



## European Commission Inception Impact Assessment on the Review of the Design Directive and Community Design Regulation

### ECAR Feedback (December 2020)

#### **About ECAR**

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

ECAR's objective is the establishment of a harmonised, free and genuinely competitive European Internal Market for 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?**

Currently at stake is the integrity of the after-sales market of visible "must match" replacement parts for the millions of vehicle owners and for the spare parts suppliers. By extending design protection to visible spare parts, this would create a de facto product monopoly, to the sole benefit of the vehicle manufacturers. The effect would be to eliminate consumer choice and stifle free and fair competition.

#### **The Repairs Clause**

A Repairs Clause rightly and equitably gives vehicle manufacturers full protection over the design of their new cars, and retains their ability to fairly compete in the aftermarket. It merely and correctly ensures that this protection is not extended to the corresponding visible spare parts. It thus leaves vehicle owning consumers free to repair their vehicles as they wish, and avoids creating deleterious spare parts monopolies.

Repeated evidence-based reinforcement of the legal, safety, quality and economic case has been made and supported by the aftermarket and the Commission over the past 25 year.

- From a legal perspective, as correctly pointed out by the European Commission in its recently published Evaluation Report, *"there is a clear fragmentation of the market, which is not likely to change on a voluntary basis or through industry self-regulation. The current situation is facilitative of neither the completion of the internal market for goods, nor the goal of conferring equivalent protection on right holders. The Legal Review analyses different solutions to address the issue of protecting visible component parts if used for repair purposes of a complex product, and concludes*

*that a legislative amendment at EU level appears necessary. The Legal Review also recommends following the approach proposed by the Commission in 2004 (In particular, the Legal Review recommends that Article 110(1) of the Regulation should be re-cast as a defence to infringement and accordingly moved to Article 20(2) to clarify its effect and its permanent status). The Review also recommends clarifying that the repair clause only applies to 'must-match' spare parts, and that it does not translate in enabling third parties to use trade marks of the original manufacturer. Regarding the national law harmonisation, the Review recommends aligning the provisions of the Directive with those of the Regulation."*<sup>1</sup>

- From an economic perspective, as correctly pointed out by the European Commission in its recently published Evaluation Report, *"The Economic Review considers that also introducing a repair clause for national design rights is likely to have a negligible impact on innovation. The economic evidence also suggests that there is no broad economic justification for maintaining spare parts protection. The evidence further suggests that spare parts protection is leading to higher consumer prices in those Member States that did not introduce a repair clause, due to the dominance of original equipment manufacturers in the market for spare parts."*<sup>2</sup>
- The Repair Clause does not affect the question of safety which is well regulated in the EU. Indeed, vehicle manufacturers like to claim that design protection is needed to protect consumers against unsafe or inferior spare parts. But 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. 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.
- The Repair Clause also has the positive consequence of keeping jobs in the EU. It saves existing production jobs from being swept away, it encourages the creation of new jobs in the EU. Indeed, with a Repair Clause to guarantee their right to compete, Europe's independent spare parts producers can a) supply spare parts for non-European 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.

### **Current situation**

Despite the best efforts of the Commission and of the Parliament, the Repairs Clause has inexplicably not yet been included in the EU Design Directive. This unharmonised market for visible spare parts in the EU has resulted in a patchwork of conflicting national laws. Member States which do not have a Repair Clause in their design law continue to allow protection and enforcement of the vehicle manufacturers' design rights on visible must match parts against producers of related spare parts; while in Member States with a Repair Clause in their design law, the consumers can choose between competing suppliers of parts and repair services from day one: the vehicle manufacturer network and the independent aftermarket, at service kept high and prices kept low by competition.

**The current effects of the absence of a real Internal Market on the thousands of independent aftermarket SMEs, which are at the heart of our local economic base, are extremely serious.**

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<sup>1</sup> Commission Evaluation Report of EU legislation on design protection (SWD(2020) 264 final), p.66.

<sup>2</sup> Commission Evaluation Report of EU legislation on design protection (SWD(2020) 264 final), p.66.

- This has been highlighted by the 2015 Legal Study commissioned by the European Commission, which stated on p. 149 that *“The current situation leads to anomalous situations, which are not ideal. For example, if a spare part is moving from Country A (where there is no protection) to Country C (where there is no protection), it cannot be prevented from traversing Country B (where there is protection). However, it can’t be sold or offered for sale in Country B. This is hardly an ideal scenario. This would seem to be inconsistent with the intention of the Design Directive, as stated in Recital 10, to “facilitate the free movement of goods, to ensure in principle that registered design rights confer upon the right holder equivalent protection in all Member States”.*
- More than that, some automotive spare parts producers have suffered situations where goods moving from country A to country C were seized in country B, despite the free movement of goods, because there was no Repair Clause in country B. Had a Repairs Clause existed these situations would have been positively resolved to the benefit of the spare parts producers and consumers. However in the event, the goods were seized, the truck drivers were imprisoned like criminals, the producers suffered delays in their deliveries, and significant costs and administrative burdens of litigation, for a simple situation of goods in transit.
- Or, as another example of this ambiguous situation: a spare parts distributor, having warehouses in many EU countries, is deprived from the right of offering the same range of automotive spare parts in all its warehouses because of the absence of Repair Clause in some countries. Some of them, not aware of this absurd and unusual situation for the EU single market of goods, have been sued by a vehicle manufacturer because they were selling must match spare parts in warehouses located in a country where there is no Repair Clause!
- And, as last example, but not the least, some spare parts producers and distributors from countries with a Repairs Clause have seen their products seized during international exhibitions such as, Automechanika in Germany, because these products were until very recently protected in Germany. But such international exhibitions are well known worldwide, widely attracting visitors from the sector, from all around the world. 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 the EU independent aftermarket SMEs if used beyond its essential purposes.

**For ECAR, 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.**

The contributions to the Public Consultation organised by the European Commission showed that a wide majority of the stakeholders from various horizons considered that: *“different rules on spare parts protection in the EU are a problem. The respondents explained that the current complexity of the system, based on divergent approaches of the Member States: (i) makes it difficult for companies (SMEs in particular) to operate across the internal market; (ii) leads to serious obstacles in the free movement of goods; and (iii) involves confusion and considerable legal uncertainty both for professionals and consumers.”*<sup>3</sup>

This has been also acknowledged by the European Commission in the conclusion of point 5 of its recently published Evaluation Report where the Commission writes that *“In result (of the non-harmonisation of the spare parts market), **fair and effective competition is undermined** (in particular, but not exclusively, in the automotive aftermarket, which is also important in view of the existing antitrust block exemption rules for the automotive sector), **with particular negative impact on the competitiveness of the independent repair spare parts sector** (for SMEs in particular). This in turn leads to **limited choice and higher prices for consumers, and negatively impacts product reparability, going against the objectives and development of the circular economy.**”*<sup>4</sup>

<sup>3</sup> Commission Evaluation Report of EU legislation on design protection (SWD(2020) 264 final), p.67.

<sup>4</sup> Commission Evaluation Report of EU legislation on design protection (SWD(2020) 264 final), p.69.

National repairs clauses already exist in 12 Member states: Belgium, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxemburg, the Netherlands, Poland, Spain and the United Kingdom. In the rest of the EU, visible replacement parts can only be supplied by vehicle manufacturers under monopolistic conditions.

Out of these 12 countries, it is worthwhile mentioning that the **introduction of a Repairs Clause in Germany is very recent** (the law having been published on 2 December 2020), thereby showing a very strong signal to the European Commission and the other Member States.

### **Commission Inception Impact Assessment**

ECAR strongly welcomes the initiative of the European Commission to review the existing Design Directive and Community Design Regulation.

ECAR strongly supports the Commission's intended policy option d) aiming at completing *"the single market for repair spare parts through further harmonisation of rules on their protectability, and in particular full liberalisation of that aftermarket through the introduction of a repair clause into the Design Directive (such as contained already in the Community Design Regulation). The latter option could allow for fair and effective competition, strengthen the competitiveness of the independent repair spare parts sector and bring greater choice and lower prices for consumers<sup>7</sup>; in addition, it would contribute to the objectives and development of circular economy."*<sup>5</sup>

As stated in point e) of the problems this revision exercise intends to tackle, it is time to put an end to this temporary non-harmonised situation which has dragged on now for more than 20 years.

ECAR would however like to stress that it is of crucial importance to introduce a Repairs Clause applicable to ALL designs from the 1<sup>st</sup> day following the entry into force of the new Directive. A Repairs Clause which would have an effect on designs registered after the entry into force of the new legislation would have several negative impacts:

- It would create a legal uncertainty on the market as to whether this particular car or model is protected, affecting the consumers, the independent parts producers and repairers.
- It would leave the car owners of older cars (potentially those having less money) with very high priced visible spare parts, while the wealthier buying new cars would benefit from lower prices thanks to the new competitive market of visible spare parts.

### **Call to action**

On the basis of the strong support in favour of the Repairs Clause of the Economic Review and the Legal Review, on the basis of the recent change of sides of Germany and on the basis of the encouraging conclusion of its Evaluation exercise, **ECAR calls upon the European Commission to seize the momentum to harmonise the market for visible spare parts and to align the legislation in Member States to the European Union Regulation by proposing the adoption of a Repairs Clause from day 1 in the Design Directive, as the most legitimate and balanced solution for all market players.**

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<sup>5</sup> Commission Inception Impact Assessment, Review of the Design Directive and Community Design Regulation, Point B Objectives and Policy options, Ref. Ares(2020)7065286 - 24/11/2020.