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**"I/A" ITEM NOTE**

From:	General Secretariat of the Council
To:	Permanent Representatives Committee (Part 1)/Council
On:	9 April 2014
No. prev. doc.:	7596/14 PI 31
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Subject:	Council Decision 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 - Adoption = Statements

**1. Statement by the Czech Republic, Finland, France, Germany, Romania, Slovakia and Slovenia on the competence of the Union and the Member States to sign the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled**

The Czech Republic, Finland, France, Germany, Romania, Slovakia and Slovenia stress the importance of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled and thus approve its signature by the European Union.

However, the Czech Republic, Finland, France, Germany, Romania, Slovakia and Slovenia consider that the Marrakesh Treaty is within an area of shared competence between the Union and the Member States, and must therefore be signed and concluded not only by the Union, but also by all Member States. Indeed, the Czech Republic, Finland, France, Germany, Romania, Slovakia and Slovenia consider that Member States remain competent to be Parties to the Marrakesh Treaty, together with the Union, at least in respect of Article 4 thereof.

That Article imposes on the Contracting Parties an obligation to provide for a limitation or exception in their national legislation to the right of reproduction, the right of distribution and the right of making available to the public, in order to facilitate access of eligible persons to works in accessible formats. However, Union law does not have any similar provision: in this respect, Article 5(3)(b) of Directive 2001/29/EC opens a mere possibility. Furthermore, it does not define the exceptions or limitations for the benefit of blind or otherwise print disabled persons.

Thus, the Marrakesh Treaty goes beyond the harmonisation carried out by Directive 2001/29/EC. The main purpose of the Treaty is to approximate the laws of the Contracting Parties, and it aims at improving the proper operation of the national markets of the various Contracting Parties, that is, in the case of the Union, of the internal market, which falls under a shared competence of the Union and its Member States.

The Czech Republic, Finland, France, Germany, Romania, Slovakia and Slovenia consider, in the light of the relevant Court of Justice case-law (see, to that effect, Opinion 1/94 of the Court of Justice of 15 November 1994, paragraph 88), that the Union cannot impose through an international agreement, the adoption of measures that Member States remain free to provide for at the internal level. Since the Union has not yet adopted common rules in the field covered by Article 4 of the Marrakesh Treaty, it has not become exclusively competent, in accordance with Article 3(2) of the Treaty on the Functioning of the European Union (TFEU), and the Member States have not lost their competence.

Even if the decision authorising the signature of the Treaty on behalf of the Union was based solely on Article 207 TFEU, the Czech Republic, Finland, France, Germany, Romania, Slovakia and Slovenia consider that Member States would still be competent to sign and conclude the Marrakesh Treaty alongside the Union. Indeed, the Czech Republic, Finland, France, Germany, Romania, Slovakia and Slovenia consider that the principal and accessory theory developed by the Court of Justice in its case-law on the choice of a legal basis does not apply to the sharing of competences between the Union and its Member States. On the contrary, it is sufficient for a provision of an international agreement, even of minor importance, to fall outside the exclusive competence of the Union and within the competence of the Member States, in order to consider that the agreement is a matter of shared competence between the Union and its Member States, and that it must take the form of a mixed agreement (see, to that effect, Opinion 1/08 of the Court of 30 November 2009, paragraphs 138 to 140).

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## 2. Statement by Poland

The Republic of Poland recognizes the importance of the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled and is of the view that urgent steps towards the signature and ratification of the treaty should be taken by both the European Union and its Member States.

Poland believes that the Marrakesh Treaty constitutes, on the one hand, a legal framework aimed at improving a system of exchange of accessible format copies for the benefit of the blind and visually impaired persons, and on the other hand, it ensures continued respect for copyright and creativity. In the reality, the implementation of the Treaty will be closely linked with social, cultural and educational policies of the Member States relating to the fight against social exclusion of persons with disabilities.

This is the main reason why Poland considers the Marrakesh Treaty to lie within the area of shared competence between the Union and the Member States, and why its effective implementation needs action to be taken on both sides.

Poland has been constantly raising doubts if Art. 207 TFEU should be used as one of the legal bases for the signature and ratification of the Marrakesh Treaty. Indeed, we believe that the main objective of the Treaty is not to ensure better trade conditions for EU businesses outside of the EU, but to ensure access of visually impaired persons to published works in special formats. In the light of the relevant recent European Court of Justice case-law the principal objective of an international agreement should be taken into account, when deciding on the legal basis for the signature by European Union and its Member States.

Poland is of the view that the correct legal base to sign and ratify the Marrakesh Treaty should be Art. 114 TFEU, which could be complemented with Art. 19 TFEU. Such legal base would guarantee the recognition of diversities among social policies of the Member States in relation to visually impaired persons, including measures that are applied in the framework of copyright law.

On the basis of the arguments presented above, the Republic of Poland decided to abstain from voting on the adoption of the decision 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.

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### **3. Statement by the United Kingdom**

The United Kingdom reiterates its strong support for the Marrakesh Treaty (the Treaty), which stands to benefit millions of visually impaired people around the world by encouraging the supply of books in accessible formats.

The UK considers that the European Union does not have exclusive competence in relation to the Treaty, and that Member States are competent to sign and ratify it. The UK has already signed the Treaty and intends to ratify it at the earliest opportunity.

The UK therefore regrets that the Council Decision authorising the EU signature of the Treaty has a legal base which includes Article 207 TFEU. This legal base relates to the promotion of the common commercial policy, which is not the Treaty's primary objective. Because of this, the UK considers Article 207 TFEU to be an incorrect legal basis for this Council Decision.

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**4. Statement by the European Commission on the competence of the Union as regards the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled**

The European Commission considers that, pursuant to Article 3(1)(e) and Article 3(2) TFEU, the subject-matter of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled, falls within the Union's exclusive competence.

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