


Consultation on the proposal for a directive of the European Parliament and of the Council amending Directive 98/71/EC on the legal protection of designs

Introduction

The [formal consultation document](#) was launched on 25 February 2005. Responses were requested by 31 May 2005. The consultation document was sent to a number of individuals and to the organisations listed in [Annex A](#). The consultation document was also available on this website, and via the [directgov website](#) . During the consultation period the website received 1380 unique visitors.

Overview

The European Commission published a proposal on 14 September 2004 to amend Directive 98/71/EC on the legal protection of designs so as to encourage competition in the spare parts market.

The key proposals are:

- To deny registered designs protection to components used to repair a "complex product".
- To ensure that consumers are informed about the origin of spare parts.

This means the Commission proposes a liberalisation of the aftermarket in visible spare parts across the European Union by inserting a repair clause into the Directive. This repair clause states that there will be no design protection in a design which is a component part of a "complex product" (products which are composed of multiple components) and is used to repair that product so as to restore its original appearance. This would mean no registered design protection would be available for spare parts which must match the product as a whole.

There should be no change in the United Kingdom, which currently has a liberal regime. In the UK, the right in a registered design for a component part of a product is not infringed if such a part is used in a repair of the original product.

The industry most affected is the car industry, where visible parts such as body panels, bumpers, windscreens, and light clusters often need replacement. However, the directive as currently drafted would apply to all industry sectors which relate to repairable "complex products" such as household devices and electronic goods.

Responses

Written Responses

Written responses from TMPDF and CIPA as the relevant professional bodies, the Confederation of British Industry, Dyson, Unipart, Pilkington, Jensen & Son, the Ford Motor Company, the Automotive Distribution Federation, the Ministry of Defence, RAC Auto Windscreens, E-car, the Motor Conference, Flexible Lamps Ltd and the Intellectual Property Sub-Committee of the Law Society of Scotland were received.

The responses are included in Annex B.

Further consultation

The detail of the Directive was also discussed in a group of interested and affected parties. The group included: the Association of British Insurers, the Automotive Distribution Federation, Dyson, the European Campaign for the Freedom of the Automotive Parts and Repair Market, Nokia, Pilkington, the Society of Motor Manufacturers and Traders, Unipart and Which?

No clear agreement was reached in the group on the principle of liberalisation or protection in the aftermarket. However, there was broadly agreement that greater clarity is required so as to reduce uncertainty for all. Additionally, it was more or less accepted that the situation within the UK would not be easily changed. This is partly due to the difficulty is introducing protection and partly due to the trend towards liberalisation sought by the Commission. There was also disagreement with respect to the need for harmonisation. This is due to those who wish to avoid further liberalisation not wanting to lose the protection they still enjoy in at least some parts of Europe and those who favour liberalisation not wanting harmonisation in a direction which would prevent them from operating at all.

On the issue of informing customer's about parts, although it is not clear how it should or could be done, it seems that on the whole it is considered to be a good thing and indeed in some areas it already happens in a way. Again the lack of clarity in the wording of this section was criticised.

Conclusion

It is clear that there are arguments on both sides of the debate. The consultation responses produced a number of estimates of potential impacts on the automobile industry and other industries, and made clear that an appropriate balance that meets the needs of all industries is required. That said the responses demonstrate the complex nature of the market, and emphasise that there is no clear causal link between providing design protection in this market and a properly functioning and efficient market. Nonetheless, the consultation responses suggest that the option presented in the consultation, to maintain the status quo in protection of spare parts through designs attracts a fair degree of support.

The responses also raised a number of concerns about the detailed drafting of the directive, in particular what the meaning of the terms "repair," "for the purpose of repair of [a] complex product to restore its original appearance," and "complex product" should be.

Next Steps

The Directive is currently being considered at first reading by the European Parliament. Discussions in Council working group are likely to continue. The results of this consultation will be used to help inform the government in future discussions of the proposed directive.

Annex A - Copies of this consultation document have been sent the following organisations. Copies have also been sent to a number of individuals.

Organisation	Organisation
ABPI ACID ADF Agricultural Engineers Association Allvoice Anti-Counterfeiting Group Arnander Irvine & Zietman Ashurst Morris Crisp Association of British Insurers AURIL Babcock International Ltd Baker & McKenzie Bar Council Belron International Limited Beresford & Co Berwin Leighton Paisner Biotechnology and BSRC Boulton Wade & Tennant BPP Leeds IP Group British Generics Manufacturers Association Ltd British Library British Pharmaceutical Group Ltd British Poultry & Meat Federation British Retail Consortium Cardiff Law School Chartered Society of Designers Chemical Industries Association CIMMYT CIPA Clifford Chance Competition Law Association Confederation of British Industry Consumers' Association Ltd Crafts Council Cranfield University Crop Protection Association Cruickshank & Fairweather Davenport Lyons Deloitte & Touche DTI Dyson EC Laws Committee - LES Britain & Ireland ECAR	Harbottle & Lewis Howrey Simon Arnold & White Incorporated Society of British Advertisers International Chambers of Commerce Inventorslink Inc IPLA ITMA Lancaster University Linklaters & Paines Lodestar Translations Lovells Magister Ltd Marketforce Communications Mewburn Ellis Microsoft Ltd Mishcon de Reya MoD Motorcycle Action Group Nokia Norton Rose Office of Government Commerce Olswang Pfizer Limited Pilkington Technology Centre PJB Publications Practical Law Company Preventative Medicines Tech Inc. RMIF RWS Group SCRIPT SIBLE University of Sheffield Simmons & Simmons SMMT Society of Numismatic Artists & Designers State Patent Bureau of the Republic of Lithuania Taylor & Meyer The British Brands Group The British Motorcyclists Foundation The Law Society The Law Society of Scotland TMPDF Unipart

Eureka Manufacturing Co. Ltd	University of Alicante
Europe Analytica	University of Cambridge
Federation of the Electronics Industry	University of London Queen Mary & Westfield College
FICPI	University of Oxford
Frank B Dehn	Urquhart-Dykes & Lord
Freshfields	Visteon Global Technologies
Gallfent & Co	Wedlake Bell
Gill Jennings & Every	

Annex B - Text of non-confidential responses

Unipart

The UK should seek to ensure a harmonised spare parts market throughout Europe, which is fully liberalised.

Pilkington

Question 1

Should the UK seek:

- b. to ensure a harmonised spare parts market which is liberalised

Question 2

Cost and benefit of this proposal

a. To the business

Pilkington's global business in the Automotive Glass sector is:

Original Equipment (OE) - €1,200 M

Aftermarket (AGR) - €435 M

Pilkington's aftermarket products can reach the end user by one of two main routes; the vehicle manufacturers own network or independent AGR distribution chains, including Pilkington's own, supplying the retail fitter. The relative importance of these routes varies between markets, from 100% independent in the USA to around 50% in Europe. The adoption of the proposal would bring Europe into line with the USA.

The business will benefit from freedom to distribute replacement auto glazing throughout the EU without obstruction from design rights (allowing potentially larger volumes and hence lower costs throughout Europe)

b. The sector

The auto glazing production and independent aftermarket distribution sectors should benefit similarly.

c. The UK economy as a whole

No significant change

d. The consumer

The European consumer will benefit from freedom of choice and the resulting competition, the effect being most apparent in countries which (unlike the UK) do not yet have a repair clause or similar liberalisation of the aftermarket.

Question 3

Other factors affecting competition.

Current European legislative activity has been aimed at encouraging competition, including competition in the aftermarket e.g. Vehicle Distributors Block Exemption.

Question 4

Other sectors affected by the proposal

The automotive sector is the primary industrial sector affected. A motor vehicle is a high value investment and without maintenance and repair is not usable.

It is understood that the mobile phone sector (Nokia) and the vacuum cleaner sector (Dyson) have some concerns about the wording of the proposed directive, but these can be overcome by clarification of that wording.

Question 5

The proposed wording for Article 14 (1)

The proposed wording is acceptable to the automotive glass industry, but it is recognised that some small changes may be acceptable – see the response to question 4 above.

Question 6

Notification of the consumer as to the origin of spare parts (see proposed Article 14(2))

Yes, Pilkington supports the wording in the proposal. To avoid any confusion and discourage counterfeiting, parts should be marked with the producer's trademark and the customer notified of the origin.

Question 7

The partial RIA

The partial RIA presents a good analysis of the current position in relation to the Commission proposal. The automotive glass industry fully supports the "Explanatory Memorandum" contained in the Commission proposal COM (2004) 582 final.

Question 8

Other Comments

European vehicle manufacturers do not produce automotive glazings. They are produced by independent auto glass producers, such as Pilkington, who supply auto glazing to the motor manufacturers for OE use and for the motor manufacturers own aftermarket distribution chain and to the independent aftermarket distribution chain.

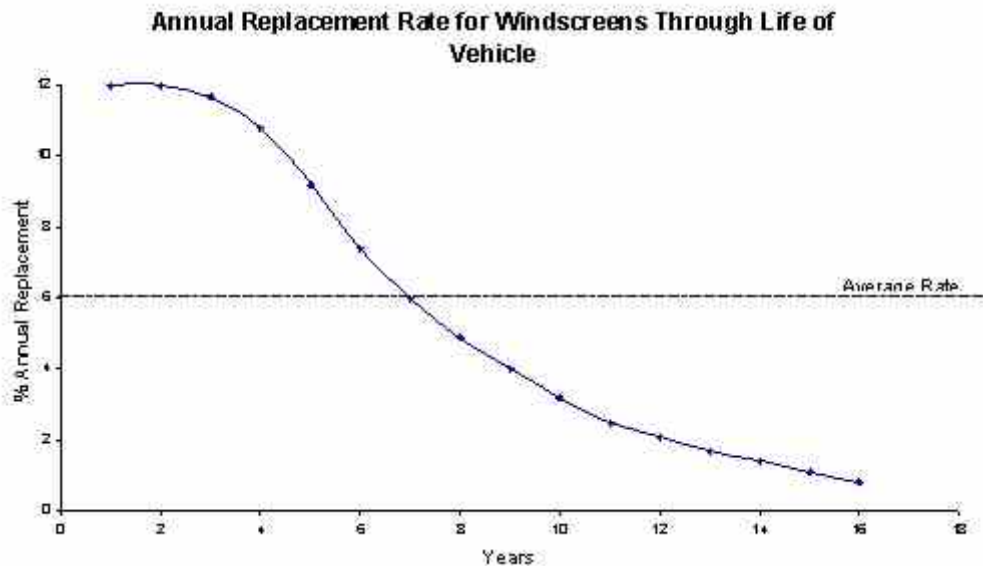
The auto glass producers such as Pilkington offer full systems capability to motor manufacturers, from initial design to final product, and contribute to the design of new vehicle glazing, especially windshields and backlights. The growing complexity of glazing has only been achieved as a result of major expenditure by auto glass producers on research and process development. The glazing manufacturer must be able to control closely the pattern of temperature in the glass throughout the shaping process to achieve overall shape control, good optical quality and stress patterns. Computer simulation techniques have been developed to provide a full design service to the car manufacturer. These techniques are used to assess manufacturing feasibility in terms of shape control and optical quality.

Automotive glazing parts can and do break from the moment a vehicle goes into service as a result of an accident, stone damage or vandalism. When a glazing breaks, it must be replaced quickly for safety, security and to restore consumer mobility.

Vehicle makers control a large share of the replacement market through their franchised dealers (especially in territories where the law governing supply of replacement parts has not been liberalised), but the need for high speed mobile replacement services has encourage the development of an independent aftermarket in vehicle glazing.

It has been that suggested by ACEA (the motor manufacturer's trade association) that vehicle manufacturers should be able to legally protect the design of their spare parts for an initial period of time and 10years has been suggested. Pilkington would strongly resist such a proposal, even if a much shorter period were suggested. The market for replacement glazing is high whenever a new model is introduced, partly because of the need to fill the supply chains (so that roadside repair is immediately practical), and partly because the replacement rate for windshields is high at the beginning of a new models life.

The graph below shows the annual UK replacement rate (%/ per annum) for a typical laminated windscreen fitted to a high volume model production car over the lifetime of the model. The average replacement rate over the lifetime of the model range is about 6%, but the demand is much higher in the first few years. This relates to vehicle ownership, miles driven and speed. A high demand exists from the moment the car goes into service. Clearly any period of monopoly protection would not be acceptable to the automotive glass industry.



Trade Marks Patents and Designs Federation

TMPDF represents the views of UK industry in matters concerning intellectual property. Its members include many of the major innovative UK companies; a list of members is attached.

As to the broad principle of whether the Designs Directive should be amended to introduce a harmonised repair clause this Federation takes no position. Amongst its membership are representatives of both automotive vehicle manufacturers and automotive equipment manufacturers and it has never taken a position on the desirability of a repair clause within the Designs Directive.

However, there is nothing sector-specific in the proposal and it will affect our members in many other sectors. Therefore, in the interests of all our members, we wish to comment on the proposal as presented. In brief, in our view, considerably more precision is needed in the way it is worded.

Sectors affected by the proposal

In our view the Commission has been unduly dismissive of the effects of the proposal outside the automotive sector. The consultation described in Section 6 of the Explanatory Memorandum, though extensive, appears to have been directed exclusively at the automotive sector. There has been no proper consideration of the effects the proposal would have in other sectors. In its Frequently Asked Questions¹ the Commission is reduced to commenting:

"Other sectors for which there is a repair sector are for instance, domestic electrical appliances, sanitary appliances, motorbikes and watches. However the removal of design protection might have only very minor impact on these."

While it is no doubt true that the total economic value to which the proposal would apply is greatest in the automotive sector, replacement parts can be an important part of the total economic equation for other industries. Examples of products from our

members that would (or might, depending on the precise meaning of the proposal) be affected include

- Domestic equipment such as vacuum cleaners needing replacement parts
- Consumer durables such electric tooth-brushes where the brush is worn out and needs replacing
- Replacement face-plates for mobile telephones.

Proposals that would affect products such as those should not be adopted without a proper consideration of the effect the proposal would have on the sectors concerned. No such consideration has taken place.

In many ways the most straightforward approach would be simply to introduce a sector-specific solution that applies to the automotive sector alone. However, we do not normally favour sector specific solutions and we can understand why the Commission should not want to follow that course. On the other hand, given that the proposal is not tied to the automotive sector, the Commission has a clear responsibility to limit its effect to those specific cases that possess the underlying characteristic that leads to the need (as seen by the Commission) for action in that sector. As we shall discuss in the next section, at present the proposal does not do that. Instead it contains an operative clause that, on its natural reading, appears to extend far beyond the class of design the Commission explains as needing the repair clause.

When are parts covered by the proposal?

There is a real difficulty in identifying when a spare part is intended to be covered by the proposal. The exception provided under Article 1 is for component parts used "for the purpose of the repair of [a] complex product so as to restore its original appearance".

This phrase could be read as meaning that the primary purpose of the repair is specifically to restore the appearance of the complex product. But the normal purpose of any repair is to restore the product to a functioning whole. Repairs for purely aesthetic reasons are rare in the types of product subject to the Designs Directive. It might apply to the replacement of a dented but functioning body panel of a car, but would not apply to many of the instances cited by the Commission as covered by the proposal. We therefore think it is unlikely that the Commission can have intended that interpretation.

If that interpretation is not correct, the natural reading of the requirement is that it exempts any part that is used for the purpose of repair if the result is that the original appearance of the complex product is restored. Such a reading would mean that any component that was identical in appearance to the original could ipso facto always be used for repair purposes. If a third party can always manufacture a spare provided it looks identical to the original we have clearly moved far beyond the "must match" case which, according to the Commission, is the only subject matter of the proposal². This is not "must match" but "does match". The element of necessity, which the Commission stresses is an essential part of "must match"³, is entirely omitted. The consequence is that, for example, it would be possible to provide a replacement head

for an electric toothbrush that looks identical to the original (assuming for the moment that replacing a worn-out head is a indeed a repair). Yet there is no necessity at all for the replacement to look identical. Many shapes of head could be designed that would work perfectly satisfactorily and the consumer is in no way deprived of choice if only the original manufacturer can produce heads of the original shape. Indeed, a ready supply of heads from other manufacturers of alternative shape could give the consumer useful choice: they might fit his or her mouth better.

To give another example, if a watch is sold with a strap and a distinctive buckle and the strap breaks, the need is to be able to obtain a strap with a buckle that fastens and there is no "must match" involved. It should not be possible for a third party to copy the buckle under the guise of restoring the original appearance of the whole watch.

We think it is essential that the proposal should be clarified to make it clear that it does not exempt spare parts simply because they look identical to the original. What we think the Commission must have in mind is that the component is used for repair in order to restore the complex product to a functioning whole, but is subject to a constraint that the original appearance must also be preserved. It is the latter factor that underlies that rationale of the proposal, namely that (in the Commission's view) in those circumstances design protection would be disproportionate. It needs to be captured in the proposal. A possible amendment might be based on the definition of "must match" spare parts to be found near the start of the FAQ - "spare parts which must, in order to be of use, exactly match in design the part they are replacing"

What is a "repair"?

The meaning of "repair" is not at all clear. The proposal is directed to the case where an article has been damaged in some way that affects its appearance and it is an essential feature of the repair that it should restore the original appearance. It should be clearly limited to such cases and it should be clarified that replacements for consumables and other worn-out parts are not subject to the proposal.

Similarly it should be clarified that design protection would not be removed when the component part is offered for sale primarily as a replacement item where the replacement is not needed but is at the user's choice - decorative face plates for a mobile telephone would be an example. It needs to be made clear that where the predominant intended use is not for repair then protection is not lost because there might be a subsidiary use for the purpose of replacement of a damaged part.

Status of the proposal as an exception

It is very clear from the explanatory material that the proposal is intended as an exception to protection that would apply in the secondary market (aftermarket) but leave protection available for component parts meeting the usual standards and enforceable in the primary market of the original manufacture of the complex product. However, the wording of the proposed new Article would be more appropriate to a provision that excluded protection altogether, especially the lead-in words "Protection as a design shall not exist for.." The provision could well be interpreted in different member states or their courts as excluding protection for any component that is replaceable. We can see no reason for the proposal not to use the conventional type of language used for exceptions to intellectual property rights. The parent directive, in Article 13, uses this formulation for its exceptions:

"The rights conferred by a design right upon registration shall not be exercised in

respect of ..." and we can see no reason to use any different formulation for this proposal. Indeed, the failure to use this language suggests that something other than an exception is intended and adds to the uncertainty about the intention of the provision.

At the same time it would be helpful to introduce a recital into the parent directive that confirms that the exception of the new Article 14.1 is without prejudice to the ability to obtain protection for the design in the first place.

Relation to the Designs Regulation

We realise that the current formulation reflects the provision adopted in Article 110.1 of the Designs Regulation. But we do not think that instrument should be regarded as the last word on the topic. Its provision is better regarded as a work in progress and it is explicitly revisable following adoption of a proposal to harmonise under the Designs Directive. While the policy underlying this proposal maybe the same as that which governed the Designs Regulation, nonetheless if the language of that instrument can be improved it should be, and that improvement carried back into the Designs Regulation.

¹europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/04/215&format=HTML&aged=0&language=EN&guiLanguage=en

²E.g. Explanatory Memorandum, page 3.

³E.g. "'must match' design, which means that replacing parts must be identical to the originals" (Explanatory Memorandum, page 5); "a 'must match' spare part by definition cannot be designed any other way" (FAQ, page 1).

David Moore – Patent Attourney – Jensen and Son

Fundamentally, it would appear that the debate about protection for car parts in particular is based on the situation in the industry several decades ago rather than the current situation and with a view to the future. When this issue first arose in the cases of British Leyland and Ford's designs, most vehicle manufacturers were largely vertically integrated, whereas in the last decade increasingly the manufacturers have disposed of large parts of operations including the foundries that produce body panels. It should also be noted that the British Leyland case was about copyright and not registered design rights, where the requirements for protection are quite different. This results in the situation being much more complex than many of the studies suggest. This is probably clearest in the case of automotive lighting, which the partial RIA seems to imply is a sector not categorised by rapid technological change. This is not the case as a look at the patent statistics will show. In the case of adaptive headlights, which are now being introduced, the technology if sufficiently advanced that there will be no independent producers other than the big 3 headlight manufacturers due to capital investment requirements and patent protection.

The effects of design protection on the cost of repairs are also in my personal experience of living in Germany and Italy exaggerated. The cost of having a part replaced in Italy is generally higher than in Germany despite the absence of design protection for parts (and an ability to enforce) in Italy. This suggests that other factors are more important. You also cannot ignore the fact that designs protect the appearance of a product, whereas with car parts there will often be patent protection,

e.g. in the fastenings, production methods, adaptation for crash/pedestrian safety. In the past, this would not have been the case as the products were much more simple.

The wording of the proposed directive is also problematic and appears to suffer from unforeseen consequences.

As an example of the problems of looking backwards and not forwards, you should look at the examples of the GM Saturn and the smart vehicles from DaimlerChrysler, which have interchangeable plastic body panels. There is in fact a market of people changing these body panels and a small number of independent designers in this field. At the moment, most vehicles do not use this technology but it is very new. If you take an independently designed car body panel, or perhaps, more familiarly say a car body kit, or an alloy wheel, I think that most people would agree that this should qualify for design protection if it is novel. What happens when a purchaser needs to repair a broken part? Under the proposed wording, you could argue that if the part were originally purchased at say Halfords, it would not be for restoring the original appearance as supplied by the vehicle manufacturer but this is certainly not clear. If the design, being otherwise novel etc., is not protected then surely the directive would fall foul of TRIPS. What happens if for example the designer licences the same design to a manufacturer for a special edition? The design would then clearly not be protected, even though the same design if only sold through Halfords would be protected.

This results in the customer of the design being determinative of whether it qualifies for protection or not. This is obviously an absurd result. This argument applies to other car parts where there is an independent market such as wheels, steering wheels, exhausts etc.

The use of the phrase "complex product" is also problematic. A house is a complex product and has parts that are regularly replaced such as doors and windows. Since replacement doors and windows are always for the purpose of repair, it would appear that doors and windows will lose design protection if the Directive is implemented. There will no doubt be other examples given to you.

In adopting this language, it appears that in dealing with the problems of the old U.K. position, which effectively meant that a design applied for by a vehicle manufacturer would be invalid, whereas the same design applied for by a supplier would be valid as it would then at least potentially have an independent commercial existence, a new problem is being created without addressing the fundamental issues of possibly unjust profits being created by motor vehicle manufacturers as is seen by the known facts of spare parts being cheaper in Germany than in Italy. This should be addressed using competition law not by artificial distortions to design law.

The Automotive Distribution Federation

Consultation questions

1. It is the view of the ADF that the UK should seek to ensure a harmonised spare parts market that is liberalised. i.e. Maintain the current UK practice (option 'b')

2. Can you put a figure on the cost or benefit of this proposal:

- a. **to your business?** -Not applicable
- b. **to your sector?** - Option 'b' would maintain the current UK market. Estimates of the value of the market vary between £50 million and £88 million for independently supplied replacement panels and £60 million and 85 million for independently supplied lighting units. Please note that the impreciseness of these figures is due to the supply into the market by Vehicle Assemblers (VAs) of components purchased by them from companies also supplying the independent sector direct. This crossover of supply makes the calculation of statistics difficult and also highlights the bogus nature of VA's arguments regarding quality and safety.
- c. **to the UK economy as a whole?** -Adoption of option 'b' would complete the single market for these products and would open opportunities for UK producers and other UK suppliers to supply newly liberalized markets in other EU states. With some 95% of the total EU market of €7.5 billion for panels and 65% of the total EU market of €1.4 billion for lighting units supplied via the VAs, the scope for expansion of the independent market is immense. UK companies would be well-positioned to take advantage of that opportunity, with knock-on benefits for manufacturing, exports and re-exports, and for employment.
- d. **to UK consumers?** -UK consumers would continue to enjoy the benefits of a competitive supply of products for use by vehicle body repair workshops. It has been shown that the existence of a competitive supply for body repair parts (panels and lighting) restricts the opportunity for VAs to apply monopoly-pricing policies to the market. In other EU states, such as France (where the 'repair clause' does not apply) prices for such repair parts are significantly higher than in the UK. The free supply situation provides both lower repairs costs and improved access to the parts required for repair, thus lowering the cost of repair and reducing the cost of provision of courtesy cars – reflected in vehicle insurance premiums.

3. What other factors affect competition in the spare parts market and how great is their effect compared to design protection? (e.g. warranties, franchises, insurance companies.) - The market for automotive spare parts is currently adjusting to the recent changes in EU 'Block Exemption' Regulations (1400/2002). These changes, which principally concerned the distribution arrangements for motor vehicles, also affected the distribution of replacement parts and the access to technical information required for the efficient and safe repair of those vehicles. As such the revisions to BER acknowledged the rights of the consumer (motorist or vehicle operator) to access competitive sources for servicing, repair and parts supply for their vehicles. It would seem illogical for any new 'designs' regulations to run contrary to those consumer rights.

It is also necessary to note that, in their application of the new BER, Vehicle Assemblers and their dealers are employing various strategies to deny the rights

granted to the consumer. New 'warranty' formats (which are, in fact, insurance policies and therefore outside the remit of BER), 'personal mobility plans' (which similarly aim to circumvent BER) and even outright denial of the existence of the revisions to BER (see recent article in 'What Car?' magazine and ADF reports to the Office of Fair Trading (copies available)), show that the VAs are determined to restrict the opportunity for the traders in the independent automotive aftermarket to offer a competitive service to the consumer.

4. Which industrial sectors or products, other than the automotive sector, would or could be affected by this proposal?

-It has been acknowledged in the various discussions surrounding this topic that the automotive sector is the primary market affected by this proposal from the Commission. The ADF is aware of an ongoing dispute between a manufacturer of vacuum cleaners and a supplier of replacement parts for those units. It would appear that a very similar situation exists in this instance: a complex product requires repair and the parts used for repair must be the same shape etc., in order to effect the repair. The cleaner company claims that consumers are being misled by the alternative supply of repair parts. Our brief examination of the market suggests that the cleaner company concerned, unlike its competitor cleaner manufacturers, who supply parts through both designated and independent parts suppliers, attempts to retain all sales of repair parts direct from its own operations. In the ADF's view this restriction of supply is designed to maintain high prices for replacement parts and actually encourages 'copying' of those parts. We also understand that the cleaner company does not use its trademark on its own replacement parts, thereby making it difficult for the consumer to know whether or not a 'genuine' part is being purchased. In the ADF's view this problem could easily be solved by marking product appropriately (see question 6).

In the situation advised by a manufacturer of mobile telephones who is experiencing the existence of supplies of alternative casings for their product, it would appear that this supply situation is more a matter of fashion than one of repair. Therefore it would appear that the Commission's proposals would be irrelevant in this case, as it is a normal problem of intellectual property rights between primary products – the original telephone company's design of the casing and the alternative supplier's casing.

5. Do you have any comments on the particular wording of the proposed Article 14(1)?

-The ADF is content with the wording of this section.

6. Do you agree that there should be a legal requirement for consumers to be informed as to the origin of spare parts (see proposed Article 14 (2))? Do you have any comments on the proposed text? - Manufacturers of components to the independent parts market can suffer from misrepresentation of their products by others i.e. Counterfeiting. For that reason those manufacturers are keen to mark their products with their trademarks and advise the consumer of the origin of those parts. This topic also forms part of the revisions to BER, and was warmly welcomed by the independent aftermarket for automotive components. Thus the ADF concurs with this proposal.

7. Do you have any comments on the Partial RIA? -The ADF finds the Partial RIA satisfactory.

8. Do you have any other comments? -In the view of the ADF and its members – manufacturers, importers and independent wholesalers of vehicle components, there are compelling reasons for supporting the Commission’s proposals for a UK-type 'Repairs Clause' in the EU Designs Directive.

A 'Repairs Clause' gives Vehicle Assemblers (VAs) full protection over the design of new vehicles – which is, of course, their primary business. However it also protects the consumer from the creation of a monopoly in the supply of items required for the repair of vehicles. It must be remembered that, for the consumer, the purchase of a motor vehicle is a major financial decision, which impacts over a number of years. To remove the consumer’s freedom to decide on the manner of repairing their asset could be ruinous for the consumer.

The inclusion of a 'Repairs Clause' does not impact upon the safety or quality of the vehicle being repaired. Safety and quality are often cited by VAs as reasons why a 'Repairs Clause' should not exist. However designs protection is based upon appearance, not on any structural quality. It is for this reason that, in the EU, new vehicles and their parts are subject to a tough regulatory framework: 'type approval'. Quality in a product is a subjective issue that reflects consumer preferences and market forces.

There are sound economic reasons for the 'Repairs Clause'. Firstly, monopolies are bad for a market. A monopoly on crash repair parts would potentially drive thousands of aftermarket SMEs across Europe out of business. It is not a case of them just losing the opportunity to supply crash repair parts, but continuing to supply other items. Their customers, faced with buying crash repair parts from the VAs and their dealers, would tend to operate a 'one-stop-shop' policy and buy all their other requirements from the VAs and their dealers. Thus the whole supply proposition of the independent sector would be undermined and, ultimately, the consumer would suffer an even greater loss.

Secondly; EU and other countries' Vehicle Assemblers together already import about 40% of their parts from non-EU countries (in comparison to the independent aftermarket, which imports less than 1%). The lack of a 'Repairs Clause' would encourage the VAs to shift purchases, and therefore, jobs overseas. The 'Repairs Clause' would, on the other hand, enable EU (including UK) producers, most of whom are too small to engage in offshore supply, to compete against the VAs imports.

Motor Conference

This response is made on behalf of Motor Conference. Motor Conference represents all members of the Association of British Insurers and the syndicates of the Lloyd's Market Association transacting motor insurance business. The membership represents over 98% of motor insurance business transacted in the UK, amounting to over £13 billion per annum in terms of premium income.

Question 1

Should the UK seek:

b. to ensure a harmonised spare parts market which is liberalised

Question 2

Can you put a figure on the cost or benefit of this proposal:

a. To your business?

See answer to Q.7.

b. To your sector?

It is not possible to put a figure on the cost or benefit of this proposal, not least because the UK already enjoys a liberal regime. Overall, however, we believe that the benefits of a European-wide liberal regime are well argued in the latest brochure issued by the European Campaign for the Freedom of the Automotive Parts and Repair Market (ECAR).

c. to the UK economy as a whole?

See answer to Q2b.

d. To UK consumers?

See answer to Q2b.

Question 3

What other factors affect competition in the spare parts market and how great is their effect compared to design protection? (e.g. warranties, franchises, insurance companies.)

Question 4

Which industrial sectors or products, other than the automotive sector, would or could be affected by this proposal?

Insurers represent one of the largest buyers of after market spare parts. The ability to purchase competitively priced parts from a number of sources helps to stabilise the cost of vehicle damage repairs to the benefit of the insuring public. The case for EU-wide liberalisation is further supported by the fact that, by their very nature, vehicles from one country find themselves being damaged in another, with potentially differing approaches to the purchasing of the necessary spare parts dependent upon where the vehicle has to be repaired.

Question 5

Do you have any comments on the particular wording of the proposed Article 14 (1)? We fully support the wording of the proposed Article 14(1).

Question 6

Do you agree that there should be a legal requirement for consumers to be informed as to the origin of spare parts (see proposed Article 14 (2))? Do you have any comments on the proposed

Yes

Comments: We have no comments on the proposed text. We assume that any UK implementing legislation will be sufficiently flexible as to the precise means by which consumers will be notified as to the origin of the spare parts.

Question 7

Do you have any comments on the Partial RIA? As indicated in our response to Q1, our preference is for a liberal regime throughout the whole of the European Community via the repairs clause. A fallback position would be status quo given the additional cost implications to which the partial RIA rightly refers.

CIPA Designs and Copyright Committee

A first and general point we wish to make is that all the background research and discussion appears to be solely concerned with automotive spare parts, whereas the proposed change is not limited to automotive spare parts. We suggest that thought be given to either carrying out an impact assessment covering other sectors which might be affected, or limiting the provision just to automotive spare parts.

Commenting now on the questions set out in the Consultation and using its question numberings:

Question 1

- a. We believe that harmonisation is in principle a good thing. It is, however, imperative that harmonisation lead to clarification of the position. Thus, for example, it should be made clear what comprises a “complex product”, and what is meant by “repair” and “so as to restore its original appearance”. It should also be made clear whether the Directive covers the mechanical repair market, as well as the cosmetic repair market.
- b. We feel this is a political/competition issue on which it is inappropriate for us to comment.
- c. We feel this is a political/competition issue on which it is inappropriate for us to comment.
- d. We believe that any compulsory licensing system will have to be run nationally, and there would be difficulties ensuring uniformity of interpretation and implementation. Also, the widely differing manufacturing costs across the EU would need to be taken into account if there was not to be potential distortion of the market.
- e. We feel this is a political/competition issue on which it is inappropriate for us to comment.

Questions 2 and 3

We are unable to comment meaningfully on these questions.

Question 4

As mentioned above, it appears that the Commission’s Impact Assessment has focused on automotive spare parts. This appears to be a flaw in the methodology of the Impact Assessment. We note that the stakeholders who were consulted for the Extended Impact Assessment were all concerned with automotive spare parts.

The other sectors or products which might be involved will depend on exactly what "complex product" means. The following sectors or products all involve the supply of relatively expensive parts after the sale of the original product and are therefore examples of industry sectors or products other than automotive spare parts which might be affected: (a) office equipment and information technology equipment; (b) razors and razor blades; and (c), face-plates for mobile telephones. Please note that this is not intended to be an exhaustive list of other sectors or products which may be affected – it simply aims to make the point that the automotive industry is not the only industry in which there is a significant secondary market for parts and fittings.

Question 5

As mentioned above, we believe that it is important for the meaning of the Article to be clear. It is submitted that it is not entirely clear what is meant by a "complex product", "repair", nor "so as to restore its original appearance".

As discussed above in my comments on Question 4, the definition of "complex product" is a general one which clearly covers all sorts of products other than automotive spare parts. The difficulty in determining the scope of what is meant by "complex product" are, it is submitted, not helped by the fact that the definition of "complex product" of Section 1(3) of the UK registered Designs Act 1949 as amended by the Registered Design Regulation 2001 differs from the definition of Article 1(c) of Directive 98/71/EC. The UK definition would cover a two-part product whereas the Directive definition would probably not.

The following example from a member of the CIPA Designs Committee may help illustrate some of the possible problems surrounding "repair" and "restore original appearance":

Are replacement face-plates for personalizing mobile phones covered by the proposed wording? These are available in many colours, and sometimes with themed artwork, for the common makes of phone. Their shape, however is invariably exactly the same as the original.

Of course, these replacement body parts could be (and I am sure are) used to repair phones if the original has been broken, scuffed or just plain dirty. But their main use is personalization, with the perfectly good original being discarded.

Is the fitting of such a replacement "repair"? Nothing has been broken. Furthermore, does "restoring ...original appearance" include colour as well as shape?

Question 6

This appears to the CIPA Designs and Copyright Committee to be a matter for trade mark or consumer safety law and better covered there than in designs legislation. We note that the Commission's comments on safety and health (see page 9 of Explanatory Memorandum) include a statement that "design rights, which protect the appearance and aesthetics of a product, have a neutral impact with regard to safety or pedestrian protection and would not be capable of providing safety guarantees which are available through other specific mechanisms".

Question 7

We feel it is inappropriate for us to comment on this other than to repeat the general point that legislation covering all industry sectors is being proposed based only on analysis of the automotive spare parts market.

Ford Motor company

Question 1

c. to ensure a harmonised spare parts market which provides registered design protection for a limited time.

We would like to see a harmonised spare parts market which provides design protection for 10 years.

An Analysis of the consequences of liberalisation in UK and other countries with a liberalised market suggests that keeping registered design protection would provide consumers with the best deal. See response to Question 8 for further details.

If the EC is not willing to harmonise the market in this way, then our fall back position would be to maintain the current status quo in Europe to at least prevent the detrimental effects to consumers and industry that liberalisation would bring from being introduced into those countries which currently provide design protection for the spare parts market.

We believe that providing a harmonised spare parts market which is liberalised would not bring the desired economic benefits to consumers. See response to Question 8 for further details.

A harmonised spare parts market which operates on the basis of a compulsory licensing and remuneration system would probably merely increase bureaucracy and costs by creating a secondary distribution system subject to royalty payments with no benefits to the consumer. Licensing would also be very difficult to enforce.

Question 2

Can you put a figure on the cost or benefit of this proposal:

a. To your business?

Cost to Ford due to lost revenue estimated at 60 million euros per year in UK alone

b. To your sector?

Cost to vehicle manufacturers due to lost revenue estimated at 300 million euros per year in UK alone

c. to the UK economy as a whole?

Not possible for us to put a figure to this

d. To UK consumers?

Many influencing factors including:

Possibility of invalidity of anti-corrosion warranties due to repairs effected with non-original parts;

cost of creation of a Europe wide secondary distribution channel would be passed on to consumers as a whole;

proliferation of cheap spare parts from outside EU and which may conform with the external shape but not necessarily with the structural features of the original parts could lead to safety issues

Question 3

What other factors affect competition in the spare parts market and how great is their effect compared to design protection? (e.g. warranties, franchises, insurance companies.)

Vehicle Manufacturers' anti-corrosion warranties may be invalidated by use of non-original spare parts for repair purposes.

Insurance companies rather than consumers decide which parts are used for repairs. These decisions are generally based on cost rather than quality and do not necessarily serve the consumers' interests, for example leading to possible invalidation of warranty (see above) or safety issues if the repair part does not conform with the structural features of the original part.

Question 4

Which industrial sectors or products, other than the automotive sector, would or could be affected by this proposal?

Any involved in manufacture of complex products, including domestic electrical appliances (eg vacuum cleaners, electric toothbrushes), mobile phones, watches

Question 5

Do you have any comments on the particular wording of the proposed Article 14 (1)?

Article 14(1) is wholly inappropriate and should be removed in its entirety from the proposed Directive.

Implementation of similar legislation in UK and other countries has not provided the benefits to consumers that were promised - see response to Question 8 for further details.

Question 6

Do you agree that there should be a legal requirement for consumers to be informed as to the origin of spare parts (see proposed Article 14 (2))? Do you have any comments on the proposed text? Yes

Comments:

The quality of a repair will be influenced by the ability of the repairer and the quality of the replacement parts used. Where there is a problem with the parts used, any

damage to reputation will be suffered by the vehicle manufacturer and not the parts copier, unless the source of the parts is made explicitly clear to the customer.

Since the origin of spare parts fitted can affect the residual value of vehicles, for the consumers' benefit it is essential that they are informed as to the origin of spare parts used.

To ensure transparency for the buyer of a used vehicle, this concept should also be extended to a requirement for the seller to inform prospective buyers as to the origin of any spare parts used to repair the vehicle.

Question 7

Do you have any comments on the Partial RIA?

The Partial RIA looks at the issue from a short term UK perspective. It does not take into account the experience of the UK and other countries which have liberalised the spare parts market. As a result it provides a flawed, incomplete and biased assessment of the impact of the options.

In UK, liberalisation of the spare parts market was supposed to result in a better deal for consumers with more choice and lower costs for spare parts, and lower insurance premiums. In fact, while the cost of Ford original spare parts has risen in line with RPI, insurance costs have rocketed compared with those countries which have retained design protection for spare parts. See response to Question 8 for further details.

Supporting the Commission's proposal might have minimal immediate impact on UK. However, we believe that liberalising the spare parts market throughout the EU would open the door to a much greater scale of imports from low manufacturing cost countries (primarily from S. E. Asia and S. America) which would threaten all spare parts manufacturers based in Europe. Our estimates suggest the cost to the European motor vehicle industry would amount to a loss of revenue in the range of €2bn / year and a loss of 50,000 jobs.

Question 8

Do you have any other comments?

Instead of providing benefits for consumers and industry, liberalisation in UK has resulted in increased insurance costs, lower vehicle residual values, uncertainty over validity of warranties, and created unfair competition for the vehicle manufacturers by allowing copiers onto the market.

The insurance companies' own data shows that while the prices of the vehicle manufacturers' original parts has risen in line with RPI, the cost of insurance in liberalised countries increased significantly more than in countries which retain design protection for spare parts. According to the ANIA (Association of Italian Insurers) yearbook 2002-2003, the cost of insurance increased as follows:

Liberalised countries: UK insurance costs rose by 70%, Italian costs by 97%, Spanish costs by 36% between 1996 and 2002;

Countries with design protection for spare parts: in Germany costs rose by 20% and in France costs fell by 8% during the same period.

A comprehensive survey carried out by Eurotax Glass in January 2005 demonstrates that prices of automotive spare parts are on average 7.3% higher in countries without design protection than in countries with design protection.

In the majority of situations, liberalisation does not give the consumer increased choice over which parts are used for repairs as this decision, which can have a direct effect on vehicle residual value and validity of anti-corrosion warranty, is made by the insurance companies.

The threat to the European economy in terms of lost revenue and jobs due to imports from low manufacturing cost countries should not be ignored.

Liberalisation of the spare parts market will deprive the vehicle manufacturers of a fair return on their investment in product design and will negatively impact the competitive position of the European automobile industry.

The proposed Directive contradicts the EU's own policy for protecting intellectual property rights and, according to the legal opinion of Prof. Joseph Strauss of the Max Planck Institute, it is incompatible with the WTO Agreement on Trade Related Intellectual Property Rights (TRIPS).

Flexible Lamps Ltd

Question 1

Interest Group

Question 2

To your business: Estimated at between 5 and 10% of sales turnover

To UK consumers:

With no control on performance and quality the consumer can expect longevity of the repair part to be reduced. A short term gain in cost at the expense of lifetime and resultant cost of later replacement

Question 3

Counterfeiting from Far East and Eastern Europe. Too expensive for individual companies to take legal action and the authorities are short of manpower to control

Question 4

All sectors according to the scope of the Directive

Question 5

Add the word "and quality" after "restore its original appearance"

Question 6

Do you agree?

Yes - I do agree

Question 7**Question 8**

The protectionist policies of France et al have their attraction in our field of business

Intellectual Property Sub-Committee of the Law Society of Scotland

The Intellectual Property Sub-Committee of the Law Society of Scotland, has the following comments to make:-

1. The United Kingdom should seek to ensure a harmonised spare parts market which is liberalised.
2. The Sub-Committee has no estimate on the cost or benefit of this proposal.
3. The Sub-Committee is of the view that issues such as insurance co-approval and warranties may have impact on the competition in the spare parts market.
4. The Sub-Committee has no comments to make.
5. The Sub-Committee has no comments to make on the proposed wording of Article 14(1).
6. The Sub-Committee agrees that there should be a legal requirement for consumers to be informed as to the origin of spare parts.
7. The Sub-Committee has the following comments on the partial RIA:-

The maintenance of incompatible national laws on this point is problematic. It is inconsistent to have a single market in which the same item is lawful in one part and counterfeit in another and therefore there needs to be reform and harmonisation.

8. The Sub-Committee is of the view that Article 3.3, 4.3 and 7.8 go some way towards creating a repair right.

The future of Directive 98/73/EC should not be considered in isolation from the future Regulation 6/2002/EC (the Regulation on the Community Design Registered and Unregistered) and should also not be considered in isolation from the issue of a repair of a patented product. In the Sub-Committee's view there should be a Community wide harmonised spare parts market.

Which? The UK consumers' association**Question 1.**

Should the UK seek:

b. to ensure a harmonised spare parts market which is liberalised?

While a compulsory licensing system may be seen as a compromise position it would concede the important issue of intellectual property ownership. It would also allow the holder of the IP to slow down the process of competition for spare parts. The ability to use IP systems to foreclose markets is well established, as is the clear desire of the car manufacturers to restrict competition for visible spare parts. We can see absolutely no logic in a position that does not liberalise the entire EU market on a similar basis to the spare parts market for non-visible parts. Apart from the need to ensure that consumers in currently non-liberalised markets benefit from competition there is a serious macro-economic case for ensuring that parts firms can take advantage of scale economies and transport efficiencies to the fullest extent possible.

Having a patchwork of rules makes little sense in a single market context. There is no logic to a position that allows some member states to restrict competition and deny their consumers and firms the advantages of the single market.

Question 2.

Can you put a figure on the cost or benefit of this proposal:

Unfortunately it is difficult to place specific numbers on the benefits to consumers. This is largely because the benefits to consumers are primarily reflected in the cost of repairing vehicles after accidents. It would make most sense to assess the state and level of competition in the car insurance market to get a proxy measure of the positive impact of a liberal market. From an anecdotal perspective the car insurance market is certainly not a market that has caused us any particular problems from a competition standpoint. It would appear to be one of the most competitive insurance product markets in the UK.

Question 3.

What other factors affect competition in the spare parts market and how great is their effect compared to design protection? (e.g. warranties, franchises, insurance companies.)

With all markets there are a range of factors that affect competition in the spare parts market. The complex web of warranties, franchises, insurance repair contracts and design protection combine to provide a market definition of some complexity. However, what is clear is that in the UK the market for visible spare parts has been positively affected by a more liberal regime. In many ways it has acted as a catalyst for competition in the marketplace. The benefits of lower prices for the customers of visible spare parts (repair centres and insurance companies) have in effect largely been passed on to consumers. Indeed, the complaints of the repair sector appear to focus on the fact that the insurance companies have left them too little of the market gain from liberalization.

Question 4.

Which industrial sectors or products, other than the automotive sector, would or could be affected by this proposal?

As we mentioned at the consultative meeting we would be concerned to ensure that sectors other than the car market have their concerns dealt with. However, we have yet to see any clear evidence of a problem in the UK market for any products that would warrant concern about widening the liberalization efforts to the rest of the EU. One would expect, as a matter of logic, that an absence of evidence of a problem in a

liberal market would suggest that a widening of that liberalization would present no wider or greater problem.

Question 5.

Do you have any comments on the particular wording of the proposed Article 14 (1)?

None.

Question 6.

Do you agree that there should be a legal requirement for consumers to be informed as to the origin of spare parts (see proposed Article 14 (2))? Do you have any comments on the proposed text?

Yes

We note that the existing text states:

"2. Member States shall ensure that consumers are duly informed about the origin of spare parts so that they can make an informed choice between competing spare parts."

The only suggestion we would make would concern the time at which the consumer is informed of the spare part origin. We would suggest that perhaps the wording should specify that consumers are informed before work is carried out about the options they face for replacement parts. This would make the choice more than a theoretical one.

Question 7.

Do you have any comments on the Partial RIA?

RIAs are difficult exercises to carry out at the best of times. The only gap in the analysis would appear to be of the cost of car insurance and the mechanism for cost savings pass through that has characterized the benefits for UK consumers. However, we recognize that the data for this analysis may be difficult to ascertain.

Question 8.

Do you have any other comments?

None.

CBI

The CBI supports the comments made by the Trade Marks Patents and Designs Federation in their paper enclosed with their letter of 26 May.

In particular in view of the fact that our membership includes both vehicle manufacturers and replacement part suppliers, as before, we take no position on whether the designs directive should be amended to introduce a harmonized repair clause. However, the proposal does affect other business sectors as well, and we support the comments made by TMPDF in their paper.

Dyson

It has to be repeated that the Commission appears to have given virtually no weight at all to industry sectors outside the automotive industry. Since every sector will be affected by the proposal (should it be adopted), the impact on the non-automotive sectors must be thoroughly and properly assessed.

There are a number of factors which mean that the necessity for spare parts for domestic appliances to "match" the original parts differs from the necessity for spare parts for cars to "match". Firstly, the purchase price of the original product is vastly different which means that the consumer's requirements regarding repair are different. Secondly, vacuum cleaners and other domestic appliances are not as visible to third parties as cars – even Dyson vacuum cleaners are not often parked on the driveway. Again, this affects consumers' requirements.

But the most important factor is that of safety. There is an overwhelming need for any replacement parts for a car to be safe. I am told, and have no reason to doubt, that every reputable manufacturer of spare parts for the automobile industry tests its products to the same standards as the OEM's. Unfortunately, the same is not true in the domestic appliance industry. There is nothing to prevent low cost spare parts, which may be inferior to the original parts, being offered to the consumer. The consumers is then disadvantaged.

The English High Court recently decided in *Dyson v Qualtex*, that the "need" for spare parts for vacuum cleaners to "match" the original parts was insufficient to exclude those parts from enjoying unregistered design right. We are fortunate in the UK that, since we cannot enforce registered design rights against spare parts used for repair purposes, we have an unregistered design right which lasts for at least 10 years (the last 5 being subject to licenses of right). However, the Community unregistered design right lasts only for 3 years. By the time warranty periods have been taken into account, during which the OEM guarantees to repair the appliance free of charge, there is virtually no protection available to the OEM. Removing the ability of OEMs to enforce registered designs against spare parts manufacturers in France and Germany will allow more sub-standard parts onto the market. This is because there is no effective unregistered design right with which near-identical parts can be kept off the market.

It must be understood that, when a spare part is virtually identical to the original part, the consumer will be very unlikely to remember, even if he or she is ever aware, that the spare part did not originate from the OEM. Premature failure of that spare part frequently damages the reputation of the OEM which in turn inhibits the OEM's growth. It is unclear how the obligation to inform consumers about the origin of spare parts would alleviate this.

ECAR

Ecar provided a copy of their brochure (available at: [http://www.ecar-eu.com/pdf/ECAR Brochure final EN.pdf](http://www.ecar-eu.com/pdf/ECAR_Brochure_final_EN.pdf))

RAC Auto Windscreens

Question 1 — Should the UK seek:

- a. to maintain the current status quo in Europe? (i.e. Member States may only make changes in their laws which liberalise the market in spare parts but do not have to)
- b. to ensure a harmonised spare parts market which is liberalised?
- c. to ensure a harmonised spare parts market which provides registered design protection for a limited time? If so, how long should such protection last?
- d. to ensure a harmonised spare parts market which operates on the basis of a compulsory licensing and remuneration system? How long for?
- e. some other system?

RAC Auto Windscreens believes option b — a harmonised spare parts market which is liberalised should be adopted.

Question 2 — Can you put a figure on the cost or benefit of this proposal:

- a. to your business?**
 - b. to your sector?**
 - c. to the UK economy as a whole?**
 - d. to UK consumers?**
- a. RAC Auto Windscreens is not able to quantify the exact financial benefit of Option B on the business, but it would create a more open and flexible supply chain for the 750,000 automotive glazing units fitted by RAC Auto Windscreens every year and reduce costs.
 - b. The auto glazing production and independent aftermarket distribution sectors will benefit from option B because it will create greater freedom for businesses in the sector to distribute and use replacement auto glazing throughout the EU without obstruction from design rights.
 - c. RAC Auto Windscreens is not in a position to comment on this.
 - d. Option B will result in greater competition in the spare parts market throughout the EU and will help reduce costs. This will provide consumers with greater choice and lower costs.

Other comments – if option C or option D were adopted UK businesses and UK consumers would be particularly negatively affected it would reverse the current liberalisation status in the UK. If these options were adopted UK auto glazing manufacturers may be forced to close (e.g. the RAC Auto Windscreens factory in Chesterfield) with the loss of UK jobs and repair companies will face increased costs. Companies will then be forced to pass on these costs either directly to the consumer through increased product costs, or indirectly through increased costs to insurers who in turn raise premiums.

Question 3 – What other factors affect competition in the spare parts market and how great is their effect compared to design protection? (eg warranties, franchises, insurance companies). RAC Auto Windscreens would not be able to comment on the spare parts market as a whole but the automotive glass replacement market is driven by the quality of customer service offered in conjunction with cost per glass installed.

Question 4 – What industrial sectors or products, other than the automotive sector, would or could be affected by this proposal?

The automotive repair sector is the principal industry affected by this proposal because of the high value of automotive vehicles and the need for maintenance and repair.

The insurance industry is also likely to be affected if option C or option D are adopted because increased costs for auto glazing manufacturing and repair companies will result in increased costs being passed to insurers and in turn to insured customers.

Question 5 – Do you have any comments on the particular wording of the proposed Article 14 (1) ?

RAC Auto Windscreens agrees with the proposed wording.

Question 6 – Do you agree that there should be a legal requirement for consumers to be informed as to the origin of the spare parts? Do you have any comments on the proposed text of Article 14 (2) ?

Proposed wording - "Member States shall ensure that consumers are duly informed about the origin of spare parts so that they can make an informed choice between competing spare parts"

All glass should be marked with the manufacturers name as at present. Glasses are not marked with Country of Origin except for a DOT number which has to be looked up in a US Department of Transport table. It is not clear from the wording of this proposal as to whether the customer should be informed of the manufacturer's name, country of origin, or Original Equipment or non Original Equipment. This could have the effect that customers will state a preference for Original Equipment parts and this in turn will increase demand and raise insurance premiums in general to cover the cost of these changes.

RAC Auto Windscreens does not support the proposed legal requirement for consumers to be informed as to the origin of the spare parts.

Question 7 — Do you have any comments on the Partial Regulatory Impact Assessment (RIA)?

RAC Auto Windscreens supports the Commission's proposal for the full liberalisation identified as Option 1 in the RIA and agrees with the assessments made.

Question 8 — Do you have any other comments?

A fully competitive market (as would result from adoption of option B) guarantees the consumers' right to repair their vehicle as they wish. Vehicle manufacturers should not be able to invoke alleged intellectual property rights to enforce a monopoly over the supply of visible spare parts.

Because vehicles need visible spare parts repaired, option C (to provide time limited design protection) will not prevent monopolies or the infringement of consumer rights by vehicle manufacturers. Consumers must be allowed to benefit from lower costs originating from a fully competitive market. The time limitation is particularly inappropriate because automotive glazing can need repair or replacement from the moment a vehicle is in use because of an accident, a motorway stone chipping, or vandalism and must be repaired immediately for the safety of the driver. These incidents are not limited to the time after which the design protection has ended (eg the 3 year warranty period), and can occur from the first moment of use. Any suggested time period for design protection is therefore completely arbitrary and not related to consumer demand.

Option D would also result in reduced choice and increase costs for consumers, and would place unnecessary compliance costs and additional bureaucracy upon the industry.

Background on RAC Auto Windscreens

RAC Auto Windscreens provides a wholly owned and operated complete automotive glazing repair and replacement service through the largest fitting network in the UK.

RAC Auto Windscreens is the only replacement windscreen specialist with its own manufacturing operation, producing more than 230,000 windscreens a year in a dedicated factory in Chesterfield.

Backed by a fleet of 800 fully equipped mobile fitting units, RAC Auto Windscreens provides a 24/7 national service for more than 750,000 private and corporate customers every year.

Ministry of Defence

Q1. Should the UK seek:

- a. to maintain the current status quo in Europe? (i.e. Member States may only make changes in their laws which liberalise the market in spare parts but do not have to.)
- b. to ensure a harmonised spare parts market which is Liberalised?
- c. to ensure a harmonised spare parts market which provides registered design protection for a limited time? If so, how long should such protection last?
- d. to ensure a harmonised spare parts market which operates on the basis of a compulsory licensing and remuneration system? How long for? Or
- e. some other system? Please give details.

1) Option B: The proposed Article 14(1) is to be welcomed.

2) The Ministry of Defence spends in excess of 4 billion pounds a year on major equipment programmes. The items of equipment it procures tend to have a life of

around 20 to 30 years in the field, and consequently great attention is paid to the cost and availability of replacement parts. As a result, the MOD 's Intellectual Property Rights Group has a particular interest in this area of law.

3) When planning a project, the MOD carefully analyses the "whole life costs" of an item of equipment, which includes the costs of procuring replacement parts. Presented with the option of either:

- a high up-front cost, with a free market in replacement parts, or
- a subsidised up-front cost, with the OEM ("original equipment manufacturer") retaining rights over replacement parts,

the MOD is firmly of the view that the former is the only acceptable arrangement. The former arrangement ensures that OEM's cannot profit excessively when replacement parts are urgently needed. Yet the former arrangement still permits OEM's to be fully rewarded for their creativity.

4) The former arrangement also ensures that "security of supply" of spare parts is maintained: in other words, it helps ensure the timely availability of suitable spare parts should an OEM be unwilling or unable to provide them — perhaps as a result of the OEM going into administration or liquidation. Although not addressed by the MA, this has clear resonance in the automotive industry following the recent failure of a major British car manufacturer. Vehicle owners will be rightly concerned about whether they will be able to obtain spare parts where the OEM's intellectual property assets are transferred to a new undertaking, who may not have had time to develop the know-how or capacity that would ensure an uninterrupted supply of parts to the market.

5) Unlike the MOD , most consumers are unlikely to be in a position to predict the future need for, or cost of, replacement parts; nor will they be economically strong enough to agree terms with OEM's . Where there are market failures such as these, it is justifiable for the law to intervene to ensure that consumers are not prey to excess profiteering once reliant on a product. For this reason, the MOD welcomes the Commission's proposal.

Q2. Can you put a figure on the cost or benefit of this proposal:

- a. to your business?*
- b. to your sector?*
- c. to the UK economy as a whole?*
- d. to UK consumers?*

1) The extension of Registered Design law to cover non-aesthetic designs has been so recent that it has not affected the MOD .

The lack harmonised laws relating to visible replacement parts does not significantly affect the MOD 's activities: however, MOD regularly enters into collaborative procurement programmes with other EU governments, and in general finds that reaching agreements that accommodate each partners' national laws an inconvenience and additional cost. In certain countries there are restrictions on the ability to secure

the right to make spare parts, or have spare parts made. Although the exact cost of these restrictions is not known, they are likely to be significant in the case of international acquisitions and add significantly to the cost of public procurement in the EU.

Q3. What other factors affect competition in the spare parts market and how great is their effect compared to design protection? (e.g. warranties, franchises, insurance companies.)

1) The draft proposal will not achieve the aim of liberalising and harmonising the market for replacement parts. This is because many EU Member States provide a system of unregistered design protection that runs in parallel with their Registered Design systems. The United Kingdom provides for Design Rights, whilst other countries retain Copyright protection for three-dimensional designs. Hence, even if Article 14(1) is adopted, a replacement part manufactured in France can still only be legally imported into the UK if Design Rights law so permits: similarly, a replacement part manufactured in the UK can only be legally exported to France if the requirements of French copyright law are satisfied.

2) The recent decision in *Dyson Ltd v Qualtex (UK) Ltd* [2004] EWHC 2981 (Ch) shows that even where there are provisions in a Member State's unregistered design law to free the market for replacement parts, these freedoms might not coincide precisely with the freedoms granted under harmonised Registered Design law. Whilst Article 14(1) will result in all replacement parts being free of registered rights, UK unregistered Design Right law, per section 213(3)(b)(ii) of the Copyright Designs and Patents Act 1998, excludes from protection only rights in visible parts whose design is "dependent" on other visible components.

3) Even where Member States' copyright, design and/or competition laws permit a fully-liberalised market for replacement parts, traders – particularly small traders without access to specialist legal advice – are likely to feel inhibited from engaging in infra-Community trade by reason of:

- the costs of researching this very complicated area of law, and
- the perceived risk of an infringement action, even if unjustified. Consequently, it would be desirable to introduce an explicit provision fully removing all rights in replacement parts, both registered and unregistered, to give confidence to the market by providing legal certainty.

4) If it is believed desirable that there should be a free market in replacement parts, the right to assert copyright over design documents should also be reconsidered. It is anomalous that protection is still available for 70 years p.m.a. in design drawings, even where the term of protection in the design they embody will not exceed 25 years from first marketing. The ability of engineers to reverse-engineer replacement parts should not be overestimated, and even in relation to simple designs, the costs of reverse engineering represents an additional barrier to traders wishing to enter the spare parts market.

Q. 4 Which industrial sectors or products, other than the automotive sector, would or could be affected by this proposal?

In those Member States where protection is extended to "visible" replacement parts, Directive 98/71 has application to all future designs for military equipment. This includes aircraft, ships, armoured vehicles, plant vehicles, weapons, and equipment casings of all kinds.

Q. 5 Do you have any comments on the particular wording of the proposed Article 14 (1)?

The wording is clear.

Q. 6 Do you agree that there should be a legal requirement for consumers to be informed as to the origin of spare parts (see proposed Article 14 (2))? Do you have any comments on the proposed text?

1) Although this proposal might superficially seem a good idea, the proposed Article 14(2) is unnecessary, potentially counterproductive, badly worded, and possibly unlawful.

2) In making these comments, we emphasise that the provision will affect replacement parts for all equipment, and not just automotive parts.

3) Our principle concern is that the proposed Article 14(2) does not explain sufficiently clearly how the information about the source of origin of a replacement part should be given. We fear that, guided by Recital 4, the manufacturer might be required to physically mark the parts, or at least the parts' packaging. At worst, each Member State could decide on a different way of implementing this Article, which could hinder the internal market in replacement parts.

4) Marking, particularly the marking of the replacement parts themselves, would represent a significant new burden on the replacement part manufacturer.

5) Furthermore, compulsory marking would represent a radically new concept in design law, which could easily be overlooked or misunderstood by traders. At worst, the provision could be used oppressively to hinder the free market in replacement parts, through OEM's contesting that a traders' markings are missing, incorrect, insufficiently clear or insufficiently durable.

6) Compulsory making would also require traders to conduct a trade mark search in their target market, and perhaps be required to adopt different marks for different EU jurisdictions. This would represent an additional cost that would impede free competition within the internal market.

7) We firmly believe that trade mark law, and not design law, is the appropriate vehicle for preventing the mistaking of the source of origin of replacement parts. It is true that trade mark law does not provide for the compulsory marking of replacement parts. However, in a market as limited as the automotive industry, it is inevitable that the marque (if not the model) of the vehicle to which the replacement part relates will be registered as a trade mark of the OEM . The replacement part manufacturer will need to use this trade mark in order to indicate the marque and model to which the replacement part relates.

8) However, the OEM's trade mark can be used in this manner only "where it is necessary to indicate the intended purpose of a produce or service, in particular as accessories or replacement parts provided he used them in accordance with honest practices in industrial or commercial matters". [Art 6.(1)(c) of First Council Directive 89/104/EEC and Article 12(c) Regulation 40/94/EEC]. There is already clear jurisprudence requiring suppliers of replacement parts to distinguish themselves from the suppliers of the product with which their parts will be used, in order to avoid infringing Articles 6(1)(c) or 12(c). [See Case C-63/97 Bayerische Motorenwerke AG v Deenik]. Hence, it is unnecessary to introduce a separate provision having the same purpose.

9) Furthermore, even if Article 14(2) were to be adopted, the wording is inadequate. The term "spare parts" should be deleted and replaced with the words "component parts that fall within the exception provided for by Article 14(1)". The reason for this is that the term "spare parts" is not defined in the Directive. Instead, the Directive refers to "component parts of complex products", and more specifically to "component parts of complex products... that remain visible during normal use". The sub-article must be worded in a manner that makes it clear that it does not apply to all replacement parts, and in particular, not to:

- a. replacement parts that are not protected by design law, on grounds of lack of novelty etc.
- b. replacement parts not protected by design law by reason of being component parts not visible during normal use, and
- c. replacement parts, design protection in which has lapsed.

10) It is also unclear from the wording of Article 14(2) whether the definition of "source of origin" covers distributors as well as manufacturers. The end-user may have no interest at all in who actually manufactured the product, provided that they trust the distributor to provide a quality product. If the Article were to be adopted, this should be clarified, so as to ensure information about a distributor is regarded as sufficient.

11) Finally, if Article 14(2) were to be adopted, the Commission would appear not to be complying with Community Law. The Commission's proposal is to modify Directive 98/71/EC: however, Article 110(2) of Regulation 6/2002 requires an identical proposal to Sub-Article 14(2) to be made in respect of that latter Regulation. However, no such proposal has been made. A proposal is also required to make Article 110(1) of the Regulation permanent rather than provisional.

Q7. Do you have any comments on the Partial RIA?

The Partial RIA only addresses the effects on the automotive industry, and does not consider the effects of proposed Article 14(2) at all. It also does not state the benefits of the proposal in relation to the effect on security-of-supply (addressed at Q1 above).

Q. 8 Do you have any other comments?

No.