



# St. Martin Conference of ÚOHS

Brno 11 + 12 November 2009

## Panel II: Intellectual Property Rights vs. Competition

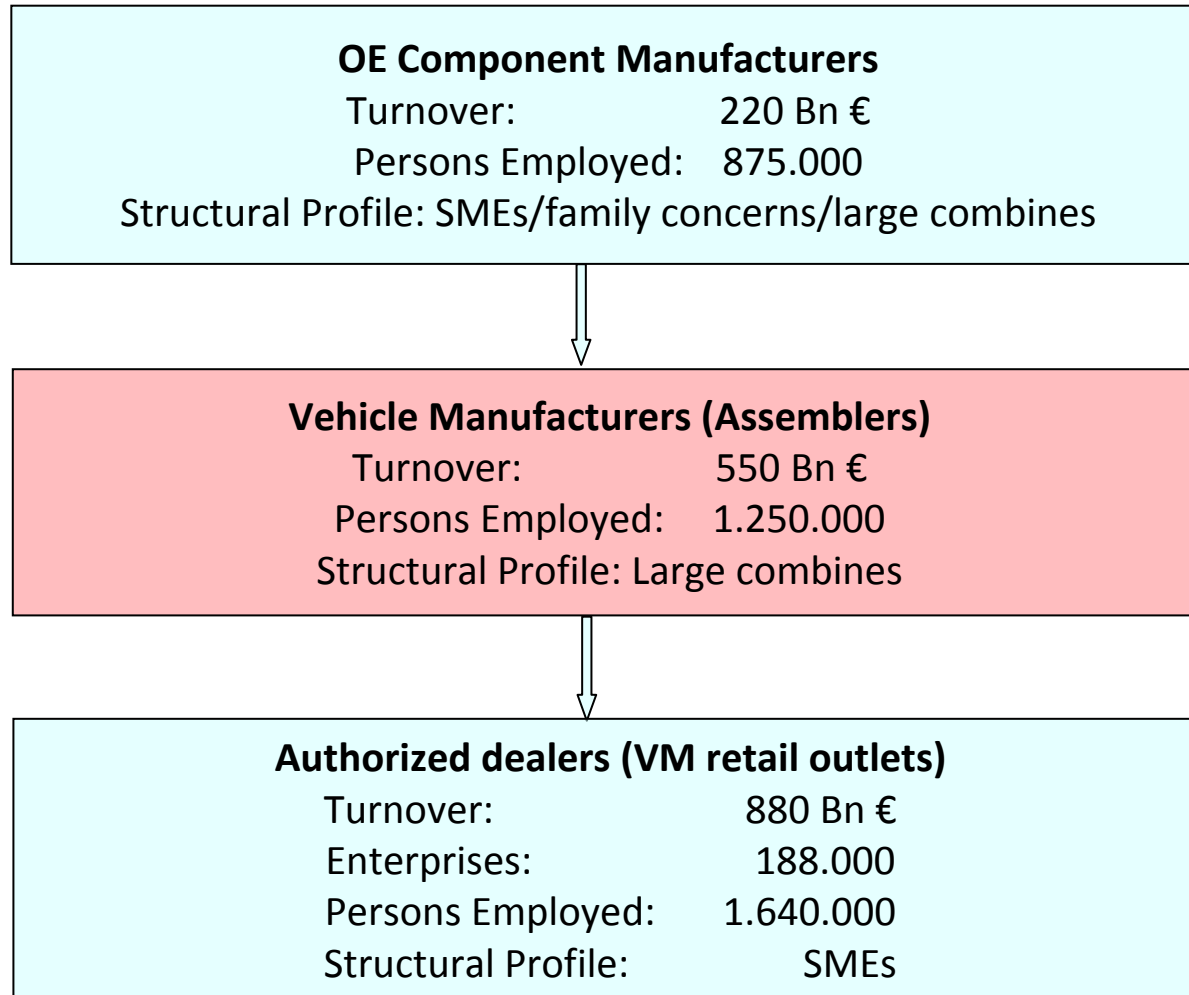
*„Some comments on the automotive sector“*

Gerhard Riehle

ECAR – The European Campaign for  
the Freedom of the Automotive  
Parts and Repair Market



## EU - 27: New Vehicle Sales Market





# EU - 27: Automotive Parts and Repair Market

- „Aftermarket“ -

## Manufacturer of Spare Parts (+ Accessories)

Turnover: 66 Bn €

Enterprises: 17.700

Persons Employed: 326.000

Structural Profile: SMEs/family concerns/large combines

## Related Markets

Garage Equipment

Roadside Patrols

Inspection Centres

Fuel Supply

## Wholesale and retail trade of spare parts

Turnover: 126 Bn €

Enterprises: 100.000

Persons Employed: 620.000

Structural Profile: SMEs

## Repair + Maintenance of vehicles

Turnover: 116 Bn €

Enterprises: 410.000

Persons Employed: 1.375.000

Structural Profile: SMEs



## Primary vs. Secondary (After-)Market

	<b>Total</b>	<b>Motor Vehicles</b> (Primary Market)	<b>Parts and Repair</b> (Aftermarket)
Turnover at retail level	1.122 bn €	880 bn € (78,5 %)	242 bn € (21,5 %)
Persons employed	6.086.000	3.765.000 (61,8 %)	2.321.000 (38,2 %)

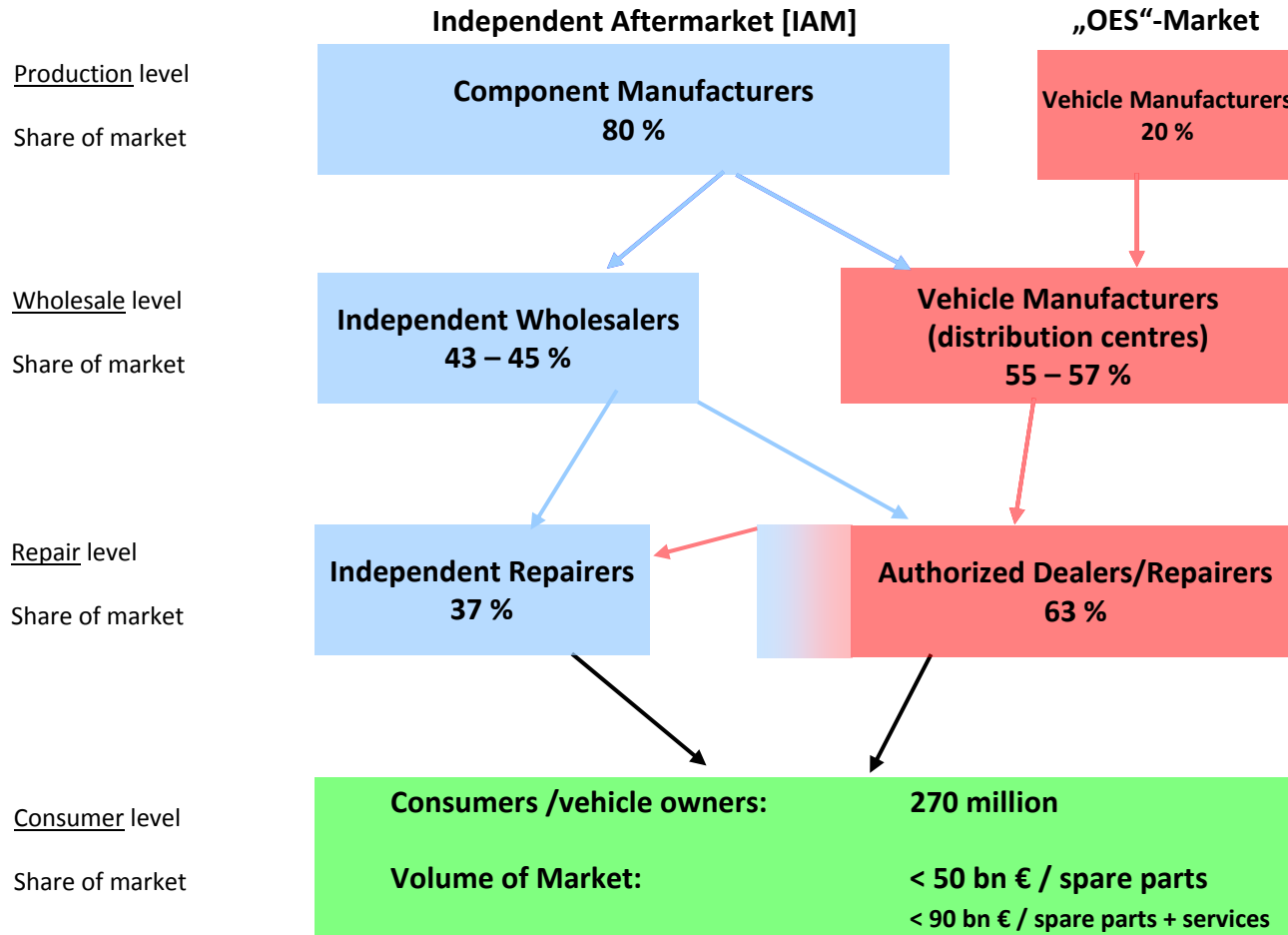
➤ **The EU-27's automotive *aftermarket* is an important sector of industry.**

- It consists of 530.000 enterprises (overwhelmingly SMEs)
- generates 240 bn € turnover = 85 bn € value added and 2.3 million jobs
- provides services for 270 million EU motorist consumers



# EU-Market of Automotive Spare Parts

- excluding tyres, accessories, lubricants, paints -





## In order to provide effective competition (and consumer welfare) the IAM needs

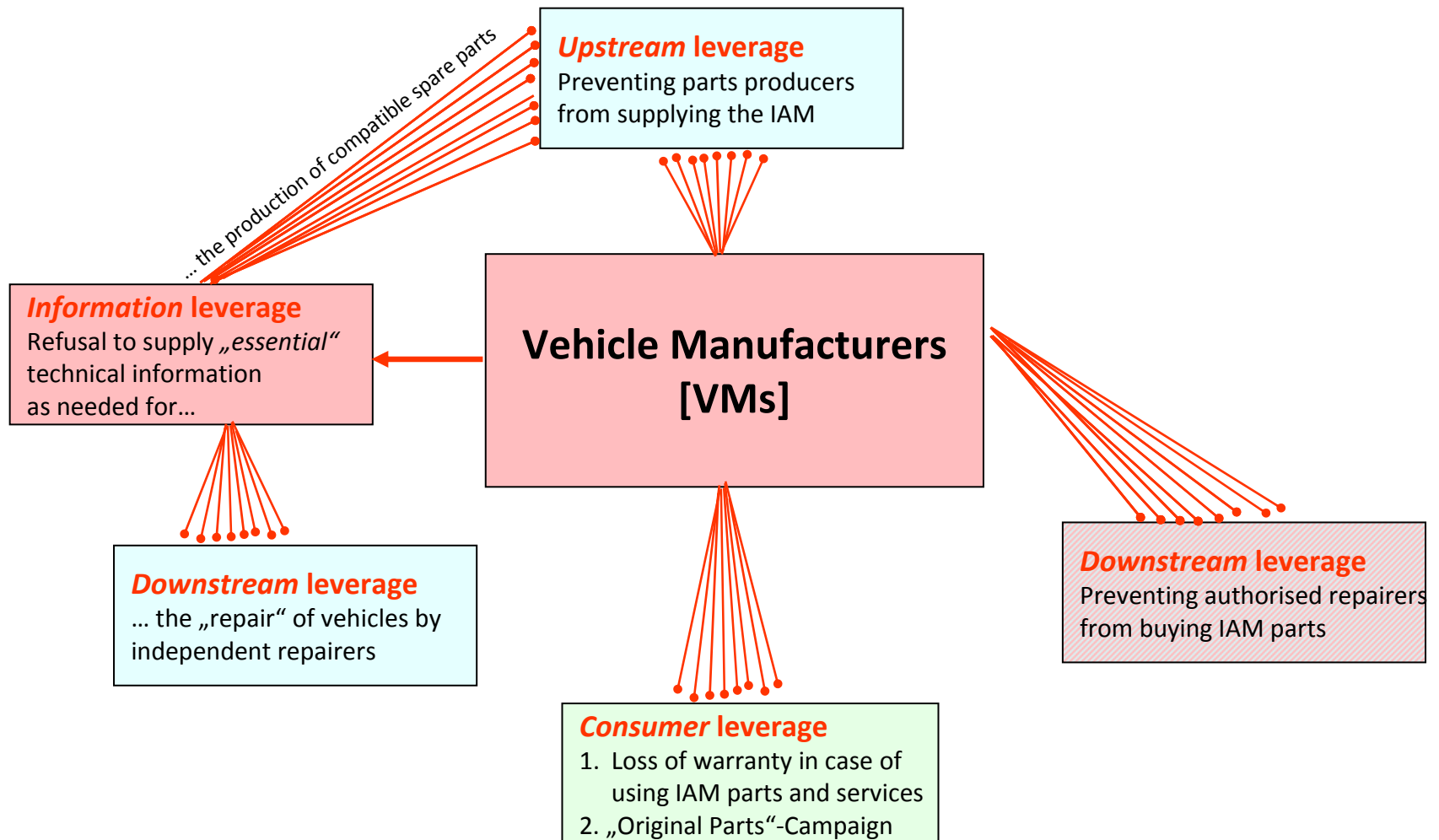
- unrestricted production, distribution and use of spare parts
- unrestricted and standardised access to technical information

as needed for

- the **repair** of modern vehicles
- the production and supply of compatible **spare parts**



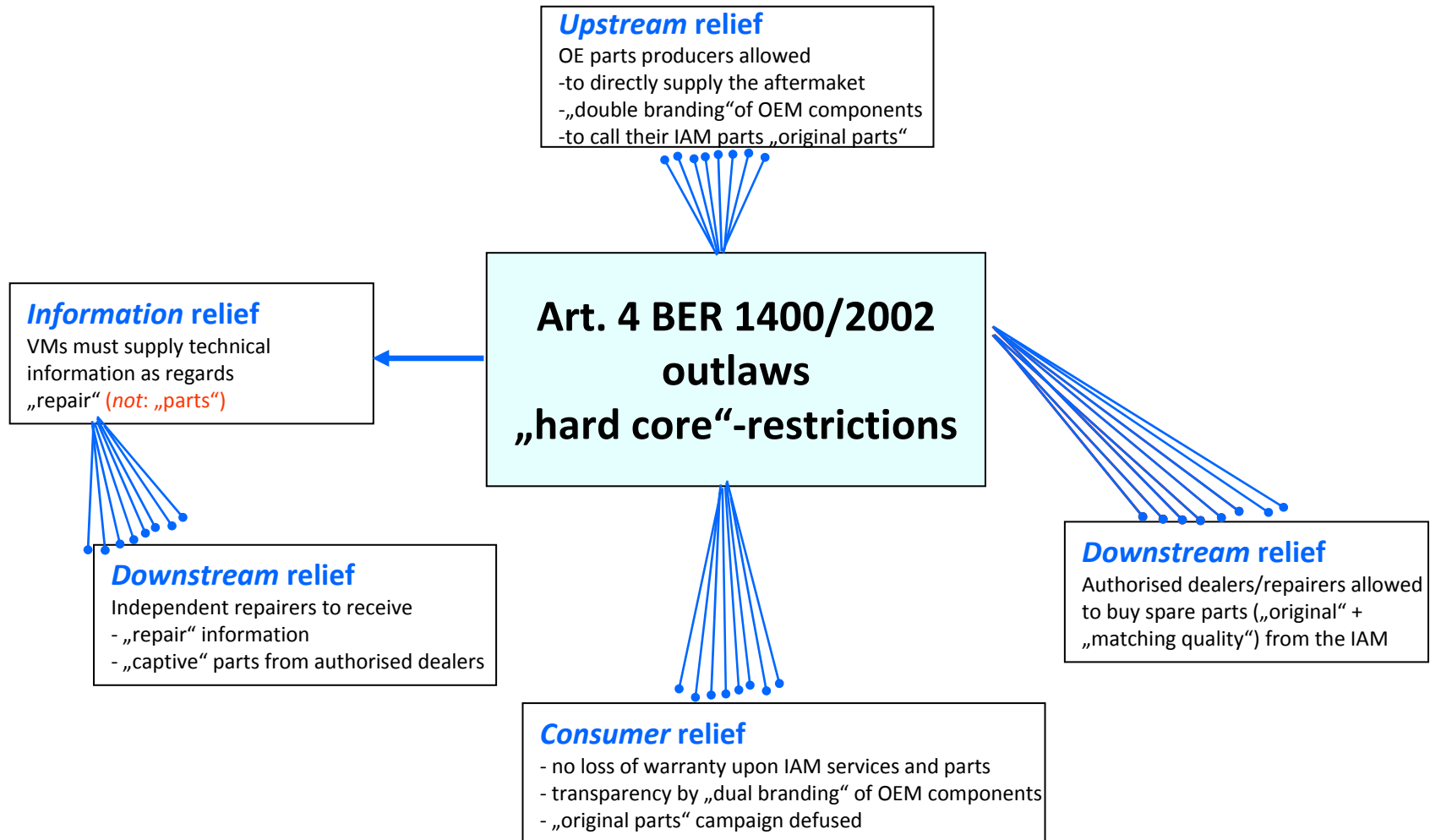
# Main potential of VMs to restraint IAM competition





## Objective of BER 1400/2002

*„To protect effective competition on the market for repair and maintenance services“.*







## Art. 4 par. 2: Access to „technical information“

The exemption shall not apply where the supplier of motor vehicles refuses to give independent operators access to any technical information, diagnostic and other equipment, tools, including any relevant software, or training required for the repair and maintenance of these motor vehicles or for the implementation of environmental protection measures.

- .
- .

Access must be given to independent operators in a non-discriminatory, prompt and proportionate way, and the information must be provided in a usable form. **If the relevant item is covered by an intellectual property right\* or constitutes know-how, access shall not be withheld in any abusive manner.**

\* Several decisions of the Commission resulted in „Commitments“ of vehicle manufacturers to provide (more) technical information to independent repairers (Case COMP/E-2/39.140 - DaimlerChrysler, Case COMP/E-2/39.141 - Fiat, Case COMP/E-2/39.142 - Toyota, Case COMP/E-2/39.143 - Opel - 13.11.2007). In all these proceedings IPR issues, however, were **not** mentioned.



## Limits of competition („antitrust“) law

With regard to „Technical“ Information“ (repair + parts) competition law needs to be flanked and detailed by regulatory measures within EU’s type-approval regime in order to be effective in practice.

Such regulations exist or are in the process of being implemented – for example:

- „Framework“-Directive 2007/46/EC: Art. 37 (repair) + Art. 38 (parts)
- Regulation (EC) No. 715/2007 (Euro 5+6): Art. 6 + 7 (repair)
- Commission Regulation (EC) No. 692/2008: Art. 5 (repair + parts)
- Amendments to Reg. 75 + 692 (pending): Art. 4.1 provision of „raw data“ (repair).

Restraints of competition based on Intellectual Property Rights [IPRs] are outside the reach of competition law. Exclusive IPRs - in principle - pre-empt competition law.

➤ **Threat: Aftermarket can be monopolized**



## Restraints of competition and „*trade mark*“ rights

### „Use“ of a protected **trade mark** by IAM operators

- who render **services** for the primary product:  
*„I am specialised in repairing **BMW**s“*



#### Legitimate use

- Art. 6 Trademark Directive
- ECJ „BMW v. Deenik“ (1999)

- who supply **spare parts** (consumables) for the primary product:
  - Marketing of a „Hella“-front lamp  
*„suitable for **VW** Passat“*



#### Legitimate use

- Art. 6 Trademark Directive
- ECJ „Toshiba v. Katun“ (2001)
  - „Gilette v. LA Laboratories“ (2005)
  - „Siemens v. VIPA“ (2006)
- Corte di Cassazione „Fiat v. ISAM“ (2000)

- who **remanufacture** parts which continue to carry the **original logo** [of a VM]



#### Legitimate use

German Federal Supreme Court [BGH] GRUR Int 2007, 864  
*Riehle*, „Trade Mark Rights and Remanufacturing in the European Community“, IIC - Vol. 22 (2003)

- who supply **spare parts** for which as such (!) protection as **3-dimensional** trade mark is claimed



#### No settled case law so far

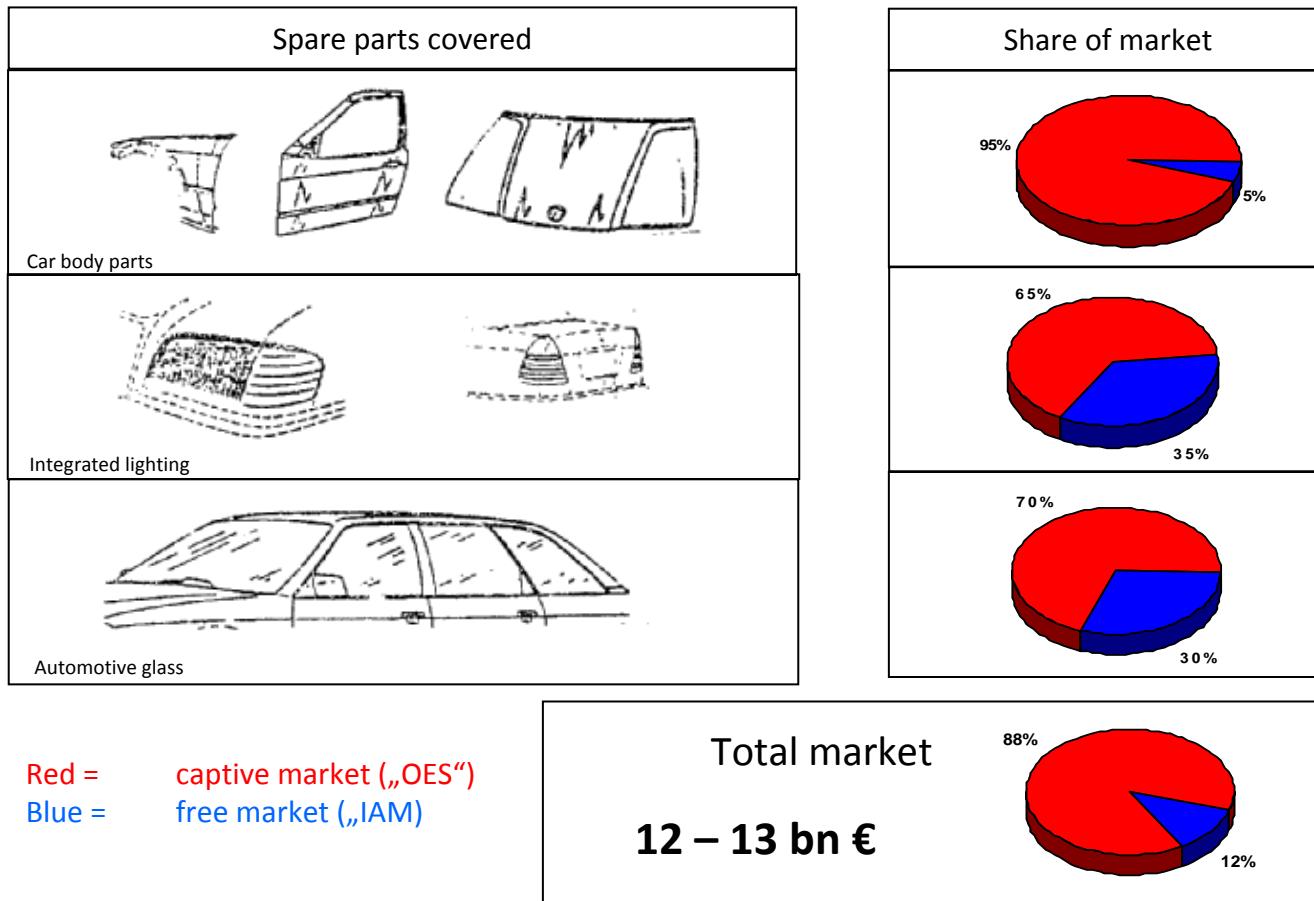
„Legitimate use“-rule should apply  
Problem similar to design protection

 **Tendency: IP law allows „use“ of a trademark where necessary for maintaining competition or (!!)** for providing **effective competition in secondary markets**



# Restraints of competition emanating from „design“ protection

- Submarket of „must match“ spare parts affected -



➤ Protecting „must match“ spares results in a monopolization of this market

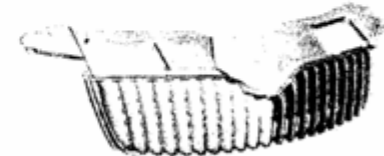


## Excerpt from the database of industrial designs valid in the CR

(Detail of document)

Data obtained on 4.11.2009. Based on data (database last updated) 3.11.2009 20:00.  
30 z 37

(11) Registration number:	33636	
(15) Registration date:	25.09.2006	
(45) Publication date:	25.09.2006	
(21) Application number:	2006-36597	<b>SKODA</b>
(54) Title:	Součásti automobilu	
(51) Locarno classification:	12-16	
(22) Application filing date:	25.01.2006	
Number of the Bulletin of publication:	2006/11	
(73) Holder:	Škoda Auto a. s., tř. Václava Klementa 869, Mladá Boleslav, 29360, CZ	





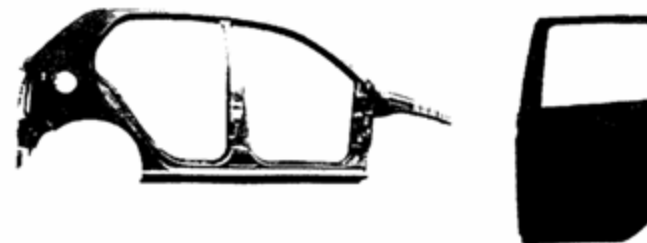
## Excerpt from the database of industrial designs valid in the CR

(Detail of document)

Data obtained on 4.11.2009. Based on data (database last updated) 3.11.2009 20:00.  
22 z 37

(11) Registration number:	29333
(15) Registration date:	26.01.2000
(45) Publication date:	26.01.2000
(21) Application number:	1999-31899
(54) Title:	Soubor částí automobilu
(51) Locarno classification:	12-16
(22) Application filing date:	27.08.1999
Number of the Bulletin of publication:	2000/03
(73) Holder:	SKODA AUTO A. S., Václava Klementa 869, Mladá Boleslav, 29360, CZ

**SKODA**





# SKODA

DPINFO



Deutsches Patent- und Markenamt



Musterregister

DE

Abfragezeitpunkt: 19.08.2003 16:37:22



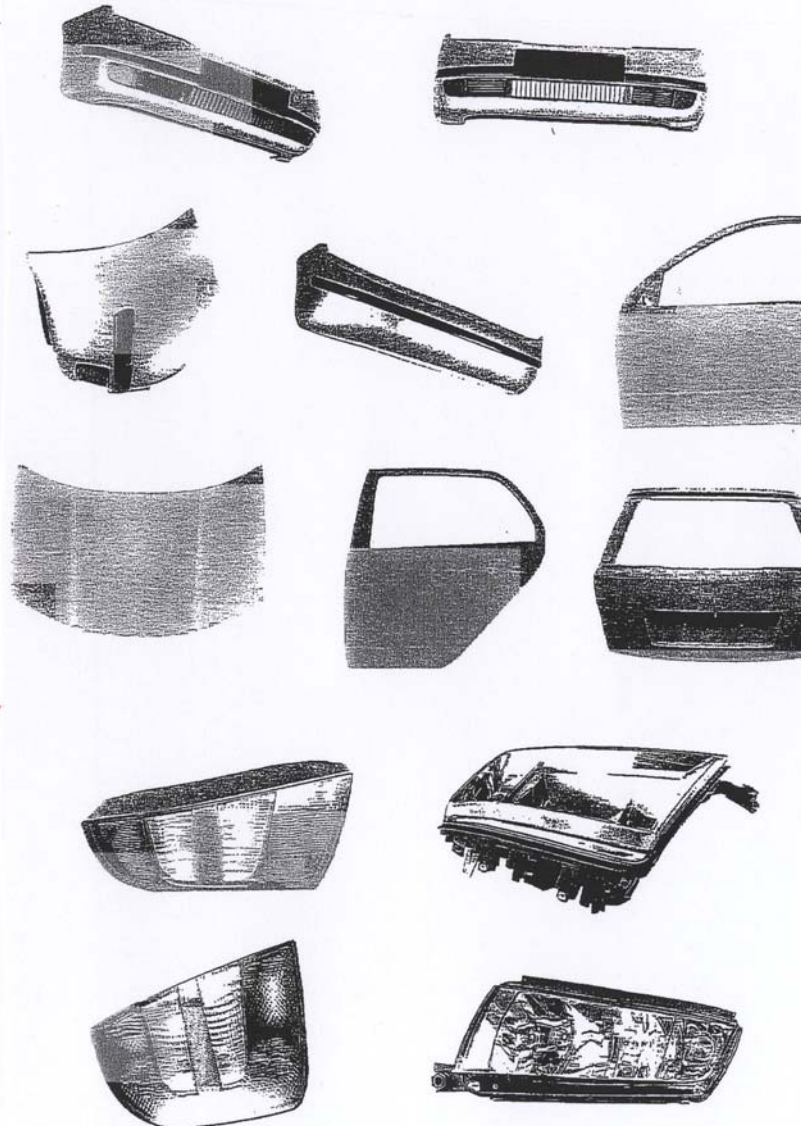
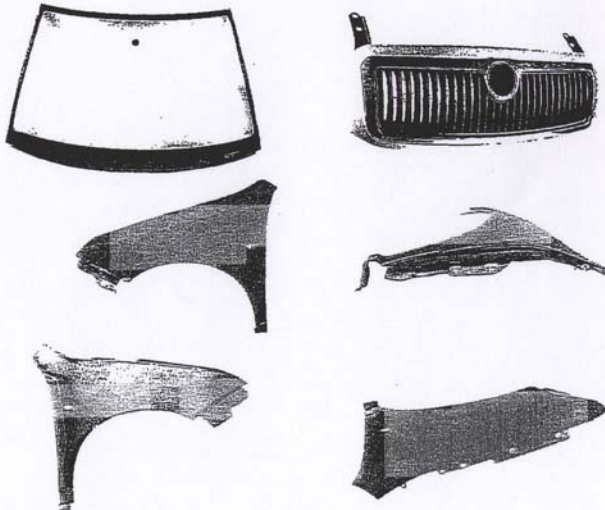
Auszug aus dem Musterregister des Deutschen Patent- und  
 Markenamtes



Aktenzeichen 40001575.7

Anmeldung: Sammelanmeldung für 22 Geschmacksmuster  
 Anmeldetag: 12. Februar 2000  
 Datum der Bekanntmachung: 25. Juli 2000 (GeschMBl, Teil 1a)  
 Warenklasse: 12-08 (Version 7)  
 Bezeichnung: Personenkraftwagen und Komponenten  
 hierfür

Inhaber:  
 Skoda Auto a.s., Mladá Boleslav, CZ  
 Vertreter:  
 Grättinger & Partner (GbR), Starnberg





## **“Design” - induced monopoly: Impact on IAM businesses and market**

### **Parts manufacturers (which are OE suppliers)**

- ⇒ will be barred from themselves supplying directly the aftermarket (as far as they have an OE-contract)
- ⇒ will be driven out of the market (as far as they have no OE-contract and thus operate as “independents”)

### **Independent parts manufacturers**

- ⇒ will be driven out of the market

### **Independent distributors**

- ⇒ will lose at least ¼ of their range of supply which seriously affects their competitiveness

### **Independent repairers**

- ⇒ will not be able to buy spare parts at competitive tariffs and would be forced to buy them from the authorized dealers, their competitors, at extremely disadvantageous terms. In the long run they will be driven from the market.

### **The independent aftermarket as a whole**

- ⇒ will come under threat because vehicle makers, in addition to their direct monopoly benefit, can use and do use their monopoly rents generated in the captive market for cross-subsidising their prices of “mechanical” spare parts still subject to competition.





## ***“Design”-induced monopoly: Impact on consumers***

### **Short-term:**

⇒ 270 million EU motorists become “*captive consumers*”

Lord Justice *Templeman*: “The purchaser of a BL car sells his soul to the company store”.

⇒ who have to pay supracompetitive prices (at least + 40 %).

### **Long-term:**

⇒ total dependence on vehicle makers’ network of authorised repairers

⇒ no free choice where to have their cars repaired

⇒ loss of getting car repairs at reasonable prices controlled by competition.



## The spare parts issue: A challenge for good law making

- There is **no** legal and economic justification for extending design rights on new cars (and their components) to „must match“ spare parts

For a detailed analysis see →

### „Competition and Intellectual Property Rights“

Seminar held by Czech Republic:  
Office for the Protection of Competition (ÚOHS)  
Brno / 2 September 2009

- text available at ÚOHS -

**„Design Protection and Spare Parts**  
*A touchstone for good IP lawmaking in a market economy“*  
Gerhard Riehle

- European design law needs a „legitimate use“ („limitation of rights“) provision as it already exists in trademark law

- The right solution: The „Repairs Clause“

This clause fully maintains the protection of the design of new cars and thus supports VMs' core business, the sale of new cars. It merely prevents the coming into existence of a spare parts monopoly.



# „Repairs Clause“

- precise wording -

By way of derogation from Article 12 (1), the rights conferred by a design right shall not be exercised against third parties, who use the design, provided that

- a) the product incorporating the design or to which the design is applied constitutes a component part of a complex product upon whose appearance the protected design is dependent; and
- b) the sole purpose of such a use is to permit the repair of the complex product so as to restore its original appearance;

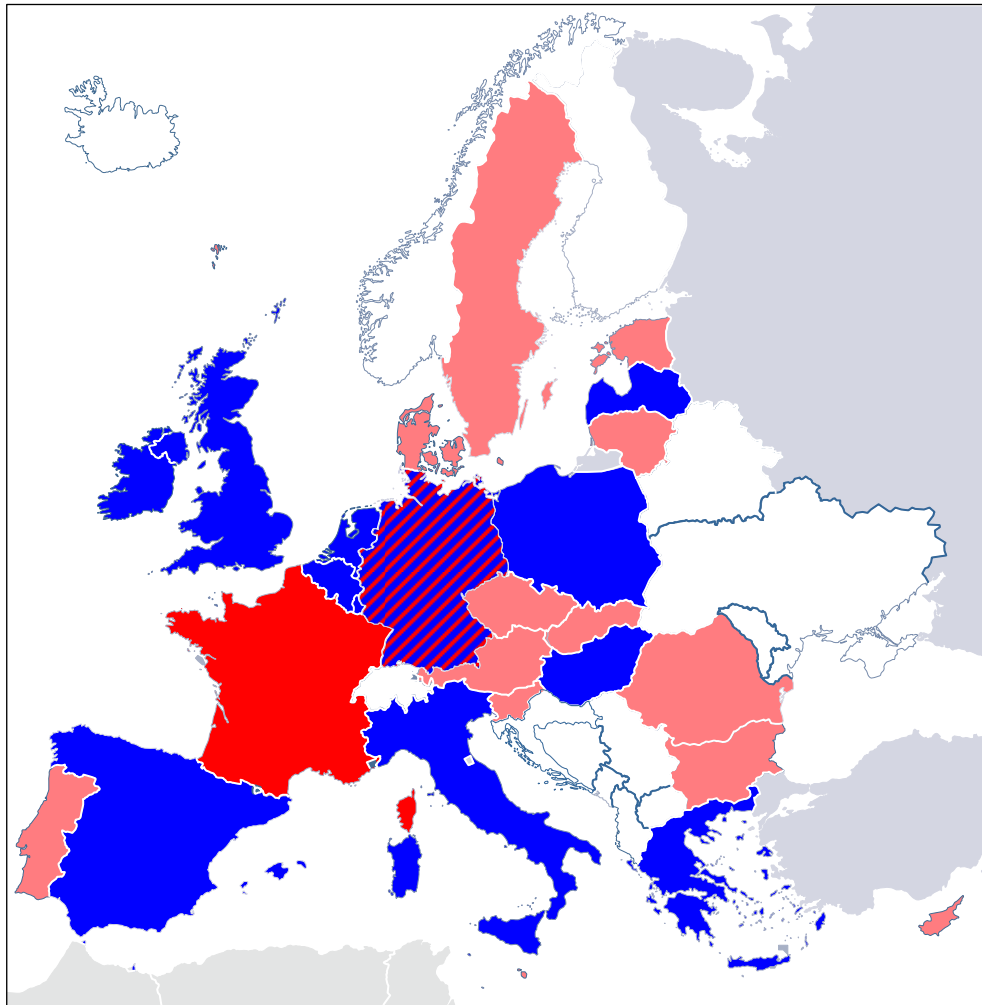
[and

- c) consumers are duly informed about the origin of the product used for repair by making use of a marking, such as a trade mark or a trade name, or in another appropriate form so that they can make an informed choice between competing products offered for repair.]



# Design protection and „*must match*“ spare parts

## 2004 – 2008 / EU-27



**Blue:**  
Member States with a Repairs Clause and thus free competition.

**Dark Red:**  
France: no Repairs Clause and rigid implementation of design- and copyright protection (!!).

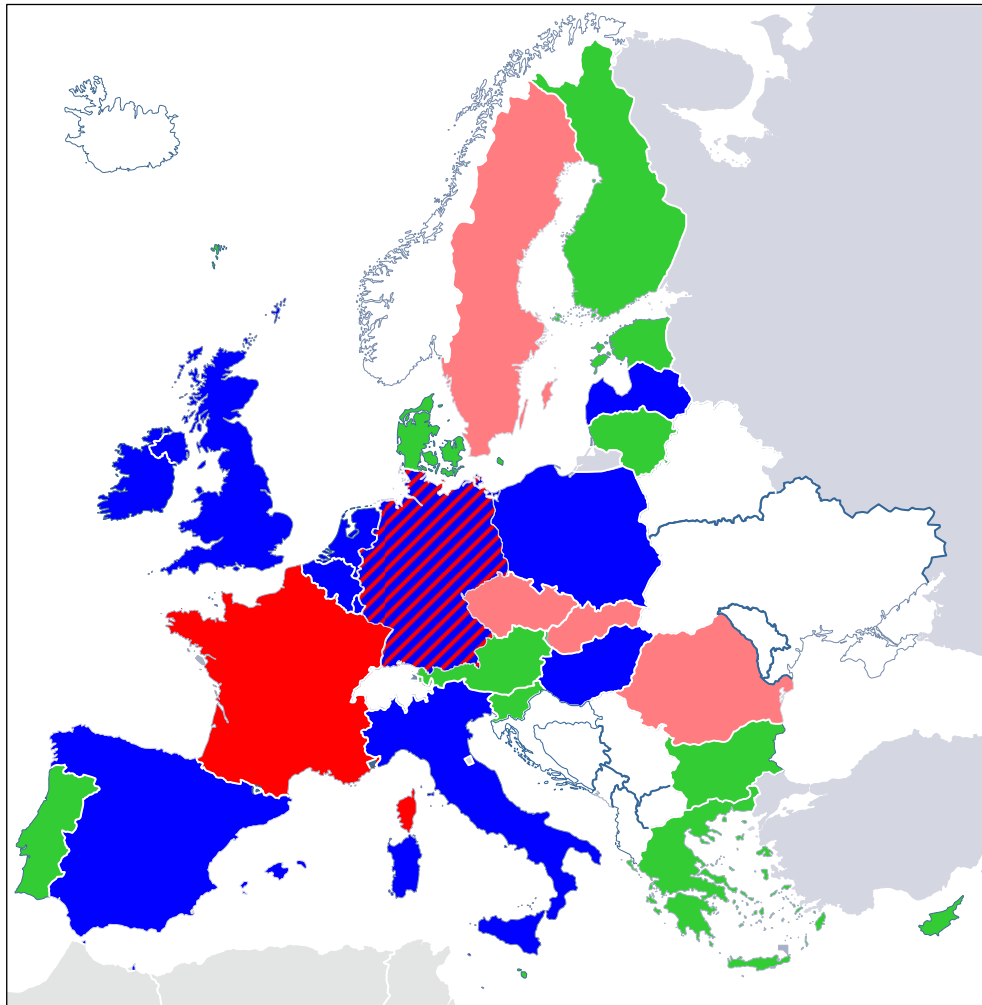
**Red:**  
Member States without a Repairs Clause where, however, prior to harmonising the design law there were de facto no design interferences or former law had not finally answered the spare parts question.

**Red/blue hatching:**  
Germany: Assurance of the vehicle makers to the German Government not to use (possible) design protection for hampering competition in the spare parts market until the spare parts issue will be solved at EU level.



# Design protection and „*must match*“ spare parts

## 2009 - EU-27



**Blue:**  
Member States with a Repairs Clause  
and thus free competition.

**Dark Red:**  
France: no Repairs Clause and rigid  
implementation of design- and co-  
copyright protection.

**Red:**  
Member States without a Repairs  
Clause where, however, prior to  
harmonising the design law there  
were de facto no design inter-  
ferences or former law had not finally  
answered the spare parts question.

**Red/blue hatching:**  
Germany: Assurance of the vehicle  
makers to the German Government  
not to use (possible) design  
protection for hampering compe-  
tition in the spare parts market until  
the spare parts issue will be solved at  
EU level.

**Green:**  
Member States which signalled  
during Council discussions that they  
would support the „Repairs Clause“  
proposal of the Commission.



## Intellectual Property Rights v. Competition?

- There are – worldwide\* - growing attempts of suppliers of primary products (cars, copiers, printers) to “escape” from antitrust law and to control secondary service markets by asserting and using IPRs.
- IPRs - in general - are still not well prepared to meet this new challenge. Traditionally, in designing their scope of protection the primary market was the main or even sole focus of attention. The socio-economic effects on secondary markets, if at all, were considered to be collateral issues and treated as (very) limited “exceptions”.
- This “proprietary” approach misses the true function (“essential purpose”) of IPRs - namely: To promote innovation by *dynamic* competition and “to ensure a *competitive* exploitation” of IPRs. So far competition and IP law share the same goals, they are “complementary”.

\* For example, in the USA see: from “Kodak” → “Lexmark”!



## Intellectual Property Rights v. Competition?

- Consequences of a “competitive” approach to IP protection:
- The impact of IPRs on secondary markets needs to be (more) carefully explored. In drafting IP legislation it should be realised that two scopes of protection - a *horizontal* and a *vertical* one - exist which must be independently identified and designed (dual approach)\*.
  - The vertical scope of protection ends where in secondary markets competition is completely eliminated or effective competition cannot be maintained.
  - “*Structural*” competitive deficits of this kind must be solved (and balanced) within the pertinent IPR (e.g. by a “Repairs Clause”), the function of competition law being to correct *singular* “abuses”.

\* In trademark law the judicature already moves in this direction. See Riehle, “Funktion der Marke und europäisches Markenrecht – Versuch einer dualen Deutung”, MarkenR 2001, 337 et seq.



Děkuji

Thank you