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#### NOTE

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From:	General Secretariat of the Council
To:	Delegations
Subject:	Beijing Treaty on Audiovisual Performances - Presidency paper on issues related to the ratification

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Delegations will find in the Annex a Presidency paper on substantive issues related to the ratification of the Beijing Treaty on Audiovisual Performances, aimed at structuring the discussion at the meeting of the Working Party on Intellectual Property on 18 September 2014.

## State of play

**The Beijing Treaty on Audiovisual Performances** (hereinafter, "the Treaty") was adopted by the Diplomatic Conference on the Protection of Audiovisual Performances in Beijing, on 24 June 2012. The European Union signed the Treaty on 19 June 2013. Bearing in mind that 72 eligible parties, including 20 EU Member States, have signed the Treaty and five have already ratified or acceded to it, the Presidency believes that it is timely to have a discussion on certain substantive issues of the Treaty, with a view to consider its ratification.

## Content of the Treaty

The Treaty updates the international protection of performers, who are granted minimum rights with respect to their audiovisual performances: moral rights, exclusive rights in their unfixed performances (fixation, broadcasting and communication to the public) and exclusive rights of reproduction, distribution, rental and making available to the public of their performances fixed in audiovisual fixations. This catalogue of rights is completed with the possibility to grant an exclusive right of broadcasting and communication to the public of performances fixed in audiovisual fixations, which, pursuant to Article 11 of the Treaty, may be replaced by a remuneration right or even not be granted at all.

There is a specific provision regarding the transfer of rights which basically allows Contracting Parties to determine this issue by national law. The provisions on limitations and exceptions, the term of protection, the legal protection of technological measures and rights management information, as well as the enforcement of rights, complete the protection granted by the Treaty and follow the model of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

Furthermore, the key provisions of the Treaty are modelled on the provisions of the WPPT concerning the protection of performers as regards their aural performances. Therefore, the kind of provisions in national legislation that are sufficient to comply with the obligations of Contracting Parties to the WPPT could easily serve as a model to comply with the corresponding requirements of the Treaty.

### Main substantive issues for discussion

With the exception of moral rights, the minimum level of protection required by the Treaty is currently granted to European performers by the EU *acquis*, as summarised in the Annex. Therefore, the Treaty could be ratified by the EU without necessarily reviewing the *acquis*.

Two articles of the Treaty offer Contracting Parties flexibility to choose among different levels of protection: Article 11 (right of broadcasting and communication to the public) and Article 19 (application in time). This is subject to formal requirements (notifications) upon ratification or accession (without prejudice to the possibilities that Contracting Parties enjoy to withdraw or amend them).

In view of the issues mentioned above, the Presidency invites Member States to consider the following questions for their discussion at the Council Working Party:

#### I. Right of broadcasting and communication to the public:

Article 11 deals with the right of broadcasting and communication to the public, which, in accordance with the definition contained in Article 2(d), excludes the acts of making available to the public, as provided for in Article 10.

Article 11 offers a wide variety of options for Contracting Parties to provide performers' rights in respect of the broadcasting and the communication to the public of their performances fixed in audiovisual fixations, ranging from an exclusive right to no right at all. The EU *acquis* doesn't provide any right of broadcasting or communication to the public of fixed audiovisual performances. This option is consistent with Article 11(3) of the Treaty

<p><i>1. Should the EU harmonise these rights and grant performers an exclusive right to authorise, or a right to an equitable remuneration for, the broadcasting and/or (all forms or some forms of) communication to the public of their performances fixed in audiovisual fixations?</i></p>
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The situation among the EU Member States varies: whereas most of them grant performers an exclusive right, others (e.g. Germany and Spain) provide for a remuneration right.

It is important to keep in mind that Article 4, paragraphs (2) and (3) (national treatment), establishes a specific regime for Article 11, thus giving Contracting Parties full flexibility as to the recognition or not of national treatment with regard to the rights set forth in Article 11.

<p><i>2. Does your national law provide performers with any of these rights?</i></p>
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<p><i>3. Do you intend to modify your national law in view of the Treaty?</i></p>
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## II. Application in Time

Article 19(1) sets forth the obligation to accord protection to fixed performances that exist at the moment of the entry into force of the Treaty and to all performances that occur after its entry into force. However, article 19(2) allows a Contracting Party not to apply the provisions of Articles 7 to 11 of the Treaty, or any one or more of those, to fixed performances that existed at the moment of the entry into force of the Treaty for that Contracting Party (subject to a notification).

Provisions on application in time in the EU copyright acquis follow the approach of Article 19(1) of the Treaty (i.e. protection extends also to works, performances and other subject-matter of protection which exist before the entry into force and meet the criteria of protection of the corresponding Directive).

4. <i>Do you envisage any reason why the EU should follow a different approach as regards audiovisual performances, pursuant to Article 19(2) of the Treaty?</i>
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### III. Moral rights:

Article 5 of the Treaty provides performers with moral rights. Moral rights have not been subject to harmonisation in the EU.

5. <i>Should any action on moral rights for audiovisual performers be taken at EU level in order to follow the standards of Article 5 of the Treaty?</i>
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6. <i>Does your national law provide audiovisual performers with moral rights?</i>
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7. <i>Do you intend to modify your national law in view of the Treaty?</i>
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**EU *acquis***

The EU *acquis* provides performers, with regard to their live performances and their performances fixed in audiovisual fixations, with the following rights, which are presented together with their corresponding article of the Treaty:

Treaty provisions	EU <i>acquis</i>
Article 6 Economic Rights of Performers in their Unfixed Performances	Articles 7(1) and 8(1) of the Rental and Lending Directive (2006/115/EC)
Article 7 Right of Reproduction	Article 2(b) of the Infosoc Directive (2001/29/EC)
Article 8 Right of Distribution	Article 9(1)(a) and 9(2) of the Rental and Lending Directive (2006/115/EC)
Article 9 Right of Rental	Article 3(1)(b) of the Rental and Lending Directive (2006/115/EC)
Article 10 Right of Making Available of Fixed Performances	Article 3(2)(a) of the Infosoc Directive (2001/29/EC)
Article 13 Limitations and Exceptions	Article 5 of the Infosoc Directive(2001/29/EC) and Article 10 of the Rental and Lending Directive (2006/115/EC)
Article 14 Term of Protection	Article 3 of the Term Directive (2006/116/EC)
Article 15 Obligations concerning Technological Measures	Article 6 of the Infosoc Directive (2001/29/EC)

Article 16 Obligations concerning Rights Management Information	Article 7 of the Infosoc Directive (2001/29/EC)
Article 20 Provisions on Enforcement of Rights	Directive on the enforcement of intellectual property rights (2004/48/EC) and Article 8 of the Infosoc Directive (2001/29/EC)

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