ECAR Contribution to the Commission Public Consultation on the European Commission's proposals for a Regulation and a Directive on the legal protection of designs (COM(2022)666 & COM(2022)667)

January 2023

Executive Summary

- On 28 November 2022, the European Commission proposed a revision of the **Design Directive** (COM(2022) 667) and the **EU Design Regulation** (COM(2022) 666).

- One of the main points is **the introduction of an EU-wide Repair Clause in the Directive and the confirmation of a permanent Repair Clause in the Regulation**. The Repair Clause is an indispensable precondition to the achievement of the liberalisation of the spare parts market, the completion of the EU internal market for spare parts and circular economy.

- **The case of the automotive aftermarket is particularly illustrative**. The Repair Clause allows consumers to purchase visible spare parts (such as car bumpers, windscreens and automotive lighting) from the producer of their choice, irrespective of the brand of their vehicles. It stimulates purchasing power for the owners of more than 300 million of vehicles in the EU, as well as innovation and employment for more than 500.000 independent aftermarket operators (many of them being SMEs or entrepreneurs), legal certainty and growth, hence **making the "right to repair" more tangible, accessible and affordable**.

- ECAR provides the following comments on the European Commission's proposal:

  - **1) We welcome the introduction of an EU-wide Repair Clause in the Design Directive** (Art. 19(1)), which is indeed the right choice from a legal and economic perspective.

  - **2) However, we regret the newly introduced restriction of the Repair Clause to "form-dependent component parts of complex products only",** both in the Design Directive (Art. 19(1)) and in the Regulation (Art. 20a(1)). In our view, this restriction is not justified under any intellectual property principle, it contradicts the original intention of the EU legislator, and it would weaken the position of consumers.

  - **3) We also regret the introduction of unclear and redundant information requirements for consumers on product design** (Art. 19(2) of the Directive and Art. 20a(2) of the Regulation), which will neither improve consumer information nor fit with the realities of the spare parts market. It is crucial to have accurate information requirements for all market participants; such requirements are already better addressed in existing consumer protection laws.

- **4) The Repair Clause will not fully benefit the millions of motorist consumers as long as it does not apply to new *and* existing designs.** Thus, we recommend a far **shorter and more flexible transition period**, leaving the choice to Member States whether they want to apply the Repair Clause to existing designs from day 1, and at most until 3 years from the entry into force of the new Directive (Art. 19(3)).

Context: Spare Parts in Design Protection Law

Established in 1993, ECAR is the **European Campaign for the Freedom of the Automotive Parts and Repair Market**, an alliance of 5 independent European organisations and companies representing vehicle parts producers (EAPA, PHIRA, ORAN, Belron) and distributors (FIGIEFA), a large cross-section of SMEs and repairers as well as the interests of more than 300 million motoring consumers in the European Union.

ECAR's objective is the establishment of a **harmonised, free and authentic EU Single 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 are to be replaced in the course of a repair, must match the design of the original component in order to restore the vehicle to its original appearance.[1]

The purpose of design protection is to compensate the investments made to create a design. A vehicle manufacturer benefits from its investment in design when it sells a vehicle – and rightly so, as vehicles are (in part) bought because of their appearance. Thus, competition in new vehicles is not hampered but enhanced by the variety of designs. In contrast, visible spare parts are not chosen because of aesthetics, but simply because of the need to repair the vehicle. Spare parts must match the original to be replaced in the course of repair. Design alternatives are not possible as they would neither fit nor restore the appearance of the vehicle.

In other words: **where design protection is applied to visible must match spare parts, it excludes any possible new market entrant, thus eliminating competition and keeping captive consumers in an unfair and unjustified monopoly situation**. Vehicle manufacturers can charge prices for spare parts at their sole discretion and rendering accident repair (and automotive repair generally) unnecessarily expensive.

The introduction of a Repair Clause that would exclude must match visible spare parts from design protection is therefore the right choice from a legal and economic perspective. The CJEU has highlighted several times that intellectual property rights are subject to limitations wherever their use would hamper or eliminate competition in secondary markets.[2] The European Commission's Economic Review and Legal Review published in 2016, together with the Evaluation Report published in 2020,[3] confirmed that "*there is no broad economic justification for maintaining spare parts protection*". In November 2021, the European Parliament called on the Commission to propose an EU-wide Repair Clause (2021/2007 (INI)).

[1] For more information: https://www.ecar-alliance.eu/

[2] 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.*

[3] European Commission, *Evaluation of EU legislation on design protection*, SWD(2020) 264, 6 November 2020.

Our detailed answer to the Commission's proposals

ECAR welcomes the publication of the European Commission's proposals for a revised Design Directive (COM(2022) 666) and a revised EU Design Regulation (COM(2022) 667). The proposed Design Directive includes an EU-wide Repair Clause for must match visible spare parts (Art. 19), and the proposed EU Design Regulation converts the currently existing transitional Repair Clause into a permanent provision (Art. 20a).

If properly defined, the Repair Clause ensures that vehicle manufacturers will continue to enjoy protection for the design of their vehicles, while enabling fair competition and freedom of consumer choice for visible spare parts used in the context of reparations.

However, it is crucial to set the right parameters to the legislation so that the Repair Clause can effectively apply. To this purpose, ECAR provides the following comments on the Commission's proposals:

1. Introduction of an EU-wide Repair Clause in the Design Directive
➔ ***Art. 19 of the Design Directive proposal***

ECAR welcomes in principle the introduction of an EU-wide Repair Clause in the proposed Design Directive. The Repair Clause provides that the manufacturer of a complex product (such as a car) gets protection on the overall design and on the first fitted visible parts, but not on the corresponding visible must-match spare parts that may need to be installed in the context of repairs (such as car bumpers, windscreens and lighting). Consumers should always be able to choose between competing suppliers of spare parts to repair their products.

As the proposed Design Directive rightly recognizes in Recital 33, **the purpose of design protection is to grant exclusive rights to the appearance of a product, but not a monopoly over the product as such**. Protecting designs for which there is no practical alternative would lead in fact to a product monopoly. Such protection would come close to an **abuse of the design protection regime**. If third parties are allowed to produce and distribute spare parts, competition is maintained. If design protection is extended to spare parts, such third parties infringe those rights, competition is eliminated and the holder of the design right is de facto given a product monopoly.

A growing majority of EU Member States have already introduced Repair Clauses into their national design protection legislation.[4] Yet, **EU-wide harmonisation is indispensable** to liberalise repair services for all Europeans, and to continue to create and encourage the development of a strong and competitive repair economy across Europe.

An EU-wide Repair Clause will help consumers (especially middle and lower-income households) **and companies** (especially SMEs, handcrafts, delivery vans, taxi drivers, etc.) **by lowering prices of automotive spare parts**, hence saving between 450 and 720 million EUR annually.[5] It will therefore have a direct positive contribution to purchasing power. It will also put independent aftermarket operators on a fair and level-playing field with vehicle manufacturers, and increase legal certainty in the repair market.

[4] For detailed overview, please refer to https://www.ecar-alliance.eu/the-repairs-clause/
[5] Herz, Mejer, *Effect of design protection on price and price dispersion*, MPRA Paper 104137, 1 June 2020

2. Restriction of the Repair Clause to "form-dependent component parts" only

➔ ***Art. 19(1) of the Design Directive proposal***

➔ ***Art. 20a(1) of the EU Design Regulation proposal***

ECAR notices that the Repair Clause in the proposed Design Directive refers to "*form-dependent component parts of complex products only*" (Recital 35), "*upon whose appearance the design of the component part is dependent*" (Art. 19(1)). A similar restriction is found in Recital 16 and Art. 20a(1) of the proposed EU Design Regulation. This is a new wording which was not present in the articles of the currently applicable Design Directive and EU Design Regulation.

In our view, **it is questionable if the proposed wording in Art. 19(1) is coherent with the intention of the EU lawmaker in respect of Art. 110 of Regulation (EC) No 6/2002 as it was explained by the CJEU in the decision in Joined Cases C-397/16 and C-435/16 – Acacia**. In paras 36 to 38, the Court made reference to the legislative history and the findings of the Advocate General who had reported that the lawmaker had to make a choice between two proposals, one relating to an extensive and the other to limited liberalization of the market in replacement components. The only difference between both options was the criterium if the design of a component falling under the repairs clause should be dependent on the appearance of the complex product (like the vehicle) or not. According to the Advocate General, the lawmaker expressively chose an extensive approach by not limiting Art. 110 by such a condition and thereby wanted to allow full liberalization (cf. paras 75,76 of the Advocate General´s opinion). According to the Advocate General, whenever a complex product needed repair, including the replacement of parts, like a wheel rim (cf. para 43), the lawmaker wanted to give consumers a choice irrespective of the design of the replacement part in question.[6]

In that context, the AG also made reference to the principle of exhaustion provided for in Article 21 of Regulation No 6/2002 that limits any monopoly to the first placing on the market of the products in question. According to that provision, the rights of the design holder would not extend to acts relating to a product when that has been put on the market by the holder or with his consent (see para 42 to 45 of the AG´s opinion). The decision of the law maker in favour of an extensive liberalization on markets for repair components is fully in line with this fundamental principle.

The Advocate General also saw the discrepancy between Recital 13 of the Regulation (still containing the limitation) and the final version of Art. 110 but (in our view) rightfully explained this with a lack of coordination. It was simply forgotten to remove this limitation also in recital 13 after it was decided to delete it in Art. 110.

Therefore, in our view, **the proposed introduction of the limitation contradicts the original intention of the EU lawmaker when introducing the Repair Clause**. There is also **no need for such a limitation under any intellectual property principles**. Moreover, it would be **weakening the position of consumers** compared to status quo.

Our recommendation:

[6] "*From the point of view of the consumer, that liberalisation offers him the possibility, should a repair be required, of purchasing a replacement wheel rim manufactured by a third party which is a replica of the original, damaged wheel rim, instead of having to purchase a replacement wheel rim manufactured by the design holder. In other words, in the event of a repair being required, the consumer is not bound by the choice that he made when he purchased the vehicle*" (para 76 of the Advocate General´s opinion).

Art. 19(1) – Design Directive
Art. 20a(1) – EU Design Regulation

"*Protection shall not be conferred on a registered design which constitutes a component part of a complex product,* ~~***upon whose appearance the design of the component part is dependent, and***~~ *which is used within the meaning of Article 16(1) for the sole purpose of the repair of that complex product so as to restore its original appearance*."

3. Unclear and redundant information requirements for consumers on product origin
- ➔ ***Art. 19(2) of the Design Directive proposal***
- ➔ ***Art. 20a(2) of the EU Design Regulation proposal***

ECAR is concerned by the new requirement for producers or sellers of must match spare parts to "*duly inform consumers, through a clear and visible indication on the product or in another appropriate form, about the origin of the product to be used for the purpose of the repair of the complex product*" (Art. 19(2) of the proposed Design Directive), "*in order to ensure that consumers are not mislead but are able to make an informed decision between competing products that can be used for the repair*" (Recital 35 of the proposed Design Directive). A similar wording is found in Art. 20a(2) and Recital 16 of the proposed EU Design Regulation.

ECAR fully agrees that consumers should not be misled and make informed choices. This is why it is in the interest of consumers and manufacturers to have **clear, meaningful and coherent information requirements** on the market, which ensures legal certainty and common understanding for all market participants.

The proposed information requirement on the "origin" of spare parts is unclear. It could be understood as the geographic origin of the producer or importer. Yet, it poorly applies to the market realities of cross-border and interdependent value chains with a variety of involved stakeholders. For example, a spare headlight marketed by one vehicle manufacturer in Czechia may actually have been produced by a different producer in Germany and include capacitors made by a third party in Japan. A replacement mirror marketed by an independent aftermarket operator may have been produced by, or contain components of, a different subcontractor.

The proposed information requirement is also redundant. Several existing pieces of legislation at EU and Member State level already ensure meaningful information requirements, in particular on trade practices,[7] advertisement,[8] and product safety[9]. Therefore, it would be against the principles of Better Regulation if legislation on designs were to duplicate the obligation not to mislead, or complexify the designations of origin with unclear wording.

The proposed text leaves unclear what information should be applied to the product or its packaging. Hence, it would seem appropriate to apply existing rules on product labelling and consumer protection. Product safety law already requires "*an indication, by means of the product or its packaging, of the identity and details of the producer*".[10] Hence, spare parts for motor vehicles already reveal the manufacturer's identity in appropriate form.

[7] Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

[8] Directive 2006/114/EC of 12 December 2006 concerning misleading and comparative advertising.

[9] Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety.

[10] Art. 5(1) Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, Official Journal L 011 , 15/01/2002 P. 0004 – 0017. Art. 2(e) of the same Directive defines the term « producer »..

Besides, one of the Commission's objectives as regards competition policy for the motor vehicle sector is to protect access by spare parts manufacturers to the motor vehicle aftermarkets, thereby ensuring that competing brands of spare parts continue to be available to both independent and authorised repairers, as well as to parts wholesalers. As the Commission has highlighted, "*(t)he availability of such parts brings considerable benefits to consumers, especially since there are often large differences in price between parts sold or resold by a vehicle manufacturer and alternative parts*."[11] The proposed design legislation should support this goal and highlight the benefits that the availability of such parts brings.

Against this backdrop, the new information requirement introduced in Art. 19(2) of the proposed Design Directive and in Art. 20a(2) of the proposed EU Design Regulation is **not only unclear but redundant**. **In line with the principles of Better Regulation, it should be deleted from the legislative text.**

Our recommendation:
Art. 19(2) – Design Directive
Art. 20a(2) – EU Design Regulation

[Delete]

4. Ten more years of unfair monopoly for existing designs in the transition period
➔ *Art. 19(3) of the Design Directive proposal*

Only a full Repair Clause covering both new and existing designs from day 1 will truly bring fair competition and freedom of choice for consumers, by allowing them to purchase spare parts of their choice for all vehicles on the road.

On the contrary, a partial Repair Clause limited to new designs only will still constrain millions of consumers to purchase original spare parts for their current vehicles, often at higher prices and without any competing alternative, thus benefitting only new vehicle buyers and unfairly penalizing the owners of more than 300 million motor vehicles currently on the roads.

ECAR regrets that the Commission's proposal imposes a ten-year transition period to the Member States which do not have a national Repair Clause yet, as this will prevent the EU-wide Repair Clause to have any effect on existing designs for ten more years:

- Independent spare part providers will still be kept out of a captive market for spare parts for the 300 million currently existing vehicles and products for ten more years;
- Design right holders will continue to enjoy a monopolistic situation in these countries for ten more years;
- Consumers having to repair their goods will continue to pay higher prices than others for ten more years;
- Consumers, spare part manufacturers and repairers will continue to suffer legal uncertainty regarding the type of product that can be repaired alternatively with independent or original equipment for ten more years;
- The EU Single Market will remain fragmented for ten more years.

The liberalisation of the spare parts market, the creation of legal unity and the harmonization of the internal market are public interests which justify regulations governing the content and limits of ownership. If the spare parts market is to be liberalised, it is dysfunctional as long as existing design rights continue to apply.

[11] Commission Notice, Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles, para. 18.

ECAR strongly recommends the adoption of **a much shorter and more flexible transition period, leaving the choice to Member States whether they want to apply the Repair Clause to all designs from day 1.** To this end, we recommend the following changes:

Our recommendation:
Art. 19(3) – Design Directive

"*Where at the time of adoption of this Directive the national law of a Member State provides protection for designs within the meaning of paragraph 1, the Member State* ~~***shall***~~ ***may****, by way of derogation from paragraph 1, continue* ***at most*** *until …[OP please insert the date =* ~~***ten***~~ ***three*** *years from the date of entry into force of this Directive] to provide that protection for designs for which registration has been applied before the entry into force of this Directive*."