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NOTE

From: Presidency
To: Permanent Representatives Committee

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Subject: Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled
- Guidance for further work

INTRODUCTION

1. The negotiations for the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled ('the Marrakesh Treaty') were concluded on 27 June 2013 in Marrakesh under the auspices of the World Intellectual Property Organisation (WIPO).

2. While enhancing opportunities for persons who are blind, with visual impairments or other print disabilities to participate in the cultural life of the community, to enjoy the arts and to share scientific progress and its benefits, the Marrakesh Treaty establishes a set of international rules which ensure the cross-border exchange of published works (books and printed material) in an accessible format for these persons by imposing the introduction of a limitation or exception to the copyright protection of right holders in any of the Contracting Parties to that Treaty.
3. As the will to sign without delay the Marrakesh Treaty was strong, but the issues linked to the legal basis and the nature of the competence of the European Union controversial, it was agreed that the discussions on those issues would be postponed to a later stage. Thus the Council reached a fragile compromise and adopted on 14 April 2014, the decision on the signing of the Marrakesh Treaty on behalf of the European Union¹, with the United Kingdom voting against and Poland abstaining out of opposition to the use of Article 207 TFEU as legal basis. The signature took place in Geneva on 30 April 2014.
4. On 21 October 2014, the Commission submitted a proposal for a Council Decision on the conclusion of the Marrakesh Treaty on behalf of the European Union².
5. The Working Party on Intellectual Property examined that proposal on 24 November 2014 and on 29 January and 17 February 2015. All delegations confirmed their support for the objectives of the Marrakesh Treaty and their wish for an early entry into force of that Treaty to facilitate the participation in the cultural life and the access to education to the persons who are blind, with visual impairments or other print disabilities.
6. At the end of the examination of the proposal in the Working Party, the following issues remain outstanding:
 - the appropriate sequence of the implementation of the Marrakesh Treaty and of the adoption of the proposed Council Decision on the conclusion of the Marrakesh Treaty by the European Union;

¹ OJ L 115, 17.4.2014, p. 1.

² 14617/14 PI 117

- the appropriate legal basis of the proposed Council Decision, in conjunction with the issue of the competence (exclusive versus shared).

II. ANALYSIS OF THE OUTSTANDING ISSUES

7. A large number of delegations share the view that it would be more appropriate to proceed to the adoption of the Council Decision on the conclusion of the Marrakesh Treaty after the Commission has tabled a legislative proposal setting out the amendments to the legal framework of the European Union that are necessary to adjust it to the requirements of the Marrakesh Treaty. Those delegations have recalled that when the European Union becomes party to an international treaty it must be in a position to give full effect to its obligations deriving from that treaty, and that this is possible only after the EU legal framework has been made compliant to the international treaty in question. Accordingly, even if the Council adopts the Decision on the conclusion of the Marrakesh Treaty on behalf of the European Union, it would not be possible to deposit the relevant instruments of ratification (and thus finalise the conclusion of the Marrakesh Treaty by the European Union) until the internal EU legal framework has been adjusted accordingly. Such an adjustment, however, can only take place on the basis of a legislative proposal on the implementation of the Marrakesh Treaty that the Commission has not submitted so far.
8. It has been suggested by one delegation that the Council follows its previously set precedent, when the Council adopted the Decision to conclude the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (Council Decision 2000/278/EC) before the corresponding adjustment of the EU legal framework had been carried out.³ It has been pointed out, however, by the Council's Legal Service that contrary to the present case, the Commission's legislative proposal implementing the Treaties in question had been submitted prior to the adoption of the Council Decision to conclude.

³ In that case, the Council Decision provided explicitly that the instruments of ratification could not be deposited before the date by which Member States had to bring into force the measures adopted by the European Parliament and the Council necessary to adapt the existing EU legal framework to the obligations deriving from the WCT and WPPT.

9. Clarity and legal certainty as regards the measures necessary for the implementation of the Marrakesh Treaty is of particular importance in order to ensure the speedy and effective application of the Marrakesh Treaty. This in turn would facilitate the full and equal participation in the cultural life and the access to education of persons who are blind, with visual impairments or other print disabilities. In an attempt to provide insight in the measures necessary for the implementation of the Marrakesh Treaty, the Commission services circulated on 11 February 2015 a paper setting out the Commission's preliminary views on the possible ways of implementing the Marrakesh Treaty.⁴ In the view of many delegations, however, the Commission's paper remains too vague and does not meet the requirement of absolute clarity and legal certainty; according to these delegations, only a concrete formal legislative proposal on the implementation of the Marrakesh Treaty in the European Union *acquis* submitted by the Commission would be able to meet this requirement. The existence of such a legislative proposal is essential for both the timely conclusion of the Marrakesh Treaty and its speedy implementation and application in the European Union and its Member States. Furthermore, this approach would achieve both goals: to accelerate and facilitate the preparation by Member States of the necessary national legal instruments to accommodate the Marrakesh Treaty at national level; and to provide a useful basis for concluding the ongoing complex discussions on the legal basis of the proposed Council Decision on the conclusion of the Marrakesh Treaty and on the question of competence.
10. The Commission considers that the Marrakesh Treaty falls under exclusive European Union competence and that the appropriate legal basis for the proposed Council Decision on the conclusion of the Marrakesh Treaty should be Articles 114 and 207 TFEU.
11. The Council's Legal Service shares the Commission's view as regards the nature of the competence. However, as regards the legal basis, the Council's Legal Service considers that Article 207 TFEU would be an adequate legal basis by itself.

⁴ 6035/15.

12. A large number of delegations consider that the Marrakesh Treaty falls under shared EU/national competence. Some of these delegations have clearly indicated their intention to ratify the Marrakesh Treaty in their own name, side by side with the European Union. In this regard, several delegations recalled their earlier statements entered in the Council's minutes upon the adoption of the Council Decision on the signature of the Marrakesh Treaty.⁵ According to the Commission, Member States should not ratify the Marrakesh Treaty under EU law.
13. As for the legal basis, several delegations disagree with the use of Art. 207 TFEU, while a few delegations consider that, if any legal basis additional to Art. 114 TFEU should be used, that should be Art. 19(1) TFEU, which allows action to combat discrimination based on, *inter alia*, disability. At the same time there are also delegations that could accept the double legal basis (Art. 114 and 207 TFEU) proposed by the Commission.

III. CONCLUSION

14. In the light of the above mentioned situation and with the aim to facilitate a pragmatic solution based on consensus and the strong political will to see the Marrakesh Treaty produce its effects in the shortest possible time in order to ensure benefits to the persons who are blind, with visual impairments and other print disabilities worldwide, the Permanent Representatives Committee is invited to consider recommending to the Council to request the Commission, under the A items of one of the Council's future meetings, to submit, without delay, a legislative proposal to amend the EU legal framework so that it complies with the Marrakesh Treaty (see proposed language in the Annex to this Note) and consider suspending the further examination of the proposed Council Decision on the conclusion of the Marrakesh Treaty until the Commission has presented the legislative proposal to amend the EU legal framework so that it complies with the Marrakesh Treaty.

⁵ 8305/14 ADD 1.

The Council of the European Union,

UNDERLINES its full commitment to the rapid entry into force of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled (hereafter "the Marrakesh Treaty").

WELCOMES in this regard the Commission proposal for a Council Decision on the conclusion of the Marrakesh Treaty on behalf of the European Union as one of the steps leading towards such a goal.

RECALLS that the conclusion of the Marrakesh Treaty on behalf of the European Union cannot take place before the EU legal framework has been amended to comply with that Treaty.

REGRETS the fact that the Commission has not so far submitted the necessary legislative proposal which would allow a rapid amendment of the EU legal framework in that respect.

CONSIDERS therefore that the further examination of the proposed Council Decision should be suspended pending the adaptation of the EU legal framework.

CALLS upon the Commission, in accordance with Article 241 TFEU, to submit without delay the necessary legislative proposal to that effect.
