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## INFORMATION

From:	General Secretariat of the Council
To:	Working Party on Intellectual Property (Designs)
N° prev. doc.:	10155/23; 10156/23
Subject:	Protection of cultural heritage or elements of public interest - Position paper from the Portuguese delegation

In view of the Working Party on Intellectual Property on 20 June 2023, delegations will find attached a paper from the Portuguese delegation in relation to the above-mentioned subject.

## **Portugal Position Paper on the protection of cultural heritage or elements of public interest**

The proposed recast of the Directive on the legal protection of Designs provides for an exhaustive list of grounds for refusal that enable Member-States to refuse, *ex officio*, an application for registration of a design (Article 13), namely where:

- the design is not a design within the meaning of Article 2, point (3);
- the design does not fulfil the requirements of Article 8;
- the design constitutes an improper use of any of the items listed in Article 6ter of the Paris Convention for the Protection of Industrial Property, or of badges, emblems and escutcheons other than those covered by Article 6ter of the said Convention which are of particular public interest in the Member State concerned.

Since the analysis of this proposal started, Portugal has voiced the need for the inclusion of a rule allowing the refusal of requests for registration of designs exclusively consisting of elements related to a country's cultural heritage, such as traditional costumes, monuments and other items of public interest.

The fact is that Portugal has experienced several abusive design registrations containing elements that are part of **the country's cultural heritage and that are of public interest** and that, for this reason, should not be subject to exclusive rights of economic agents.

If design registrations of this nature are allowed it will lead to critical situations, as whoever is granted the registration of these elements has their exclusive use and may notify other producers to refrain from selling identical products and resort to civil and criminal legal actions.

Those who legitimately sell these traditional products, before a third party is granted an exclusive right, are forced to defend themselves in court (with all the inherent tangible and non-tangible costs) and ask for the invalidity of the improperly granted registrations.

It is for this reason, and **based on previous experience**, that Portugal has continuously asked for greater attention to this matter, requesting that an *ex officio* grounds of refusal be introduced into the law preventing the creation of private monopolies over realities that, unequivocally, should remain in the public domain and that deserve all respect.

Taking an opposite stance, the European Commission believes that there should not be any more grounds for refusal than those already found in the proposal, to ensure swiftness of the registration procedure, but, in fact, this is not what will happen when faced with a law that allows for an **unduly registration and misappropriation**.

We believe that more important than the costs and speed of the registration process is the safeguarding of the economic interests of all nationals and the avoidance of unnecessary proceedings in court against an unduly granted registration by those acting in good faith and that have always produced and sold these traditional products.

In its current draft, the proposal will benefit those who intend to abusively profit from what does not belong to them.

An example of misappropriation can be found here:

<https://www.radiocampanario.com/ultimas/regional/produtores-de-capotes-alentejanos-surpreendidos-com-avisos-de-violacao-de-direitos-de-peca-identitaria-da-regiao>

<https://expresso.pt/sociedade/2021-12-07-Produtores-de-capotes-alentejanos-surpreendidos-com-avisos-de-violacao-de-direitos-296a8e1c>

At the last working party, after another insistence from Portugal, the Commission and the Presidency clarified that cultural heritage is covered by article 8 and that both articles must be analysed together (articles 8 and 13). The Presidency also referred that Member States have flexibility regarding definitions and the Commission reiterated that cultural heritage is covered by **public policy** in article 8.

After consideration of the Presidency and the Commission's arguments, we studied the definition of "**Public Policy**" ("ordem pública" in Portuguese), in order to determine

whether the elements of public interest/cultural heritage would be encompassed in that clause.

It is with great difficulty that we see such a framing possible, insofar as the concept of “Public Policy” seems to be more directed towards values related to human dignity, freedom, equality, solidarity, democracy, among others, which is why we consider that the existence of a rule that expressly protects cultural heritage would bring more transparency and clarity to the system of industrial property rights.

Therefore, we believe that the creation of rules, such as the ones we propose below for both the Directive and the Regulation, would better serve the interests of the Member States who may share our concerns.

Proposal for a Directive on the legal protection of designs - Presidency revised text (15400/22 + ADD 1-5)	Proposed wording (PT)
<i>Article 13</i> <b><i>Grounds for non-registrability</i></b>	<i>Article 13</i> <b><i>Grounds for non-registrability</i></b>
<p>1. A design shall be refused registration where:</p> <p>(a) the design is not a design within the meaning of Article 2, point (3);</p> <p>(b) the design does not fulfil the requirements of Article 8.;</p> <p><b>(ba) (moved from Article 14(1)(g)) the design constitutes an improper use of any of the items listed in Article 6ter of the Paris Convention for the Protection of Industrial Property, or of badges, emblems and escutcheons other than those covered by Article 6ter of the said Convention which are of particular public interest in the Member State concerned.</b></p>	<p>1. A design shall be refused registration where:</p> <p>(a) the design is not a design within the meaning of Article 2, point (3);</p> <p>(b) the design does not fulfil the requirements of Article 8.;</p> <p><b>(ba) (moved from Article 14(1)(g)) the design constitutes an improper use of any of the items listed in Article 6ter of the Paris Convention for the Protection of Industrial Property, or of badges, emblems and escutcheons other than those covered by Article 6ter of the said Convention which are of particular public interest in the Member State concerned.</b></p> <p><b>2. A design may also be refused if it contains a total or partial reproduction of traditional elements of a specific place or region, or of cultural heritage that is of national value and interest.</b></p>

Proposal amending Council Regulation (EC) No 6/2002 (15390/22 + ADD 1-5)	Proposed wording (PT)
<p style="text-align: center;"><i>Article 47</i></p> <p><b>Grounds for non-registrability</b></p> <p>1. If the Office, in carrying out the examination pursuant to Article 45, notices that the design for which protection is sought does not correspond to the definition in Article 3, point (1), or is contrary to public policy or to accepted principles of morality, <b>or constitutes an improper use of any of the items listed in Article 6ter of the Paris Convention, or of badges, emblems and escutcheons other than those covered by the said Article 6ter and which are of particular public interest in a Member State</b>, it shall notify the applicant that the design is non-registrable, specifying the ground for non-registrability.</p> <p>2. In the notification referred to in paragraph 1, the Office shall specify a period within which the applicant may submit observations, withdraw the application or the objected views or submit an amended representation of the design that differs only in immaterial details from the representation as originally filed.</p> <p>3. Where the applicant fails to overcome the grounds for non-registrability, the Office shall refuse the application. If those grounds concern only some of the designs contained in a multiple application, the Office shall refuse the application only in so far as those designs are concerned.’;</p>	<p style="text-align: center;"><i>Article 47</i></p> <p><b>Grounds for non-registrability</b></p> <p>1. If the Office, in carrying out the examination pursuant to Article 45, notices that the design for which protection is sought does not correspond to the definition in Article 3, point (1), or is contrary to public policy or to accepted principles of morality, <b>or constitutes an improper use of any of the items listed in Article 6ter of the Paris Convention, or of badges, emblems and escutcheons other than those covered by the said Article 6ter and which are of particular public interest in a Member State, or it contains a total or partial reproduction of traditional elements of a specific place or region, or of cultural heritage that is of national value and interest</b>, it shall notify the applicant that the design is non-registrable, specifying the ground for non-registrability.</p> <p>2. In the notification referred to in paragraph 1, the Office shall specify a period within which the applicant may submit observations, withdraw the application or the objected views or submit an amended representation of the design that differs only in immaterial details from the representation as originally filed.</p> <p>3. Where the applicant fails to overcome the grounds for non-registrability, the Office shall refuse the application. If those grounds concern only some of the designs contained in a multiple application, the Office shall refuse the application only in so far as those designs are concerned.’;</p>
<p style="text-align: center;"><i>Article 106e</i></p> <p><b>Examination of grounds for refusal</b></p> <p>1. Where the Office finds, in the course of carrying out an examination of an international registration, that the design for which protection is sought does not correspond to the definition in Article 3, point (1), or that the design is contrary to public policy or to accepted principles of morality, <b>or that the design constitutes an improper use of any of the items listed in</b></p>	<p style="text-align: center;"><i>Article 106e</i></p> <p><b>Examination of grounds for refusal</b></p> <p>1. Where the Office finds, in the course of carrying out an examination of an international registration, that the design for which protection is sought does not correspond to the definition in Article 3, point (1), or that the design is contrary to public policy or to accepted principles of morality, <b>or that the design constitutes an improper use of any of the items listed in</b></p>

**Article 6ter of the Paris Convention, or of badges, emblems and escutcheons other than those covered by the said Article 6ter and which are of particular public interest in a Member State,** it shall send to the International Bureau a notification of refusal not later than 6 months from the date of publication of the international registration, specifying the grounds for refusal pursuant to Article 12(2) of the Geneva Act.

2. Where the holder of the international registration is obliged to be represented before the Office pursuant to Article 77(2), the notification referred to in paragraph 1 of this Article shall contain a reference to the obligation of the holder to appoint a representative as referred to in Article 78(1).

**Article 6ter of the Paris Convention, or of badges, emblems and escutcheons other than those covered by the said Article 6ter and which are of particular public interest in a Member State, or it contains a total or partial reproduction of traditional elements of a specific place or region, or of cultural heritage that is of national value and interest.** it shall send to the International Bureau a notification of refusal not later than 6 months from the date of publication of the international registration, specifying the grounds for refusal pursuant to Article 12(2) of the Geneva Act.

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