



## **The EU, acting on its own, may conclude the Marrakesh Treaty on access to published works for persons who are visually impaired**

*The Treaty may affect common EU rules relating to copyright protection*

The Marrakesh Treaty<sup>1</sup> requires the contracting States to provide in their national law that certain entities (government institutions and non-profit organisations which provide services relating to education, instructional training, adaptive reading or information access) may, without the authorisation of the rightholder, reproduce or distribute copies of published works in a format which gives access to the works for persons who are blind, visually impaired or otherwise print disabled (referred to in the treaty as 'beneficiary persons'). The contracting States must also promote the cross-border exchange of accessible format copies by permitting certain imports and exports of those copies.

In 2012 the Council authorised the Commission to participate, on behalf of the EU, in negotiations within the framework of the World Intellectual Property Organisation (WIPO) on the future Marrakesh Treaty. The treaty was adopted on 27 June 2013. Taking the view that the EU itself (without the participation of the Member States) could conclude the Marrakesh Treaty, the Commission put forward a proposal for a decision on the conclusion of the treaty: that decision was not adopted by the Council. The Commission then asked the Court of Justice to give its Opinion on whether the Marrakesh Treaty may be concluded by the EU acting on its own or whether the participation of the Member States is necessary for that purpose. Eight Member States, which consider that the EU does not have exclusive competence to conclude the Marrakesh Treaty in its entirety and that, their participation is therefore necessary, have taken part in the Opinion procedure.<sup>2</sup>

In today's Opinion, the Court examines whether the Marrakesh Treaty is connected with the common commercial policy, which, under the FEU Treaty, falls within the exclusive competence of the EU. The Court concludes that **the Marrakesh Treaty does not come within the ambit of the common commercial policy**. First, the treaty is not intended to promote, facilitate or govern international trade in accessible format copies; its aim is rather to improve the position of beneficiary persons by facilitating, through various means, their access to published works. Secondly, the cross-border exchange of accessible format copies for which the Marrakesh Treaty provides cannot be equated with international trade engaged in by ordinary operators for commercial purposes (given that the exchange in question takes place only between government institutions or non-profit organisations in accordance with the conditions specified in the treaty and that the copies imported and exported are intended for beneficiary persons alone).

Next, the Court recalls that **the EU also has exclusive competence when the conclusion of an international agreement may affect 'common rules' or alter their scope**. The Court thus considers whether that is the case of the Marrakesh Treaty.

<sup>1</sup>Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.

<sup>2</sup>The Member States in question are Finland, France, Hungary, Italy, Lithuania, the Czech Republic, Romania and the UK.

The Court states in that regard that the EU directive on copyright<sup>3</sup> permits Member States which wish to do so to introduce — for the benefit of persons with a disability — an exception or limitation to the rights of reproduction and communication to the public. It follows that the exception or limitation provided for by the Marrakesh Treaty will have to be implemented within the area harmonised by the directive. The same is true of the import and export arrangements prescribed by the treaty, inasmuch as they are intended to permit the communication to the public or the distribution, in the territory of a contracting State, of accessible format copies published in another contracting State, without the consent of the rightholders being obtained. The Court points out in that regard that, while the Member States have the option under the directive of introducing such an exception or limitation, that option is granted by the EU legislature and is highly circumscribed by various requirements of EU law.

The Court also states that, unlike the directive, the Marrakesh Treaty lays down an obligation (not merely an option) to introduce an exception or limitation for the benefit of certain persons with disabilities. The Court thus considers that, once the treaty is concluded, all the Member States will be required to introduce the exception or limitation for persons with a disability.

It follows that **the body of obligations laid down by the Marrakesh Treaty falls within an area that is already covered to a large extent by ‘common EU rules’ and that the conclusion of the Treaty may affect those rules or alter their scope.**

**Since the conclusion of the Marrakesh Treaty may affect the directive on copyright or alter its scope, the Court concludes that the EU has exclusive competence and that the treaty may be concluded by the EU acting on its own, without the participation of the Member States.**

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**NOTE:** A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

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<sup>3</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).