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From: General Secretariat of the Council
To: Permanent Representatives Committee

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Subject: Proposal for a Regulation of the European Parliament and of the Council on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled
- Preparation for the trilogue

I. INTRODUCTION

1. On 14 September 2016, the Commission submitted a draft proposal for a Directive and for a Regulation for the implementation of the Marrakesh Treaty in order to fulfil its international obligations. The Marrakesh Treaty was adopted in 2013 at the World Intellectual Property Organisation (WIPO) with the aim of facilitating the availability and cross-border exchanges of accessible formats of books and other print material to beneficiaries of the Marrakesh Treaty, i.e. people who are blind, visually impaired or otherwise print disabled. It was signed by the Union in April 2014.

2. The proposed Regulation will implement the Union's obligation under in respect of the exchange of accessible format copies between the Union and third countries that are parties to the Marrakesh Treaty, for non-commercial purposes, for the benefit of beneficiary persons.
3. The Commission presented a proposal for a Council Decision for the ratification of the Marrakesh Treaty by the Union in October 2014. The question of exclusive competence was questioned by several Member States. The Commission asked for an Opinion from the Court of Justice on 11 August 2015. The European Court of Justice delivered its opinion on 14 February 2017 which confirms the exclusive competence of the Union. It also states that the Marrakesh Treaty does not come within the ambit of the common commercial policy and that the exceptions or limitations to the exclusive rights of holders of copyright and related rights for the making and dissemination of copies in accessible formats of certain works and other subject-matter provided for by the Marrakesh Treaty "*will have to be implemented within the field harmonised by Directive 2001/29. The same is true of the import and export arrangements prescribed by the Marrakesh treaty inasmuch as they are ultimately intended to permit the communication to the public or the distribution, in the territory of a contracting party, of accessible format copies published in another contracting Party, without the consent of the right-holders being obtained.*"
4. The European Parliament started the discussions and their vote is scheduled for 23 March 2017.

II. STATE OF PLAY

5. The Presidency started the discussions together with the Directive in October 2016 at the working party meeting level. The overall objective of the draft regulation and of the draft Directive met a large consensus between the Member States which emphasised the importance of moving swiftly on this file. Several meetings of the working group took place.
6. The main issue regarding the Regulation, is the proposed change of the legal basis from 207 to 114 following the Court of Justice decision regarding the conclusions for the ratification which excludes the common commercial policy of the scope of the Marrakesh Treaty.
7. The **main** changes in comparison to the **initial** proposal thus incorporated address the modification of the legal basis and, consist of :
 - The adaptation of the recitals and in Article 1 to reflect and justify the change of legal basis,
 - The alignment of the definition of authorised entities to the Marrakech Treaty in Article 2 (4) (same as for the Directive).

III. CONCLUSION

8. **The Permanent Representatives Committee is invited to:**
 - **agree on the change of the legal basis from 207 to 114.**
 - **grant the Presidency a mandate based on the text annexed to start negotiations with the European Parliament, with a view to reaching an agreement at first reading.**

Presidency compromise
proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on the cross-border exchange between the Union and third countries of accessible format
copies of certain works and other subject-matter protected by copyright and related rights for
the benefit of persons who are blind, visually impaired or otherwise print disabled**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee¹

Acting in accordance with the ordinary legislative procedure,

¹ OJ C , , p . .

Whereas:

- (1) The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled ('the Marrakesh Treaty') was signed on behalf of the Union on 30 April 2014². It requires contracting parties to provide exceptions or limitations to the exclusive rights of holders of copyright and related rights for the making and dissemination of copies in accessible formats of certain works and other subject-matter and for the cross-border exchange of those accessible format copies.
 - (1a) The beneficiaries of the Marrakesh Treaty are persons who are blind, who have a visual impairment which cannot be improved so as to give them visual function substantially equivalent to that of a person who has no such impairment or who have a perceptual or reading disability, or who are unable, due to a physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading, in so far, as a result of such impairments or disabilities, those persons cannot read printed works to substantially the same degree as persons without such impairments or disabilities.
 - (1b) Persons who are blind, visually impaired or otherwise print disabled continue to face many barriers to accessing books and other print material. The need to increase the number of works and other protected subject-matter in accessible formats available to those persons and improve their circulation and dissemination has been recognised at an international level.

² Council Decision 2014/221/EU of 14 April 2014 on the signing, 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. (OJ L115, 17.4.2014, p. 1.)

- (1c) In accordance with the opinion A-3/15 of the European Court of Justice, the exceptions or limitations to the exclusive rights of holders of copyright and related rights for the making and dissemination of copies in accessible formats of certain works and other subject-matter provided for by the Marrakesh Treaty " *will have to be implemented within the field harmonised by Directive 2001/29. The same is true of the import and export arrangements prescribed by the Marrakesh treaty inasmuch as they are ultimately intended to permit the communication to the public or the distribution, in the territory of a contracting party, of accessible format copies published in another contracting Party, without the consent of the right-holders being obtained.*"³
- (2) Directive [...] aims to implement the Union's obligations under the Marrakesh Treaty in a harmonised manner in order to improve the availability of accessible format copies for beneficiary persons and their circulation within the internal market, and requires Member States to introduce a mandatory exception to certain rights of right holders that are harmonised by Union law. This Regulation aims to implement the obligations under the Marrakesh Treaty with respect to the export and import arrangements of accessible format copies for non commercial purposes for the benefit of beneficiary persons between the Union and third countries that are parties to the Marrakesh Treaty, and to lay down the conditions for such export and import in an uniform manner within the field harmonised by Directive 2001/29 and Directive [...] in order to ensure that those measures are applied consistently throughout the internal market and do not jeopardize the harmonisation of exclusive rights and exceptions therein.

³ point 112 of the Opinion A-3/15 of the European Court of Justice

- (3) The Regulation should ensure that accessible format copies of books, journals, newspapers, magazines and other writings, notations including sheet music, and other print material, including in audio form, whether digital or analogue, which have been made in any Member State in accordance with the national provisions adopted pursuant to Directive [...] may be distributed, communicated, or made available to a beneficiary person or authorised entity in third countries that are parties to the Marrakesh Treaty. Accessible formats include for example Braille, large print, adapted e-books, audiobooks and radio broadcasts. Taking into account the "*non-commercial objective*" of the Marrakesh Treaty⁴, the distribution, communication to the public or making available of accessible format copies to print disabled persons or to authorised entities in the third country should only be carried out on a non-profit basis by authorised entities established in the Union. Authorised entities should not be obliged to make and disseminate accessible format copies.
- (4) This Regulation should also allow for the importation of and access to accessible format copies made in accordance with the implementation of the Marrakesh Treaty from a third country, by beneficiary persons in the Union and authorised entities established in the Union, for non commercial purposes for the benefit of print disabled persons. It should be possible for those accessible format copies to circulate in the internal market under the same conditions as accessible format copies made in the Union in accordance with Directive [...].
- (5) In order to improve the availability of accessible format copies and to prevent the illegal dissemination of works and other subject-matter, authorised entities which engage in the distribution, communication to the public or making available of accessible format copies should comply with certain obligations.

⁴ point 90 of the Opinion A-3/15 of the European Court of Justice

- (6) Any processing of personal data under this Regulation should respect fundamental rights, including the right to respect for private and family life and the right to protection of personal data under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union ('the Charter') and must be in compliance with Regulation 2016/679/EC of the European Parliament and of the Council⁵, which govern the processing of personal data, as may be carried out by authorised entities within the framework of this Regulation and under the supervision of the Member States' competent authorities, in particular the public independent authorities designated by the Member States.
- (7) The United Nations Convention on the Rights of Persons with Disabilities ('the UNCRPD'), to which the EU is a party, guarantees people with disabilities the right of access to information and the right to participate in cultural, economic and social life on an equal basis with others. The UNCRPD requires parties to the Convention to take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.
- (7a) Since the objective of this Regulation, namely to implement the obligations in the Marrakesh Treaty with respect to the export and import of accessible format copies for non commercial purposes for the benefit of beneficiary persons between the Union and third countries that are parties to the Marrakesh Treaty, and to lay down the conditions for such export and import, cannot be sufficiently achieved by the Member States, but can rather, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.

⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regards to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1-88).

- (8) This Regulation respects the fundamental rights and observes the principles recognised in the Charter. This Regulation should be interpreted and applied in accordance with those rights and principles,

HAVE ADOPTED THIS REGULATION:

Article 1

Subject matter and scope

This Regulation lays down uniform rules on the cross-border exchange of accessible format copies of certain works and other subject-matter between the Union and third countries that are parties to the Marrakesh Treaty without the authorisation of the right holder, for the benefit of persons who are blind, visually impaired or otherwise print disabled, within the field harmonised by Directive 2001/29 and Directive [...] in order not to jeopardize the harmonisation of exclusive rights and exceptions in the internal market.

Article 2

Definitions

For the purposes of this Regulation the following definitions shall apply:

- (1) ‘work or other subject-matter’ means a work in the form of a book, journal, newspaper, magazine or other writing, notation including sheet music, and related illustrations, in any medium, including in audio form such as audiobooks, which is protected by copyright or related rights and which is published or otherwise lawfully made publicly available;
- (2) ‘beneficiary person’ means:
- (a) a person who is blind;
 - (b) a person who has a visual impairment which cannot be improved so as to give the person visual function substantially equivalent to that of a person who has no such impairment, and is, as a result, unable to read printed works to substantially the same degree as a person without such impairment;
 - (c) a person who has a perceptual or reading disability, and is, as a result, unable to read printed works to substantially the same degree as a person without such disability; or

- (d) a person who is otherwise unable, due to a physical disability, to hold or manipulate a book or to focus or move their eyes to the extent that would be normally acceptable for reading.
- (3) ‘accessible format copy’ means a copy of a work or other subject-matter in an alternative manner or form that gives a beneficiary person access to the work or other subject-matter, including allowing for the person to have access as feasibly and comfortably as a person without a visual impairment or any of the disabilities referred to in paragraph 2;
- (4) ‘authorised entity’ means an entity that is authorised or recognised by a Member State to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a public institution or non-profit organisation that provides the same services to beneficiary persons as one of its primary activities, institutional obligations or as part of their public-interest missions.

Article 3

Export of accessible format copies to third countries

An authorised entity established in a Member State may distribute, communicate or make available on a non-profit basis to beneficiary persons or to an authorised entity established in a third country that is a party to the Marrakesh Treaty an accessible format copy made in accordance with the national legislation adopted pursuant to Directive [...].

Article 4

Import of accessible format copies from third countries

A beneficiary person or an authorised entity established in a Member State may import or otherwise may obtain or may access and thereafter use, in accordance with the national legislation adopted pursuant to Directive [...], an accessible format copy that has been distributed, communicated or made available to beneficiary persons or to authorised entities, by an authorised entity in a third country that is a party to the Marrakesh Treaty.

Article 5

Obligations of authorised entities

1. An authorised entity established in a Member State carrying out the acts referred to in Articles 3 and 4 shall ensure that:
 - (a) it distributes, communicates and makes available accessible format copies only to beneficiary persons or other authorised entities;
 - (b) it takes appropriate steps to discourage the unlawful reproduction, distribution, communication to the public and making available of accessible format copies;
 - (c) it demonstrates due care in, and maintains records of, its handling of works and other subject-matter and of their accessible format copies; and
 - (d) it publishes and updates, on its website if appropriate, information on the manner in which it complies with the obligations laid down in points (a) to (c) of this paragraph.

2. An authorised entity established in a Member State carrying out the acts referred to in Articles 3 and 4 shall provide the following information, on request, to any beneficiary person, authorised entity or right holder:
 - (a) the list of works and other subject-matter of which it has accessible format copies and the available formats; and
 - (b) the name and details of the authorised entities with which it has engaged in the exchange of accessible format copies pursuant to Articles 3 and 4.

Article 6

Protection of personal data

The processing of personal data carried out within the framework of this Regulation shall be carried out in compliance with Directive [95/46/EC](#).

Article 7

Review

No sooner than ...[five years after the date of application], the Commission shall carry out an evaluation of this Regulation and present the main findings to the European Parliament, the Council and the European Economic and Social Committee, accompanied, where appropriate, by proposals for the amendment of this Regulation.

Member States shall provide the Commission with the necessary information for the preparation of the evaluation report.

Article 8

Entry into force and application

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be applicable as of ... [date of transposition of Directive [...]].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament

The President

For the Council

The President