safety – Consumer choice dictates quality

Vehicle manufacturers claim that design protection is needed to protect consumers against unsafe or inferior spare parts. They claim that having vehicle manufacturers as the sole suppliers of spare parts is the only way to procure spare parts that are safe and of good quality.

Design protection only protects the outside appearance of a product, not the product itself. Its technical characteristics are not taken into account. Arguing that design protection is a safety issue is a blatant misuse of its intended purpose.

Since **safety** is an essential public good, an extensive system exists to ensure that all safety-relevant goods on sale in the European Union are indeed safe. The safety of vehicle spare parts is ensured by a number of rigorous EU-wide laws, regulations and standards that apply to ALL producers. Therefore, parts and replacement parts that are considered to be safety-critical can only be marketed if they have passed a government-mandated type-approval procedure and if the type-approval mark granted upon a successful testing procedure is affixed to each unit sold.

Unlike safety, **quality** is not a public good, but a private one. Quality does not need to be regulated by an external authority: the play of competitive market is enough. Quality is regulated by the power of consumers.

European jobs threatened by monopolies, boosted by the repairs Clause

In an effort to reduce their costs, vehicle manufacturers already import a significant proportion of their parts requirements from low-cost countries. This has the ongoing effect of eliminating thousands of European jobs. Design protection, by legally sustaining this mechanism, would accelerate the on-going relocation of jobs to non-EU countries. The result - fewer jobs in Europe.

The Repairs Clause, to the contrary, helps keep jobs in the European Union. It saves existing production jobs from being swept away, it encourages the creation of new jobs in the European Union. Indeed, with a Repairs Clause to guarantee their right to compete, Europe's independent spare parts producers can a) supply spare parts for Japanese, Korean, US and other cars imported into the EU and thus generate additional EU jobs; b) compete with the spare parts imports of EU vehicle manufacturers and thus cushion the blow of automotive off-shoring or even bring jobs back into the EU; and c) manufacture spare parts in the EU for exports markets, thus again generating new EU jobs.

Consumers shouldn't have to pay twice

When a consumer buys a new car, he chooses from among competing designs. He pays for his choice voluntarily. The vehicle manufacturer's design premium is not a guarantee: it is a reward, obtained in open competition against other designs.

Spare parts are fundamentally different. No design alternative and thus no competition is possible. Why should the owner of the car be forced to pay for this design more than once whenever he needs a body-related spare part? Even worse: the price paid the second time would be set at monopolists' sole discretion, permitting price abuse against consumers.

CONCLUSION

For all these reasons, it is clear that **the Repairs Clause is the only acceptable compromise solution** between a system allowing full protection of visible spare parts and a system which does not allow the protection of the design of visible must match parts (even on the primary market) as it was the case in Italy and in the UK before the introduction of the Repairs Clause in these countries.

For 23 years, ECAR has tried to convince the Commission (successfully), the European Parliament (successfully) and national Member States (successfully in 11 countries so far) that the Repairs Clause and the principle of freedom of repair are legally, economically and competitively sound.

The current effects of the absence of a real EU Internal Market on the thousands of independent aftermarket SMEs, which are at the heart of our local economic base, are extremely serious. ECAR believes that there is a real need to reshape EU's industrial automotive policy and better combine the protection of industrial property rights with the consequences that such protection may have on EU independent aftermarket SMEs if used beyond its essential purposes.

ECAR will continue its efforts to ensure that national and European decision makers will not allow any further delay in finding a fair and concrete solution on the use of design rights in the European Internal Market for automotive spare parts, which the Repairs Clause rightly provides.