Court of Justice EU, 14 February 2017, Opinion Marrakesh Treaty

COPYRIGHT - OPINION

The conclusion of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled falls within the exclusive competence of the European Union because 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 the conclusion of that treaty may thus affect those rules or alter their scope

- **that the exception or limitation 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 that 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 rightholders being obtained.**

122. It must be added in that regard that the Member States' discretion has to be exercised within the limits imposed by EU law (see, by analogy, judgment of **1 December 2011, Painer, C-145/10, EU:C:2011:798**, paragraph 104), which means that the Member States are not free to determine, in an un-harmonised manner, the overall boundaries of the exception or limitation for persons with a disability (see, by analogy, **judgment of 26 April 2012, DR and TV2 Danmark, C-510/10, EU:C:2012:244**, paragraph 36).

123. In particular, Member States may provide, in their law, for an exception or limitation for persons with a disability, but may do so only if they comply with all the conditions laid down in Article 5(3)(b) of Directive 2001/29, that is to say, the exception or limitation must cover only uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability (see, to that effect, judgment of **27 February 2014, OSA, C-351/12, EU:C:2014:110**, paragraph 39), conditions which, moreover, are not included in Articles 4 to 6 of the Marrakesh Treaty.

124. Furthermore, the discretion enjoyed by Member States in implementing an exception or limitation for persons with a disability cannot be used in such a way as to compromise the objectives of Directive 2001/29 which relate, as stated in recitals 1 and 9 thereof, to the establishment of a high level of protection for authors and to the smooth functioning of the internal market (see, by analogy, **judgments of 1 December 2011, Painer, C-145/10, EU:C:2011:798**, paragraph 107. and of **10 April 2014, ACI Adam and Others, C-435/12, EU:C:2014:254**, paragraph 34).

125. That discretion is also limited by Article 5(5) of Directive 2001/29, which makes the introduction of the exception or limitation under Article 5(3)(b) of the directive subject to three conditions, namely that the exception or limitation may be applied only in certain special cases, that it does not conflict with a normal exploitation of the work and that it does not unreasonably prejudice the legitimate interests of the copyright holder (see, by analogy, judgments of **16 July 2009, Infopaq International, C-5/08, EU:C:2009:465**, paragraph 58, and of **1 December 2011, Painer, C-145/10, EU:C:2011:798**, paragraph 110).

- **The rules of the Marrakesh Treaty which provide for the introduction of an exception or limitation to the rights of reproduction, distribution and making available to the public cannot be held to have a specific link with international trade such as to signify that they concern the commercial aspects of intellectual property, the rules of the Marrakesh Treaty governing the export and import of accessible format copies do however relate to international trade**
- **The conclusion of the Marrakesh Treaty does not fall within the common commercial policy (article 207 CJEU) because the cross-border exchange for which the Marrakesh Treaty provides cannot be equated with International Trade for commercial purposes**

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Court of Justice EU, 14 February 2017
(K. Lenaerts, A. Tizzano, M. Ilešič, L. Bay Larsen (Rapporteur), T. von Danwitz and A. Prechal, Presidents of Chambers, J.-C. Bonichot, A. Arabadjiev, C. Toader, M. Safjan, D. Šváby, E. Jarašiūnas, C.G. Fernlund, C. Vajda and S. Rodin)
OPINION 3/15 OF THE COURT (Grand Chamber)
14 February 2017
(Opinion pursuant to Article 218(11) TFEU — Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled — Article 3 TFEU — Exclusive external competence of the European Union — Article 207 TFEU — Common commercial policy — Commercial aspects of intellectual property —

International agreement that may affect common rules or alter their scope — Directive 2001/29/EC — Article 5(3)(b) and (4) — Exceptions and limitations for the benefit of people with a disability)

In Opinion procedure 3/15,

REQUEST for an Opinion pursuant to Article 218(11) TFEU, made on 11 August 2015 by the European Commission,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, M. Ilešič, L. Bay Larsen (Rapporteur), T. von Danwitz and A. Prechal, Presidents of Chambers, J.-C. Bonichot, A. Arabadjiev, C. Toader, M. Safjan, D. Šváby, E. Jarašiūnas, C.G. Fernlund, C. Vajda and S. Rodin, Judges,

Advocate General: N. Wahl,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 June 2016,

after considering the observations submitted on behalf of:

– the European Commission, by B. Hartmann, F. Castillo de la Torre and J. Samnadda, acting as Agents,

– the Czech Government, by O. Šváb, M. Smolek, E. Ruffer and J. Vláčil, acting as Agents,

– the French Government, by D. Segoin, F.-X. Bréchot, D. Colas and G. de Bergues, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Fiorentino, avvocato dello Stato,

– the Lithuanian Government, by D. Kriaučiūnas and R. Dzikovič, acting as Agents,

– the Hungarian Government, by M. Fehér, G. Koós and M. Bóra, acting as Agents,

– the Romanian Government, by R. Radu, A. Voicu, R. Mangu and E. Gane, acting as Agents,

– the Finnish Government, by J. Heliskoski, acting as Agent,

– the United Kingdom Government, by M. Holt and V. Kaye, acting as Agents, and by R. Palmer, Barrister,

– the European Parliament, by A. Neergaard, D. Warin and A. Auersperger Matić, acting as Agents,

– the Council of the European Union, by F. Florindo Gijón and M. Balta, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 September 2016,

gives the following

Opinion

1. The request for an Opinion submitted to the Court of Justice by the European Commission is worded as follows:

'Does the European Union have exclusive competence to conclude the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled?'

Legal context

United Nations Convention on the Rights of Persons with Disabilities

2. Article 30(1) of the United Nations Convention on the Rights of Persons with Disabilities, which was approved on behalf of the European Community by Council Decision 2010/48/EC of 26 November 2009 (OJ 2010 L 23, p. 35) ('the UN Convention'), provides:

'States Parties recognise the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities:

(a) enjoy access to cultural materials in accessible formats;

...'

Directive 2001/29/EC

3. Recitals 1, 4, 6, 7, 9, 21 and 31 of 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) state:

'(1) The Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives.

...

(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation ...

...

(6) Without harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. ...

(7) The Community legal framework for the protection of copyright and related rights must, therefore, also be adapted and supplemented as far as is necessary for the smooth functioning of the internal market. To that end, those national provisions on copyright and related rights which vary considerably from one Member State to another or which cause legal uncertainties hindering the smooth functioning of the internal market and the proper development of the information society in Europe should be adjusted, and inconsistent national responses to the technological developments should be avoided, whilst differences not adversely affecting the functioning of the internal market need not be removed or prevented.

...

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. ...

...

(21) This Directive should define the scope of the acts covered by the reproduction right with regard to the different beneficiaries. This should be done in conformity with the acquis communautaire. A broad

definition of these acts is needed to ensure legal certainty within the internal market.

...

(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject matter must be safeguarded. ... Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. ... In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.'

4. Under Article 2 of Directive 2001/29, Member States are to provide for, inter alia, the exclusive right, for authors, to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part, of their works.

5. Article 3(1) of that directive provides:

'Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.'

6. In accordance with Article 4(1) of Directive 2001/29:

'Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.'

7. Paragraphs 3 to 5 of Article 5 of Directive 2001/29 are worded as follows:

'3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

...

(b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;

...

4. Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.'

The background to the request for an Opinion

The Marrakesh Treaty

8. According to the preamble to the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled (the 'Marrakesh Treaty'):

'The Contracting Parties,

[(1)] Recalling the principles of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in society, proclaimed in the Universal Declaration of Human Rights and the [UN Convention],

[(2)] Mindful of the challenges that are prejudicial to the complete development of persons with visual impairments or with other print disabilities, which limit their freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds on an equal basis with others, including through all forms of communication of their choice, their enjoyment of the right to education, and the opportunity to conduct research,

[(3)] Emphasizing the importance of copyright protection as an incentive and reward for literary and artistic creations and of enhancing opportunities for everyone, including persons with visual impairments or with other print disabilities, to participate in the cultural life of the community, to enjoy the arts and to share scientific progress and its benefits,

[(4)] Aware of the barriers of persons with visual impairments or with other print disabilities to access published works in achieving equal opportunities in society, and the need to both expand the number of works in accessible formats and to improve the circulation of such works,

[(5)] Taking into account that the majority of persons with visual impairments or with other print disabilities live in developing and least-developed countries,

...

[(7)] Recognising that many Member States have established limitations and exceptions in their national copyright laws for persons with visual impairments or with other print disabilities, yet there is a continuing shortage of available works in accessible format copies for such persons, and that considerable resources are required for their effort of making works accessible to these persons, and that the lack of possibilities of cross-border exchange of accessible format copies has necessitated duplication of these efforts,

[(8)] Recognising both the importance of rightholders' role in making their works accessible to persons with visual impairments or with other print disabilities and the importance of appropriate limitations and exceptions to make works accessible to these persons, particularly when the market is unable to provide such access,

[(9)] Recognising the need to maintain a balance between the effective protection of the rights of authors and the larger public interest, particularly education, research and access to information, and that such a balance must facilitate effective and timely access to works for the benefit of persons with visual impairments or with other print disabilities,

[(10)] Reaffirming the obligations of Contracting Parties under the existing international treaties on the protection of copyright and the importance and flexibility of the three-step test for limitations and exceptions established in Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works and other international instruments,

…

[(12)] Recognising the importance of the international copyright system and desiring to harmonise limitations and exceptions with a view to facilitating access to and use of works by persons with visual impairments or with other print disabilities,

…'

9. Article 1 of the Marrakesh Treaty is worded as follows:

'Nothing in this Treaty shall derogate from any obligations that Contracting Parties have to each other under any other treaties, nor shall it prejudice any rights that a Contracting Party has under any other treaties.'

10. Article 2 of that treaty provides:

'For the purposes of this Treaty:

(a) "works" means literary and artistic works within the meaning of Article 2(1) of the Berne Convention for the Protection of Literary and Artistic Works, in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media …;

(b) "accessible format copy" means a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability. The accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons;

(c) "authorised entity" means an entity that is authorised or recognised by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or non-profit organisation that provides the same services to beneficiary persons as one of its primary activities or institutional obligations …

An authorised entity establishes and follows its own practices:

(i) to establish that the persons it serves are beneficiary persons;

(ii) to limit to beneficiary persons and/or authorised entities its distribution and making available of accessible format copies;

(iii) to discourage the reproduction, distribution and making available of unauthorised copies; and

(iv) to maintain due care in, and records of, its handling of copies of works, while respecting the privacy of beneficiary persons in accordance with Article 8.'

11. Article 4(1) of the Marrakesh Treaty provides as follows:

'(a) Contracting Parties shall provide in their national copyright laws for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public as provided by the WIPO Copyright Treaty (WCT), to facilitate the availability of works in accessible format copies for beneficiary persons. …

(b) Contracting Parties may also provide a limitation or exception to the right of public performance to facilitate access to works for beneficiary persons.'

12. Article 4(2) of the Marrakesh Treaty specifies that a Contracting Party may fulfil the requirements set out in Article 4(1) thereof by providing in its national law a limitation or exception with certain features as described in Article 4(2).

13. Paragraphs 3 to 5 of Article 4 of the Marrakesh Treaty provide:

'3. A Contracting Party may fulfil Article 4(1) by providing other limitations or exceptions in its national copyright law pursuant to Articles 10 and 11 …

4. A Contracting Party may confine limitations or exceptions under this Article to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market. …

5. It shall be a matter for national law to determine whether limitations or exceptions under this Article are subject to remuneration.'

14. Under Article 5 of the Marrakesh Treaty:

'1. Contracting Parties shall provide that if an accessible format copy is made under a limitation or exception or pursuant to operation of law, that accessible format copy may be distributed or made available by an authorised entity to a beneficiary person or an authorised entity in another Contracting Party …

2. A Contracting Party may fulfil Article 5(1) by providing a limitation or exception in its national copyright law such that:

(a) authorised entities shall be permitted, without the authorisation of the rightholder, to distribute or make available for the exclusive use of beneficiary persons accessible format copies to an authorised entity in another Contracting Party; and

(b) authorised entities shall be permitted, without the authorisation of the rightholder and pursuant to Article 2(c), to distribute or make available accessible format copies to a beneficiary person in another Contracting Party;

provided that prior to the distribution or making available the originating authorised entity did not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons …

…

4. (a) When an authorised entity in a Contracting Party receives accessible format copies pursuant to Article 5(1) and that Contracting Party does not have obligations under Article 9 of the Berne Convention, it

will ensure, consistent with its own legal system and practices, that the accessible format copies are only reproduced, distributed or made available for the benefit of beneficiary persons in that Contracting Party's jurisdiction.
(b) The distribution and making available of accessible format copies by an authorised entity pursuant to Article 5(1) shall be limited to that jurisdiction unless the Contracting Party is a Party to the WIPO Copyright Treaty or otherwise limits limitations and exceptions implementing this Treaty to the right of distribution and the right of making available to the public to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder ...
...'

15. Article 6 of the Marrakesh Treaty provides:

'To the extent that the national law of a Contracting Party would permit a beneficiary person, someone acting on his or her behalf, or an authorised entity, to make an accessible format copy of a work, the national law of that Contracting Party shall also permit them to import an accessible format copy for the benefit of beneficiary persons, without the authorisation of the rightholder.'

16. Paragraphs 1 and 2 of Article 9 of the Marrakesh Treaty are worded as follows:

'1. Contracting Parties shall endeavour to foster the cross-border exchange of accessible format copies by encouraging the voluntary sharing of information to assist authorised entities in identifying one another. The International Bureau of WIPO shall establish an information access point for this purpose.
2. Contracting Parties undertake to assist their authorised entities engaged in activities under Article 5 to make information available regarding their practices pursuant to Article 2(c), both through the sharing of information among authorised entities, and through making available information on their policies and practices, including related to cross-border exchange of accessible format copies, to interested parties and members of the public as appropriate.'

17. Article 11 of that treaty provides:

'In adopting measures necessary to ensure the application of this Treaty, a Contracting Party may exercise the rights and shall comply with the obligations that that Contracting Party has under the Berne Convention, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WIPO Copyright Treaty, including their interpretative agreements so that:
(a) in accordance with Article 9(2) of the Berne Convention, a Contracting Party may permit the reproduction of works in certain special cases provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author;
(b) in accordance with Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, a Contracting Party shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder;
(c) in accordance with Article 10(1) of the WIPO Copyright Treaty, a Contracting Party may provide for limitations of or exceptions to the rights granted to authors under the WCT in certain special cases, that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author;
(d) in accordance with Article 10(2) of the WIPO Copyright Treaty, a Contracting Party shall confine, when applying the Berne Convention, any limitations of or exceptions to rights to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.'

18. Article 12 of the Marrakesh Treaty is worded as follows:

'1. Contracting Parties recognise that a Contracting Party may implement in its national law other copyright limitations and exceptions for the benefit of beneficiary persons than are provided by this Treaty having regard to that Contracting Party's economic situation, and its social and cultural needs, in conformity with that Contracting Party's international rights and obligations, and in the case of a least-developed country taking into account its special needs and its particular international rights and obligations and flexibilities thereof.
2. This Treaty is without prejudice to other limitations and exceptions for persons with disabilities provided by national law.'

Origin and history of the treaty whose conclusion is envisaged

19. On 26 November 2012, the Council of the European Union adopted a decision authorising the Commission to participate, on behalf of the European Union, in negotiations within the framework of the World Intellectual Property Organisation (WIPO) on a possible international treaty introducing limitations and exceptions to copyright for the benefit of people who are blind, visually impaired or otherwise print disabled ('beneficiary persons').

20. Those negotiations were concluded at the diplomatic conference held in Marrakesh between 17 and 28 June 2013 and resulted in the adoption, on 27 June 2013, of the Marrakesh Treaty.

21. The Council authorised the signing of that treaty, on behalf of the European Union, by Council Decision 2014/221/EU of 14 April 2014 (OJ 2014 L 115, p. 1). The decision cited as a legal basis both Article 114 TFEU and Article 207 TFEU.

22. On 21 October 2014, the Commission adopted a proposal for a decision on the conclusion of the Marrakesh Treaty on behalf of the European Union, citing the same legal basis. That proposal did not obtain the necessary majority in the Council.

Views expressed by the Commission in its request for an Opinion

23. The Commission's principal submission is that conclusion of the Marrakesh Treaty should be based on both Article 114 TFEU (because of the harmonising effect that the treaty will have on the laws of the Member States) and Article 207 TFEU (so as to cover the exchange of accessible format copies with third countries). In that case the competence of the European Union to conclude the Marrakesh Treaty would be exclusive by virtue of Article 3(1) and (2) TFEU.
24. In the alternative, the Commission submits that conclusion of the Marrakesh Treaty must be based on Article 207 TFEU alone and that the European Union has exclusive competence in that regard pursuant to Article 3(1) TFEU.

Article 3(1) TFEU

25. The Commission recalls that under Article 3(1) TFEU the European Union has exclusive competence for matters within the scope of the common commercial policy, including the commercial aspects of intellectual property.
26. It submits that the latter concept covers the entirety of the Marrakesh Treaty, or at least Articles 5 and 6 and those aspects of the other articles of that treaty which relate to them.
27. In that regard, the Commission, referring to the judgment of 18 July 2013, Daiichi Sankyo and Sanofi-Aventis Deutschland (C‑414/11, EU:C:2013:520), submits that only rules adopted by the European Union which have a specific link to international trade may be covered by the concept of *'commercial aspects of intellectual property'* as referred to in Article 207 TFEU.
28. That concept does not, in the Commission's view, cover only agreements related to the World Trade Organisation (WTO). Indeed, it follows from the Court's case-law that an international agreement entailing harmonisation of intellectual property protection regimes must, generally speaking, be related to the common commercial policy when the agreement is intended to promote trade.
29. In the present case, the Commission argues that, although Articles 4 to 6 and 9 of the Marrakesh Treaty envisage approximation of the laws of the Contracting Parties, the primary objective of that treaty is not to harmonise those laws but rather to facilitate, through that harmonisation, the cross-border exchange of accessible format copies, including between the European Union and third countries, as the preamble and Article 9 of the treaty make clear. The setting of those international standards in the field of intellectual property thus appears to be merely a means of achieving the objective of the liberalisation of international trade.
30. The fact that the Marrakesh Treaty applies only to accessible format copies made on a non-profit basis is irrelevant, given, first, that this does not rule out the possibility of covering the costs incurred and, secondly, that Article 207 TFEU also applies when goods or services are supplied on a non-profit basis. The Commission submits that it is relevant in this respect that the exception or limitation provided for in Article 5(3)(b) of Directive 2001/29 also applies to activities which are not for profit. Moreover, the system established by the Marrakesh Treaty is such as to interfere with commercial activities that involve the making available and exchange of accessible format copies.
31. Similarly, in the Commission's view, the argument that the ultimate objective of the Marrakesh Treaty is a social or humanitarian one cannot succeed, since it follows from Opinion 1/78 (International agreement on natural rubber), of 4 October 1979 (EU:C:1979:224), and from the judgment of 17 October 1995, Werner (C‑70/94, EU:C:1995:328), that the common commercial policy may not be the subject of a restrictive interpretation that excludes measures having specific objectives.

Article 3(2) TFEU

32. The Commission maintains that, were a legal basis other than Article 207 TFEU to be considered appropriate for the purpose of approving, in whole or in part, the Marrakesh Treaty, the European Union would have exclusive competence under Article 3(2) TFEU, which provides, inter alia, that the Union has exclusive competence for the conclusion of an international agreement in so far as that conclusion may affect common EU rules or alter their scope.
33. Whilst maintaining that Article 114 TFEU, rather than Article 19 TFEU, is the correct legal basis, the Commission asserts that determination of the legal basis is, in any event, secondary since it is irrelevant in ascertaining whether an international agreement affects common EU rules.
34. The Commission notes that copyright and related rights, with which the Marrakesh Treaty is concerned, and, in particular, the exceptions and limitations to those rights have been harmonised at EU level by Directive 2001/29.
35. It is true that the Member States are free to choose whether or not to apply the exceptions and limitations provided for by that directive. The Commission submits, however, that the Member States' discretion in that regard is limited given that, first, the list of exceptions and limitations set out in Article 5 of the directive is exhaustive and, secondly, the Member States may implement those exceptions and limitations only within the limits imposed by EU law.
36. It follows, in the Commission's submission, that the Marrakesh Treaty does indeed derogate from copyright and related rights which have been fully harmonised by Directive 2001/29, by providing a mandatory exception or limitation for uses directly related to the disability, while Article 5(3)(b) of the directive provides for optional exceptions or limitations in that area.
37. In that context, when the Member States decide to make provision for such an exception or limitation, they are not exercising a *'retained'* competence but are making use of an option *'granted/authorised'* by EU law and will do so in compliance with the framework set out by EU law. According to the Commission, the mere fact that the Member States have some freedom to adapt certain aspects of the law in a given area does not

mean that the European Union's external competence in that area is not exclusive.

38. The Commission also notes that the implementation of the exceptions or limitations provided for by the Marrakesh Treaty is, under Article 11 thereof and Article 5(5) of Directive 2001/29, subject to compliance with the general obligation not to apply such exceptions or limitations in a way which is prejudicial to the legitimate interests of the rightholder or which conflicts with a normal exploitation of his work. That obligation derives from international agreements that fall within the European Union's exclusive competence.

39. Finally, the Commission considers that Articles 5 and 6 of the Marrakesh Treaty are intended to regulate trade between Member States and that they would affect the free movement of goods. Likewise, Article 7 of that treaty would have an impact on Article 6 of Directive 2001/29, which relates to legal protection for technological measures used by rightholders.

Summary of the observations submitted to the Court

Article 3(1) TFEU

40. The Czech, French, Italian, Hungarian, Romanian, Finnish and United Kingdom Governments submit that the European Union does not have exclusive competence to conclude the Marrakesh Treaty under Articles 3(1) and 207 TFEU.

41. They argue in that regard that it follows from the judgment of 18 July 2013, Daiichi Sankyo and Sanofi-Aventis Deutschland (C‑414/11, EU:C:2013:520), that only rules with a specific link to international trade can be encompassed by the concept of *'commercial aspects of intellectual property'* as referred to in Article 207 TFEU. For there to be such a link, the subject matter and objectives of the agreement envisaged must correspond to the common commercial policy, as the mere fact that there may be implications for international trade is not sufficient.

42. It is argued that the Marrakesh Treaty does not have as either its subject matter or purpose the liberalisation or promotion of international trade.

43. First, it is said to be clear from the preamble and the enacting terms of the Marrakesh Treaty that its objective is to promote equal opportunities and social inclusion for persons with disabilities. Cross-border exchange merely serves that purpose or, according to the Hungarian Government, is merely an ancillary aim of the Marrakesh Treaty. The French Government considers, moreover, that that treaty also pursues the objective of development cooperation and humanitarian aid. The harmonisation of national laws for which the Marrakesh Treaty provides is thus intended to increase the availability of accessible format copies rather than to promote, facilitate or regulate international trade.

44. Consequently, it is impossible — according to the French, Romanian and United Kingdom Governments — to consider that the Marrakesh Treaty is intended to extend the application of provisions similar to those of EU law in order to promote international trade, as was the case of the provisions at issue in the case that gave rise to the judgment of 22 October 2013, Commission v Council (C‑137/12, EU:C:2013:675). On the other hand, the Finnish and United Kingdom Governments submit that Opinion 2/00 (Cartagena Protocol on Biosafety), of 6 December 2001 (EU:C:2001:664), and the judgment of 8 September 2009, Commission v Parliament and Council (C‑411/06, EU:C:2009:518), are relevant precedents, the Court having held that the agreements in question in those cases, which concerned international trade, were not within the ambit of the common commercial policy on account of the objectives they pursued.

45. Secondly, according to the Czech, French, Italian, Hungarian, Finnish and United Kingdom Governments, the exchanges covered by the Marrakesh Treaty are non-commercial, which means, in accordance with the Court's case-law, that they are outwith the common commercial policy.

46. Thus, they argue, it follows from Article 4(2) of the Marrakesh Treaty that the exception or limitation for which it provides may be applied only on a non-profit basis, either by an authorised entity or by a beneficiary person or someone acting on his or her behalf. In addition, Article 4(4) of that treaty enables Contracting Parties to provide for an exception or limitation to copyright only if accessible format copies cannot be obtained for a reasonable price on the market. Similarly, the cross-border exchange of such copies with which the Marrakesh Treaty is concerned may be made only by an authorised entity acting on a non-profit basis.

47. Moreover, according to the French, Hungarian, Romanian, Finnish and United Kingdom Governments, it is also important to note that the Marrakesh Treaty was negotiated in order to fulfil obligations arising under the UN Convention and that the negotiations took place within WIPO, which does not have as its mission the liberalisation and promotion of trade.

48. On the other hand, the Lithuanian Government and the Parliament submit that Articles 5, 6 and 9 of the Marrakesh Treaty, and the provisions implementing them, are intended to promote, facilitate or govern cross-border trade and are therefore covered by the common commercial policy, an area within the exclusive competence of the European Union. The United Kingdom Government subscribes, in the alternative, to that conclusion.

Article 3(2) TFEU

49. The various governments that have submitted observations to the Court have adopted different stances regarding the appropriate legal basis for concluding the Marrakesh Treaty: the French Government mentions Articles 114 and 209 TFEU or, in the alternative, Articles 19 and 209 TFEU, the Hungarian Government refers to Articles 4 and 114 TFEU, the United Kingdom Government to Article 19 TFEU and the Finnish Government to Articles 19 and 114 TFEU.

50. Notwithstanding those differences, the Czech, French, Italian, Lithuanian, Romanian, Finnish and United Kingdom Governments take the view that the

European Union does not have exclusive competence under Article 3(2) TFEU to conclude the Marrakesh Treaty inasmuch as the latter is not capable of affecting common EU rules or of altering their scope.

51. They argue in that regard that it follows from the Court's case-law that any conclusion concerning competence must be based on a specific analysis of the relationship between the international agreement envisaged and the EU law in force, account being taken of, inter alia, the nature and content of the rules in question.

52. They argue that Directive 2001/29 brought about only minimum harmonisation of certain aspects of copyright and related rights. In particular, the directive did not harmonise the exceptions and limitations to those rights.

53. Thus, so they argue, Article 5(3)(b) of Directive 2001/29 merely gives the Member States the option of providing for an exception or limitation to copyright and related rights for the benefit of persons with disabilities. The Member States thus retain their competence, both internally and externally, to render such an exception or limitation mandatory. The French and Romanian Governments submit that that analysis is borne out by the fact that the directive does not lay down the rules for implementing exceptions or limitations to copyright and related rights for the benefit of persons with disabilities. The United Kingdom Government further argues that there is no inconsistency between the Marrakesh Treaty and Directive 2001/29.

54. On that basis, the French, Hungarian and Romanian Governments maintain that it follows from Opinion 1/94 (Agreements annexed to the WTO Agreement), of 15 November 1994 (EU:C:1994:384), that the European Union cannot, by means of an international agreement, render mandatory the adoption of measures relating to an exception or limitation to copyright and related rights for the benefit of persons with a disability when the Member States continue to have a choice as to whether to adopt such measures *'internally'*.

55. However, the French Government considers that the situation changed following the Council's request to the Commission, on 19 May 2015, to which the latter subsequently agreed, that the Commission should submit a legislative proposal to introduce, in EU law, the mandatory exception or limitation provided for in Article 4 of the Marrakesh Treaty. It maintains that that factor is relevant in view of the Court's case-law to the effect that, in order to determine whether an area is already covered to a large extent by EU rules, it is necessary to take into account, amongst other matters, the future development of EU law. Consequently, Article 4 of the Marrakesh Treaty falls within the exclusive competence of the European Union.

56. That finding does not, in the French Government's view, call into question the fact that competence is shared in the case of the other provisions of the Marrakesh Treaty, particularly since (i) those provisions are within the areas of development cooperation and humanitarian aid and (ii) Article 4(4) TFEU makes clear that the exercise of the European Union's competence in those areas is not to result in Member States being prevented from exercising their competence in that regard.

57. The Czech, Italian, Hungarian, Romanian, Finnish and United Kingdom Governments, as well as the Parliament and the Council, maintain, on the contrary, that the Council's request, referred to in paragraph 55 of this Opinion, is not sufficient to establish a *'future development of EU law'* that must be taken into account in determining whether the European Union has exclusive competence in the area concerned by the Marrakesh Treaty.

58. Nonetheless, the Parliament takes the view that the European Union has exclusive competence with regard to Article 4 of the Marrakesh Treaty, the Union having in fact exercised its competence in this area through the adoption of Directive 2001/29. The fact that the Member States have some discretion with regard to the implementation of the exceptions and limitations provided for by the directive does not imply that there is a shared competence: that is because of the distinction that must be drawn between exceptions relating to the scope of an EU act and exceptions relating to the rights laid down in such an act.

59. Moreover, the effect of Article 4 of the Marrakesh Treaty on the system established by Directive 2001/29 is evident, so the Parliament argues, in so far as that treaty will take away the discretion which the Member States currently enjoy under Article 5(3)(b) of the directive.

Position of the Court

Article 3(1) TFEU

60. In view of its purpose and content, it is clear that the Marrakesh Treaty does not concern the first four areas referred to in Article 3(1) TFEU. However, consideration must be given to whether that treaty relates, in whole or in part, to the common commercial policy, defined in Article 207 TFEU, which, under Article 3(1)(e) TFEU, falls within the European Union's exclusive competence.

61. According to the Court's settled case-law, the mere fact that an EU act is liable to have implications for international trade is not enough for it to be concluded that the act must be classified as falling within the common commercial policy. On the other hand, an EU act falls within that policy if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade (judgments of 18 July 2013, Daiichi Sankyo and Sanofi-Aventis Deutschland, C‑414/11, EU:C:2013:520, paragraph 51, and of 22 October 2013, Commission v Council, C‑137/12, EU:C:2013:675, paragraph 57).

62. In order to determine whether the Marrakesh Treaty falls within the common commercial policy, it is necessary to examine both the purpose of that treaty and its content.

63. As regards, first of all, the purpose of the Marrakesh Treaty, that treaty's very title makes clear that it is intended to facilitate access to published works

for beneficiary persons, namely persons who are blind, visually impaired or otherwise print disabled.

64. The desire of the Contracting Parties to harmonise exceptions and limitations to copyright, and to facilitate the circulation of accessible format copies in order to make published works more readily accessible to beneficiary persons and thus overcome the current barriers to such access, is confirmed by, inter alia, recitals 7, 8 and 12 in the preamble to the Marrakesh Treaty.

65. It is also clear from recitals 1, 2 and 4 in that preamble that the establishment of the enhanced legal framework at international level, for which the Marrakesh Treaty provides, must serve, ultimately, to ensure observance of the principles (proclaimed in the UN Convention) of non-discrimination, equal opportunity, accessibility and the full and effective participation and inclusion in society of persons with a disability, in particular by combating the barriers to such persons' complete development, their freedom of expression and their enjoyment of the right to education.

66. It is true that recitals 4 and 7 in the preamble to the Marrakesh Treaty allude to the circulation and cross-border exchange of accessible format copies.

67. However, it is not stated in those recitals that that circulation and exchange are commercial in nature and they are referred to only as a means of improving the access of beneficiary persons to accessible format copies and of avoiding duplication of the efforts made by Contracting Parties for that purpose.

68. Furthermore, whilst it follows from recitals 3, 9, 10 and 12 in the preamble to the Marrakesh Treaty that the Contracting Parties recognise the importance of copyright protection in general and of the international copyright system in particular, the wording of the preamble does not indicate that that treaty is intended to strengthen either that protection or that system.

69. Nor does it appear from the provisions of the Marrakesh Treaty that it pursues objectives other than those mentioned in its title and preamble.

70. Consequently, it must be held that the Marrakesh Treaty is, in essence, intended to improve the position of beneficiary persons by facilitating their access to published works, through various means, including the easier circulation of accessible format copies.

71. Concerning, next, the content of the Marrakesh Treaty, the latter makes clear that the Contracting Parties must use two separate and complementary instruments in order to achieve its objectives.

72. First, Article 4(1) of that treaty provides that Contracting Parties are to provide for an exception or limitation to the rights of reproduction, distribution and making available to the public, in order to make accessible format copies more readily available for beneficiary persons. The other paragraphs of Article 4 stipulate further the way in which Contracting Parties may give effect to that obligation in their national laws, whilst leaving them a broad discretion in that regard.

73. Secondly, Articles 5 and 6 of the Marrakesh Treaty impose certain obligations relating to the cross-border exchange of accessible format copies.

74. More specifically, Article 5(1) of that treaty stipulates that Contracting Parties are to provide that if an accessible format copy is made under a limitation or exception, or by virtue of the operation of law, that copy may be distributed or made available by an authorised entity to a beneficiary person or an authorised entity in another Contracting Party. The other paragraphs of Article 5 stipulate further the way in which Contracting Parties may give effect to that obligation in their national laws, whilst leaving them a broad discretion in that regard.

75. Article 6 of the Marrakesh Treaty specifies that, to the extent that the national law of a Contracting Party would permit a beneficiary person, someone acting on his or her behalf, or an authorised entity, to make an accessible format copy, that law must also permit them to import an accessible format copy for the benefit of beneficiary persons, without the authorisation of the rightholder.

76. Articles 5 and 6 of that treaty are supplemented by Article 9, which requires Contracting Parties to cooperate in order to promote the cross-border exchange of accessible format copies.

77. Those elements form the basis on which it must be determined whether the Marrakesh Treaty is, in whole or in part, within the sphere of the common commercial policy.

78. In that regard, it is true, in the first place, that the rules adopted by the European Union in the field of intellectual property which have a specific link to international trade are capable of falling within the concept of *'commercial aspects of intellectual property'*, as referred to in Article 207(1) TFEU, and hence within the field of the common commercial policy (see, to that effect, judgment of **18 July 2013, Daiichi Sankyo and Sanofi-Aventis Deutschland, C‑414/11, EU:C:2013:520, paragraph 52**).

79. The Court has thus held that certain international rules containing provisions that must be applied to each of the principal categories of intellectual property rights have a specific link with international trade, since those rules operate within the context of the liberalisation of that trade in the sense that they are an integral part of the WTO system and are intended to facilitate international trade by reducing distortions of it (see, to that effect, judgment of **18 July 2013, Daiichi Sankyo and Sanofi-Aventis Deutschland, C‑414/11, EU:C:2013:520, paragraphs 53 and 57 to 60**).

80. Moreover, the Court has held that rules establishing adequate legal protection for services based on, or consisting in, conditional access have a specific link with international trade and thus fall within the common commercial policy. The Court relied in that regard on the fact that the objective of those rules was to promote international trade in those services rather than to improve the functioning of the internal market (see, to that effect, judgment of 22 October 2013,

Commission v Council, C‑137/12, EU:C:2013:675, paragraphs 64, 65 and 67).

81. However, contrary to the Commission's argument, a comparable line of reasoning cannot be applied to the rules of the Marrakesh Treaty relating to the introduction of an exception or limitation to the rights of reproduction, distribution and making available to the public.

82. Indeed, as is clear from paragraphs 63 to 70 of this Opinion, the purpose of the Marrakesh Treaty is to improve the position of beneficiary persons by facilitating, through various means, the access of such persons to published works; it is not to promote, facilitate or govern international trade in accessible format copies.

83. As regards more particularly the harmonisation of the exceptions and limitations to the rights of reproduction, distribution and making available to the public, recital 12 in the preamble to the said treaty specifically states that such harmonisation is undertaken with a view to facilitating the access to, and use of, works by beneficiary persons.

84. Furthermore, Article 4 of the Marrakesh Treaty is not capable of bringing about an approximation of national laws serving to facilitate international trade, given that the Contracting Parties have a broad discretion with regard to the implementation of that article and that it follows from Article 12 of that treaty that the latter has neither the object nor the effect of preventing such parties from introducing in their own national laws other exceptions and limitations in favour of beneficiary persons than are provided for by the said treaty.

85. Moreover, the Commission's argument that, of the rules governing intellectual property, only those relating to moral rights are not encompassed by the concept of *'commercial aspects of intellectual property'*, as referred to in Article 207 TFEU, cannot be accepted, as it would lead to an excessive extension of the field covered by the common commercial policy by bringing within that policy rules that have no specific link with international trade.

86. In those circumstances, the rules of the Marrakesh Treaty which provide for the introduction of an exception or limitation to the rights of reproduction, distribution and making available to the public cannot be held to have a specific link with international trade such as to signify that they concern the commercial aspects of intellectual property referred to in Article 207 TFEU.

87. As regards, in the second place, the rules of the Marrakesh Treaty governing the export and import of accessible format copies, there is no doubt that those rules relate to international trade in such copies.

88. However, it follows from the Court's case-law that the objective of such rules must be taken into consideration for the purpose of assessing their connection with the common commercial policy (see, to that effect, Opinion 2/00 (Cartagena Protocol on Biosafety), of 6 December 2001, EU:C:2001:664, paragraphs 35 to 37, and judgment of 8 September 2009, Commission v Parliament and Council, C‑411/06, EU:C:2009:518, paragraphs 49 to 54 as well as 71 and 72).

89. In the light of the reasoning in paragraphs 63 to 70 of this Opinion and in the absence of any indication that Articles 5, 6 and 9 of the Marrakesh Treaty pursue a different objective from that of the treaty as a whole, the Court finds that those articles are not specifically intended to promote, facilitate or govern international trade in accessible format copies, but are rather intended to improve the position of beneficiary persons by facilitating such persons' access to accessible format copies reproduced in other Contracting Parties.

90. That being so, the facilitation of the cross-border exchange of accessible format copies appears to be a means of achieving the non-commercial objective of the Marrakesh Treaty rather than an independent aim of the treaty.

91. The point should also be made that, in view of its characteristics, the cross-border exchange for which the Marrakesh Treaty provides cannot be equated with international trade for commercial purposes (see, by analogy, Opinion 2/00 (Cartagena Protocol on Biosafety), of 6 December 2001, EU:C:2001:664, paragraph 38, and judgment of 8 September 2009, Commission v Parliament and Council, C‑411/06, EU:C:2009:518, paragraph 69).

92. Indeed, the obligation laid down in Article 5(1) of the Marrakesh Treaty to permit the export of accessible format copies covers only exports by an authorised entity. Article 9 of that treaty confirms that the mechanism thus put in place is not intended to promote, facilitate or govern, generally, all exchanges of accessible format copies, but rather those exchanges that take place between authorised entities.

93. It follows from Article 2(c) of the Marrakesh Treaty that those entities must be authorised or recognised by their government, must act on a non-profit basis and provide their services solely to beneficiary persons. Therefore, whilst it remains possible under Article 4(5) of that treaty that the exports governed by Article 5 thereof may be subject to remuneration, such remuneration may be envisaged only within the limits imposed by the fact that the exporter's activities are undertaken on a non-profit basis.

94. Similarly, Article 6 of the Marrakesh Treaty requires Contracting Parties to authorise imports only in so far as those imports are made (i) by a beneficiary person, acting directly or indirectly, or (ii) by an authorised entity.

95. In addition, it is made quite clear in Article 5(1) and Article 6 of the Marrakesh Treaty that only exports and imports which are intended for beneficiary persons, through an authorised entity if need be, are covered by those provisions. Article 2(c) and Article 5(2) and (4) of that treaty establish, in addition, mechanisms designed to ensure that only beneficiary persons will obtain accessible format copies exchanged in that way.

96. Moreover, it is only copies that have been made under a limitation or exception, or by virtue of the operation of law, which constitute the accessible format

copies whose export is governed by Article 5(1) of the Marrakesh Treaty. Article 6 of that treaty is limited to providing that the importation of accessible format copies into the territory of a Contracting Party must be permitted where the law of that Contracting Party permits the person or entity concerned to make such copies.

97. It is thus apparent not only that the cross-border exchange promoted by the Marrakesh Treaty is outside the normal framework of international trade but also that the international trade in accessible format copies which might be engaged in by ordinary operators for commercial purposes, or simply outside the framework of exceptions or limitations for beneficiary persons, is not included in the special scheme established by that treaty.

98. Moreover, Articles 1 and 11 of the Marrakesh Treaty require compliance with obligations arising under other international treaties, which implies that that scheme is not intended to derogate from the international rules governing international trade in literary and artistic works.

99. In view of those various characteristics, the scheme introduced by the Marrakesh Treaty must thus be distinguished from the schemes falling within the ambit of the common commercial policy which were examined by the Court in Opinion 1/78 (International agreement on natural rubber), of 4 October 1979 (EU:C:1979:224), and in the judgments of 17 October 1995, Werner (C‑70/94, EU:C:1995:328), of 10 January 2006, Commission v Council (C‑94/03, EU:C:2006:2), and of 12 December 2002, Commission v Council (C‑281/01, EU:C:2002:761), which, whilst they did not pursue exclusively commercial aims, were, however, based on the adoption of measures of a commercial nature.

100. In those circumstances, the mere fact that the scheme introduced by the Marrakesh Treaty may possibly apply to works which are, or may be, commercially exploited and that it may, in that event, indirectly affect international trade in such works does not mean that it is within the ambit of the common commercial policy (see, by analogy, Opinion 2/00 (Cartagena Protocol on Biosafety), of 6 December 2001, EU:C:2001:664, paragraph 40).

101. It must therefore be held that the conclusion of the Marrakesh Treaty does not fall within the common commercial policy defined in Article 207 TFEU and, consequently, that the European Union does not have exclusive competence under Article 3(1)(e) TFEU to conclude that treaty.

Article 3(2) TFEU

102. Pursuant to Article 3(2) TFEU, the European Union has exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

103. The conclusion of the Marrakesh Treaty is not provided for in any legislative act of the European Union and its conclusion is not necessary to enable the Union to exercise its internal competence.

104. Consequently, only the case mentioned in the last limb of Article 3(2) TFEU is relevant here: that case concerns a situation in which the conclusion of an international agreement *'may affect common rules or alter their scope'*.

105. In that regard, the Court has held that there is a risk that common EU rules may be adversely affected by international commitments undertaken by the Member States, or that the scope of those rules may be altered, which is such as to justify an exclusive external competence of the European Union, where those commitments fall within the scope of those rules (Opinion 1/13 (Accession of third States to the Hague Convention), of 14 October 2014, EU:C:2014:2303, paragraph 71, and judgment of 26 November 2014, Green Network, C‑66/13, EU:C:2014:2399, paragraph 29).

106. A finding that there is such a risk does not presuppose that the area covered by the international commitments and that of the EU rules coincide fully (Opinion 1/13 (Accession of third States to the Hague Convention), of 14 October 2014, EU:C:2014:2303, paragraph 72, and judgment of 26 November 2014, Green Network, C‑66/13, EU:C:2014:2399, paragraph 30).

107. In particular, such international commitments may affect EU rules or alter their scope when the commitments fall within an area which is already covered to a large extent by such rules (see, to that effect, Opinion 1/13 (Accession of third States to the Hague Convention), of 14 October 2014, EU:C:2014:2303, paragraph 73, and judgment of 26 November 2014, Green Network, C‑66/13, EU:C:2014:2399, paragraph 31).

108. That said, since the EU is vested only with conferred powers, any competence, especially where it is exclusive, must have its basis in conclusions drawn from a comprehensive and detailed analysis of the relationship between the international agreement envisaged and the EU law in force. That analysis must take into account the areas covered, respectively, by the rules of EU law and by the provisions of the agreement envisaged, their foreseeable future development and the nature and content of those rules and those provisions, in order to determine whether the agreement is capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system which they establish (Opinion 1/13 (Accession of third States to the Hague Convention), of 14 October 2014, EU:C:2014:2303, paragraph 74, and judgment of 26 November 2014, Green Network, C‑66/13, EU:C:2014:2399, paragraph 33).

109. It is necessary to recall in this regard that — as has been made clear in paragraphs 71 to 76 of this Opinion — the Marrakesh Treaty provides that the Contracting Parties must, in order to achieve that treaty's objectives, introduce two separate and complementary instruments, namely (i) an exception or limitation to the rights of reproduction, distribution and making

available to the public in order to make accessible format copies more readily available for beneficiary persons and (ii) import and export arrangements to foster certain types of cross-border exchange of accessible format copies.

110. Articles 2 to 4 of Directive 2001/29 confer on authors the exclusive right to authorise or prohibit the reproduction, communication to the public and distribution of works.

111. Furthermore, Article 5(3)(b) of Directive 2001/29 specifies that Member States may opt to provide for an exception or limitation to the rights of reproduction and communication to the public in respect of *'uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability'*. It follows from Article 5(4) of the directive that Member States may also provide for an exception or limitation to the right of distribution to the extent that such an exception or limitation is justified by the purpose of the act of reproduction authorised under Article 5(3)(b) of the directive.

112. It follows that the exception or limitation 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 that 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 rightholders being obtained.

113. Although a number of the governments that have submitted observations to the Court have maintained in this connection that the obligations laid down by the Marrakesh Treaty could be implemented in a manner that is compatible with Directive 2001/29, it should be observed that, according to the Court's settled case-law, Member States may not enter, outside the framework of the EU institutions, into international commitments falling within an area that is already covered to a large extent by common EU rules, even if there is no possible contradiction between those commitments and the common EU rules (see, to that effect, judgment of 4 September 2014, Commission v Council, C‑114/12, EU:C:2014:2151, paragraphs 70 and 71, and Opinion 1/13 (Accession of third States to the Hague Convention), of 14 October 2014, EU:C:2014:2303, paragraph 86).

114. Accordingly, even if it were established that Article 11 of the Marrakesh Treaty lays down a comparable obligation to the obligation arising under Article 5(5) of Directive 2001/29, or that the conditions laid down in Articles 4 to 6 of that treaty are not, as such, incompatible with the conditions set out in Article 5(3)(b) and (4) of Directive 2001/29, that would not in any event be decisive.

115. In addition, it must indeed be noted — as the governments that have submitted observations to the Court have emphasised — that it is clear from both the title of Directive 2001/29 and recital 7 thereof that the EU legislature brought about only a partial harmonisation of copyright and related rights, given that the directive is not intended to remove or to prevent differences between national laws which do not adversely affect the functioning of the internal market (see, to that effect, judgments of 5 March 2015, Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraph 88, and of 26 March 2015, C More Entertainment, C‑279/13, EU:C:2015:199, paragraph 29).

116. As regards more particularly the exceptions and limitations to those rights, recital 31 of Directive 2001/29 states that the degree of harmonisation of those exceptions and limitations should be based on their impact on the smooth functioning of the internal market. Thus, for example, the EU legislature did not fully harmonise, in Article 5(3)(b) and (4) of the directive, the exceptions and limitations for the benefit of persons with a disability.

117. However, that consideration cannot, in itself, be decisive.

118. Although it follows from the Court's case-law that an international agreement covering an area which has been fully harmonised may affect common rules or alter their scope (see, to that effect, Opinion 1/94 (Agreements annexed to the WTO Agreement), of 15 November 1994, EU:C:1994:384, paragraph 96, and judgment of 5 November 2002, Commission v Denmark, C‑467/98, EU:C:2002:625, paragraph 84), that is nevertheless only one of the situations in which the condition in the last limb of Article 3(2) TFEU is met (see, to that effect, Opinion 1/03 (New Lugano Convention), of 7 February 2006, EU:C:2006:81, paragraph 121).

119. Likewise, although the Member States have a discretion as regards the implementation of their option to provide for an exception or limitation for the benefit of persons with a disability, that discretion derives from the decision of the EU legislature to grant the Member States that option, within the harmonised legal framework which Directive 2001/29 establishes and which ensures a high and even level of protection for the rights of reproduction, making available to the public and distribution (see, to that effect, judgments of **26 April 2012, DR and TV2 Danmark, C‑510/10, EU:C:2012:244, paragraph 32, and of 4 September 2014, Commission v Council, C‑114/12, EU:C:2014:2151, paragraph 79**).

120. Article 5(3)(b) and (4) of Directive 2001/29 do not concern a situation comparable to that referred to in paragraphs 18 and 21 of Opinion 2/91 (ILO Convention No 170), of 19 March 1993 (EU:C:1993:106), in which the Court held that the European Union did not have exclusive competence because both the provisions of EU law and those of the international convention in question laid down minimum requirements.

121. Those provisions of Directive 2001/29 do not set a minimum level of protection of copyright and related rights while leaving untouched the Member States' competence to provide for greater protection of those

rights. Rather, they introduce a derogation from the rights harmonised by the EU legislature, permitting the Member States to provide, subject to certain conditions, for an exception or limitation to those rights. Accordingly, a Member State that makes use of the option granted by EU law will ultimately afford those rights less protection than that which will normally arise from the harmonised level of protection established in Articles 2 to 4 of the directive.

122. It must be added in that regard that the Member States' discretion has to be exercised within the limits imposed by EU law (see, by analogy, **judgment of 1 December 2011, Painer, C-145/10, EU:C:2011:798**, paragraph 104), which means that the Member States are not free to determine, in an un-harmonised manner, the overall boundaries of the exception or limitation for persons with a disability (see, by analogy, **judgment of 26 April 2012, DR and TV2 Danmark, C-510/10, EU:C:2012:244**, paragraph 36).

123. In particular, Member States may provide, in their law, for an exception or limitation for persons with a disability, but may do so only if they comply with all the conditions laid down in Article 5(3)(b) of Directive 2001/29, that is to say, the exception or limitation must cover only uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability (see, to that effect, **judgment of 27 February 2014, OSA, C-351/12, EU:C:2014:110**, paragraph 39), conditions which, moreover, are not included in Articles 4 to 6 of the Marrakesh Treaty.

124. Furthermore, the discretion enjoyed by Member States in implementing an exception or limitation for persons with a disability cannot be used in such a way as to compromise the objectives of Directive 2001/29 which relate, as stated in recitals 1 and 9 thereof, to the establishment of a high level of protection for authors and to the smooth functioning of the internal market (see, by analogy, **judgments of 1 December 2011, Painer, C-145/10, EU:C:2011:798**, paragraph 107, and of **10 April 2014, ACI Adam and Others, C-435/12, EU:C:2014:254**, paragraph 34).

125. That discretion is also limited by Article 5(5) of Directive 2001/29, which makes the introduction of the exception or limitation under Article 5(3)(b) of the directive subject to three conditions, namely that the exception or limitation may be applied only in certain special cases, that it does not conflict with a normal exploitation of the work and that it does not unreasonably prejudice the legitimate interests of the copyright holder (see, by analogy, **judgments of 16 July 2009, Infopaq International, C-5/08, EU:C:2009:465**, paragraph 58, and of **1 December 2011, Painer, C-145/10, EU:C:2011:798**, paragraph 110).

126. In view of all those matters, it is apparent that whilst the Member States have the option of implementing, for the benefit of persons with a disability, an exception or limitation to the harmonised rules set out in Articles 2 to 4 of Directive 2001/29, that option is granted by the EU legislature and is highly circumscribed by the requirements of EU law described in paragraphs 123 to 125 of this Opinion.

127. It is important to point out in this regard that, whilst Article 5(3)(b) of Directive 2001/29 provides only for an option allowing the Member States to introduce an exception or limitation for beneficiary persons, Article 4 of the Marrakesh Treaty lays down an obligation to introduce such an exception or limitation.

128. Consequently, the conclusion of the Marrakesh Treaty would mean that the various constraints and requirements imposed by EU law which are mentioned in paragraphs 123 to 125 of this Opinion will apply to all the Member States, which would henceforth be required to provide for such an exception or limitation under Article 4 of that treaty.

129. Accordingly, 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 the conclusion of that treaty may thus affect those rules or alter their scope.

130. It follows from the foregoing considerations that the conclusion of the Marrakesh Treaty falls within the exclusive competence of the European Union.

Consequently, the Court (Grand Chamber) gives the following Opinion:

The conclusion of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled falls within the exclusive competence of the European Union.

Lenaerts
Tizzano
Ilešič
Bay Larsen
von Danwitz
Prechal
Bonichot
Arabadjiev
Toader
Safjan
Šváby
Jarašiūnas
Fernlund
Vajda
Rodin

Delivered in open court in Luxembourg on 14 February 2017.

A. Calot Escobar Registrar
K. Lenaerts President

OPINION OF ADVOCATE GENERAL WAHL

delivered on 8 September 2016 (1)

Opinion procedure 3/15

initiated following a request made by the European Commission

(Conclusion of international agreements by the European Union — Marrakesh Treaty to
Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or
Otherwise Print Disabled — Competence of the European Union — Legal bases —
Article 19 TFEU — Article 114 TFEU — Article 153 TFEU — Article 207 TFEU —
Article 209 TFEU — Directive 2001/29/EC)

1. The fact that international agreements may seek to achieve, simultaneously, a variety of objectives explains why the conclusion of such agreements by the European Union may give rise, in the EU legal system, to certain specific issues of law. In particular, the identification of the correct legal basis for the conclusion of an international agreement, and the determination of the nature of the competence exercised by the European Union when concluding that agreement, may at times prove a rather complex exercise. Unfortunately, but perhaps unsurprisingly, on those issues the EU institutions and the governments of the Member States at times come to different conclusions.

2. That situation is illustrated by the present case, in which the Commission asks the Court to clarify whether the European Union has exclusive competence to conclude the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (2) ('the Marrakesh Treaty'), negotiated in the context of the World Intellectual Property Organization ('WIPO').

I – Legal framework

A – The Marrakesh Treaty

3. In the preamble to the Marrakesh Treaty, the Contracting Parties set out, inter alia, the reasons for and the aim of that treaty. In particular, they first recall *'the principles of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in society, proclaimed in the Universal Declaration of Human Rights and the United Nations Convention on the Rights of Persons with Disabilities'. Mindful 'of the challenges that are prejudicial to the complete development of persons with visual impairments or with other print disabilities*', they emphasise *'the importance of copyright protection as an incentive and reward for literary and artistic creations'*. They declare themselves aware '*of the barriers of persons with visual impairments or with other print disabilities to access published works'* and of 'the need to both expand the number of works in accessible formats and to improve the circulation of such works'. They recognise that, *'despite the differences in national copyright laws, the positive impact of new information and communication technologies on the lives of persons with visual impairments or with other print disabilities may be reinforced by an enhanced legal framework at the international level'*.

4. The preamble also stresses that, despite the fact that *'many Member States have established limitations and exceptions in their national copyright laws for persons with visual impairments or with other print disabilities*', *'there is a continuing shortage of available works in accessible format copies for such persons'*. In fact, considerable resources are required for making works accessible to these persons and the limited cross-border exchange of accessible format copies results in the duplication of the efforts required to that end.

5. The Contracting Parties further recognise *'both the importance of rightholders'* role in making their works accessible to persons with visual impairments or with other print disabilities and the importance of appropriate limitations and exceptions to make works accessible to these persons, particularly when the market is unable to provide such access'. In addition, they recognise *'the need to maintain a balance between the effective protection of the rights of authors and the larger public interest … and that such a balance must facilitate effective and timely access to works for the benefit of persons with visual impairments or with other print disabilities'*.

6. Article 2 of the Marrakesh Treaty contains definitions of 'works', (3) 'accessible format copy' (4) and 'authorized entity' (5) for the purposes of that treaty. In turn, Article 3 defines the concept of 'beneficiary person' — in essence, a beneficiary is defined as someone affected by one or more of a range of disabilities that interfere with the effective reading of printing material. This broad definition includes persons who are visually impaired as well as those with a physical disability that prevents them from holding and manipulating a book.

7. The obligations for the Contracting Parties are laid down, in particular, in Articles 4 to 6 of the Marrakesh Treaty. More specifically, Article 4(1) provides for an exception or limitation to national copyright laws to enable accessible format copies to be made under certain conditions, in order to facilitate the availability of works in accessible format copies for beneficiary persons. That provision states furthermore that Contracting Parties may provide a limitation or exception to the right of public performance to facilitate access to works for beneficiary persons. Article 5(1) concerns the cross-border exchange of accessible format copies: Contracting Parties are to provide that *'if an accessible format copy is made under a limitation or exception or pursuant to operation of law, that accessible format copy may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party'*. Article 6 concerns the importation of accessible format copies, and provides that *'to the extent that the national law of a Contracting Party would permit a beneficiary person, someone acting on his or her behalf, or an authorized entity, to make an accessible format copy of a work, the national law of that Contracting Party shall also permit them to import an accessible format copy for the benefit of beneficiary persons, without the authorization of the rightholder'*.

8. Article 7 of the Marrakesh Treaty provides that Contracting Parties are to ensure access by beneficiary

persons where rightholders use technological measures for copyright protection. Article 8 of that treaty aims to protect the privacy of beneficiary persons, while Article 9 thereof concerns cooperation to foster the cross-border exchange of accessible format copies.

9. Articles 10, 11 and 12 of the Marrakesh Treaty provide general guidance on the interpretation and application of that treaty. Article 11 states, inter alia, that the Contracting Parties are to comply with the obligations stemming from the Berne Convention, the Agreement on Trade-Related Aspects of Intellectual Property Rights ('the TRIPS Agreement') and the WIPO Copyright Treaty ('the WCT'). (6)

10. Articles 13 to 22 of the Marrakesh Treaty, finally, contain administrative and procedural provisions. In particular, Article 15(3) reads: *'The European Union, having made the declaration referred to in the preceding paragraph at the Diplomatic Conference that has adopted this Treaty, may become party to this Treaty.'* Article 18 specifies that that treaty will enter into force *'three months after 20 eligible parties [...] have deposited their instruments of ratification or accession'*. Article 21(1) indicates that that treaty is *'signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic'*.

B – EU law

11. Directive 2001/29/EC (7) harmonises certain aspects of copyright and related rights in the information society. In particular, that instrument harmonises, with regard to authors, the exclusive right of reproduction (Article 2(a)), the right of communication to the public of their works including the right to make those works available to the public (Article 3(1)), and the exclusive right of distribution (Article 4) of their works.

12. Article 5(2) and (3) of Directive 2001/29 lists the cases in which Member States are authorised to provide for exceptions or limitations to, respectively, the reproduction right laid down in Article 2, and the other rights provided for in Articles 2 and 3 of the directive. In particular, in point (b), Article 5(3) refers to *'uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability'*. (8) Article 5(4) adds that *'where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction'*. In turn, Article 5(5) specifies that the exceptions and limitations provided *'shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder'*.

13. Article 6(1) and (4) of Directive 2001/29, provides: *'1. Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective. ...*

4. Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject matter concerned. ...'

II – The facts, the request for an opinion and the procedure before the Court

A – Factual background

14. In 2009, negotiations began in WIPO on the conclusion of a possible international treaty introducing limitations and exceptions to copyright for the benefit of people who are blind, visually impaired or otherwise print disabled, with the objective of facilitating the cross-border exchange of books and other printed material in accessible formats.

15. On 26 November 2012, the Council adopted a decision authorising the Commission to participate in those negotiations, on behalf of the European Union. (9) The WIPO negotiations were successfully concluded at the diplomatic conference held in Marrakesh between 17 and 28 June 2013. These led to the adoption of the Marrakesh Treaty on 27 June 2013.

16. On 14 April 2014, the Council authorised the signature of the Marrakesh Treaty on behalf of the European Union. (10) The Council Decision was based on both Article 114 TFEU and Article 207 TFEU. On that occasion, however, a number of statements were made: the Commission stated that it considered the subject matter of the Marrakesh Treaty to fall within the exclusive competence of the Union, whereas several Member States instead took the view that that competence is shared between the Member States and the European Union.

17. On 21 October 2014, the Commission adopted a proposal for a decision on the conclusion of the Marrakesh Treaty on behalf of the European Union ('the decision at issue'). (11) The proposal for a Council Decision was based on Articles 114, 207 and 218(6) (a)(v) TFEU. After numerous discussions, especially within the Permanent Representatives Committee (Coreper), that proposal did not, however, obtain the necessary majority in the Council since Member States were divided as to whether or not the Marrakesh Treaty falls under the exclusive competence of the Union. Accordingly, the Union has not, to date, concluded the Marrakesh Treaty.

18. Nevertheless, on 19 May 2015, the Council decided to request, under Article 241 TFEU, the Commission to submit without delay a legislative proposal to amend

the EU legal framework so as to give effect to the Marrakesh Treaty.

19. Against that background, the Commission decided, on 17 July 2015, to submit to the Court a request, pursuant to Article 218(11) TFEU, for an opinion on the nature of the competence of the Union as regards the Marrakesh Treaty.

20. On 6 October 2015, the Commission responded favourably to the Council's request under Article 241 TFEU, declaring that it would *'present draft legislation in order to bring the Union in line with the Marrakesh Treaty'*.

B – The request for an opinion

21. The request for an opinion of the Court submitted by the Commission is worded as follows:

'Does the European Union have exclusive competence to conclude the [Marrakesh Treaty]?'

22. The text of the Marrakesh Treaty, in three authentic versions (English, French and Spanish), was annexed to the Commission's request for an opinion.

C – Procedure before the Court

23. Written observations in the present proceedings have been submitted by the Czech, French, Lithuanian, Hungarian, Romanian, Finnish and United Kingdom Governments, and by the European Parliament. The Czech, French, Hungarian, Italian, Romanian, Finnish and United Kingdom Governments, the European Parliament, the Council and the Commission presented oral argument at the hearing on 7 June 2016.

D – Summary of the observations submitted to the Court

24. The Commission suggests that the Court answer the request for an opinion to the effect that the Marrakesh Treaty falls within the exclusive competence of the Union. The Commission takes the view that the substantive legal bases are, on the one hand, Article 114 TFEU and, on the other hand, Article 207 TFEU. The former provision is relied upon because of the harmonising effect which the Commission claims the Marrakesh Treaty will have as regards certain aspects of copyright and related rights. The latter provision is considered relevant given that the Marrakesh Treaty aims, in particular, at ensuring the cross-border exchange of accessible-format copies between the Contracting Parties, including between the European Union and third countries. Regardless of the specific substantive legal bases, the EU competence is, in the Commission's view, exclusive by virtue of Article 3(2) TFEU since the conclusion of the Marrakesh Treaty may affect or alter the scope of the provisions of Directive 2001/29.

25. The European Parliament supports the position taken by the Commission. In its view, Articles 114 and 207 TFEU constitute the correct substantive legal bases for the decision at issue. The exclusive competence of the Union to conclude the Marrakesh Treaty stems from Article 3(2) TFEU: the obligation to provide for limitations or exceptions in national copyright law falls under the scope of Directive 2001/29 in general and Article 5(3)(b) thereof in particular. The Council, for its part, does not take a position on the nature of the EU competence or the substantive legal basis of the decision at issue. It merely denies that the fact that it has formally requested the Commission to present draft legislation under Article 241 TFEU may have any bearing on the assessment of the Union's competence.

26. Conversely, the Czech, French, Lithuanian, Hungarian, Romanian, Finnish and United Kingdom Governments take the view that the Union does not have exclusive competence to conclude the Marrakesh Treaty. In particular, all those governments contend that the conditions laid down in Article 3(2) TFEU for the Union's competence to become exclusive are not fulfilled. However, as regards the substantive legal bases for the decision at issue, the views of those governments differ.

27. The Lithuanian Government agrees with the Commission and the European Parliament that Articles 114 and 207 TFEU are the correct legal bases. Initially, in its written observations, the French Government took the view that Article 114 TFEU alone constituted the correct legal basis whereas subsequently, at the hearing, it declared that it had changed its position and that it considered that a reference to Article 209 TFEU was also necessary.

28. The Czech and Finnish Governments also consider Article 114 TFEU relevant, but suggest including Article 19 TFEU as an additional legal basis. The Hungarian Government argues that the reference to Article 114 TFEU is correct but, for its part, proposes adding a reference to Article 4(2)(b) TFEU since the Marrakesh Treaty mainly pursues an objective of social policy.

29. The United Kingdom Government, on the other hand, takes the view that Article 114 TFEU cannot be the basis for the decision at issue: in its opinion, that decision should be based on Article 19 TFEU alone or, in the alternative, in combination with Article 207 TFEU. Lastly, the Romanian Government does not take a position on the correct legal basis of the decision at issue but contests the applicability of Article 207 TFEU.

III – Assessment

A – Introduction

30. In its request, the only matter on which the Commission seeks the opinion of the Court is whether the European Union has exclusive competence to conclude the Marrakesh Treaty.

31. However, to answer that question, it is necessary to identify the correct substantive legal basis (or bases) for the decision at issue. In the system created by the EU treaties, which is based on the principle of conferral, the choice of the correct legal basis for a proposed act by the institutions is of constitutional significance. (12) That choice determines whether the Union has the power to act, for what purposes it may act and the procedure that it will have to follow in the event that it may act.

32. This is of particular significance as regards the conclusion of international agreements by the Union. As the Court has stated, whether the Union alone has the competence to conclude an agreement or whether

such competence is shared with the Member States depends, inter alia, on the scope of the provisions of EU law which empower the EU institutions to participate in the agreement. (13) Indeed, in some areas, the Union cannot acquire supervening external exclusivity, pursuant to Article 3(2) TFEU, even when it has already exercised its competence internally. Therefore, the indication of the legal basis determines the division of powers between the Union and the Member States. (14)

33. According to settled case-law, the choice of the legal basis for a measure, including one adopted in order to conclude an international agreement, must rest on objective factors which are amenable to judicial review. Those factors include in particular the aim and the content of the measure. If an examination of a measure reveals that it pursues a twofold purpose or that it has a twofold component and if one is identifiable as the main or predominant purpose or component, whilst the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component. By way of exception, if it is established that the measure simultaneously pursues several objectives or that it has several components inseparably linked, without one being secondary and indirect in relation to the other, the measure may be founded on the corresponding legal bases. (15)

34. Long-standing case-law thus implies that in the case of the conclusion of international agreements, just as in the case of any other act of the European Union, the interpreter should strive to identify, where possible, only one or, failing that, the absolute minimum number of legal bases. Clearly, with the entry into force of the Treaty of Lisbon — which streamlines decision-making procedures and generalises the use of the ordinary legislative procedure for the vast majority of the Union's fields of action — the problems arising from the coexistence of various legal bases in EU acts may be less acute. However, the basic principle that any unessential multiplication of legal bases is to be avoided is, undoubtedly, still valid.

35. This is, to my mind, particularly true for international agreements which cover a specific area and tend to have a single, clearly defined objective. Whereas international agreements which are meant to regulate the relationship between the contracting parties in a wide variety of areas (often referred to as *'framework agreements'*, *'partnership agreements'* or *'cooperation agreements'*) can more easily justify recourse to multiple legal bases, that is less so when the scope of the agreement is more limited and specific.

36. Identifying the so-called centre (or centres) of gravity of a proposed legal instrument may, nevertheless, prove to be a difficult task. Indeed, the areas of EU competence are defined, in the Treaties, in various manners. Across all categories, competences are predominantly expressed in terms of objectives to be achieved (for example, the internal market or the preservation and protection of the environment). These can, in turn, be limited to certain *'themes'* such as specific economic sectors (for example, transport) or specific policy fields (for example, consumer protection), or, on the contrary, be drafted in general terms (for example, the internal market) or cover a variety of policy fields (for example, the area of freedom, security and justice). In other instances, however, competences are mainly expressed in terms of the types of instruments that the European Union may adopt in a particular field (as occurs, for example, in the areas of the customs union, competition or the common commercial policy). Finally, the Union's external action is always to be guided by the same principles and aspirations, regardless of the type of competence exercised.

37. The aforementioned difficulties in identifying the correct legal basis of an EU act arise also in the case at hand. As mentioned in points 24 to 29 above, the Member States and EU institutions which have submitted observations in the present proceedings have referred to no less than five different provisions of the FEU Treaty that, alone or in various combinations, might, in their view, constitute the substantive legal bases for the decision at issue: Articles 4(2)(b), 19(1), 114, 207 and 209 TFEU.

38. In truth, the arguments put forward in support of each of those provisions have a certain force. However, all things considered, I believe that the decision at issue ought to have a dual legal basis, as most of the Member States which have submitted observations suggest. The two applicable provisions are, in my view, Articles 19(1) and 207 TFEU. In the following section, I shall explain the reasons why I take that view. In that context, I shall also explain why, in the final analysis, the arguments put forward in support of the other three provisions, whilst not unsound, do not persuade me. Lastly, I shall deal with the crux of the present request for an opinion: the exclusive or shared nature of the competence of the Union to conclude the Marrakesh Treaty.

B – The substantive legal bases

1. Article 207 TFEU

a) General observations

39. The Commission, supported by the European Parliament and the Lithuanian and United Kingdom Governments, (16) considers that the Marrakesh Treaty constitutes an instrument of common commercial policy and, accordingly, that Article 207 TFEU ought to be one of the substantive legal bases of the decision at issue.

40. I agree.

41. The common commercial policy is one of the main pillars of the Union's relations with the rest of the world. According to Article 207(1) TFEU, that policy must *'be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies'*.

42. It is well established that the mere fact that an act of the Union is liable to have implications for international trade is not enough for that act to be classified as falling within the common commercial policy. Indeed, an EU act falls within that policy if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade. (17)

43. What the subject matter of international trade is can neither be determined in the abstract nor identified in a static and rigid manner. Global trade is subject to continuous change: trade practices, patterns and trends evolve over time. The Union must always be able to fulfil its role as a global trade actor vis-à-vis its trading partners, both in bilateral contexts and in multilateral fora. That is why the Court has, from the early days, consistently taken the view that the common commercial policy must be defined broadly, dismissing restrictive interpretations of the Treaty rules which would make that policy *'become nugatory in the course of time.'* (18) The common commercial policy was conceived, as the Court has stated, with an *'open nature'*. (19) In defining the characteristics and the instruments of that policy, the Treaties took possible changes into account: accordingly, Article 207 TFEU *'presupposes that commercial policy will be adjusted in order to take account of any changes of outlook in international relations'*. (20)

44. In the light of those principles, it seems clear to me that the decision at issue falls, at least in part, within the common commercial policy.

45. Article 207(1) TFEU includes the *'commercial aspects of intellectual property'* among the sectors which fall within the scope of the common commercial policy. Interpreting that concept in Daiichi Sankyo, the Court held that, of the EU rules in the field of intellectual property, only those with a specific link to international trade are capable of falling within the field of the common commercial policy. (21)

46. A number of central provisions of the Marrakesh Treaty evidently have such a specific link to international trade: in particular, Article 5 ('Cross-border exchange of accessible format copies'), Article 6 ('Importation of accessible format copies') and Article 9 ('Cooperation to facilitate cross-border exchange'). Those provisions lay down some of the key obligations taken on by the Contracting Parties and appear crucial to attain the objectives, stated in the preamble to the Marrakesh Treaty, of *'expand[ing] the number of works in accessible formats and improv[ing] the circulation of such works'*. (22) According to that preamble, one of the reasons for the *'continuing shortage of available works in accessible format copies'* is precisely the limited cross-border exchange of accessible format copies.

47. In addition, other provisions of the Marrakesh Treaty (such as Article 4) are also intended to facilitate international trade by standardising certain rules on the availability, scope and use of intellectual property rights among the Contracting Parties. Therefore, although in a different context and on a much more limited scale, the Marrakesh Treaty also pursues one of the objectives of the TRIPS Agreement which, in Daiichi Sankyo, (23) the Court considered crucial for that agreement to fall within the scope of Article 207 TFEU.

48. Accordingly, far from merely having limited implications for international trade, a large and important component of the Marrakesh Treaty is specifically related thereto. Its provisions are intended to promote, facilitate and govern trade in a specific type of goods: accessible format copies. In the overall scheme of the Marrakesh Treaty, the opening-up of national markets to accessible format copies from other countries is one of the key means of achieving the objectives pursued by the Contracting Parties.

49. That conclusion is not called into question by certain arguments which a number of Member States put forward denying that Article 207 TFEU is an appropriate legal basis and which I shall now address in turn.

b) Non-commercial aspects of intellectual property

50. First, the Czech, French, Hungarian and Finnish Governments do not accept that the cross-border exchange of accessible format copies takes place in a commercial framework. They point, in particular, to Article 4(2) of the Marrakesh Treaty according to which the Contracting Parties are to introduce limitations or exceptions in their national copyright law when, inter alia, *'the activity is undertaken on a non-profit basis'*. They also refer to Article 4(4) of that treaty, according to which *'a Contracting Party may confine limitations or exceptions under this Article to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market'*.

51. However, according to the case-law, an activity is subject to EU law in so far as it is of an economic nature. (24) Only under very exceptional circumstances will an activity, which is prima facie of an economic nature, fall outside the scope of EU law on account of the principle of solidarity. (25) Moreover, while the Court has held that Member States have wide discretion in the field of public health and social security and, in particular, may have recourse to non-profit organisations in that connection, the Court has not outright excluded such activities from the scope of EU law. (26) In particular, the Court has consistently held that any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed, is in principle subject to the EU competition rules. (27) Accordingly, the case-law of the Court does not appear to exclude the applicability of EU law to activities carried out on a non-profit basis or at a loss, or with a view to achieving non-economic objectives. I would add that the Member States objecting to the applicability of Article 207 TFEU do not explain why that approach is ill-suited when it comes to international trade.

52. Those parties seem to take the view that goods exchanged on a non-profit basis would be covered by

the concept of *'non-commercial aspects of intellectual property'* and, as a consequence, would fall outside the common commercial policy.

53. That is, to my mind, to misinterpret Article 207 TFEU. That provision does not exclude from its ambit transactions or activities of a non-commercial nature. Indeed, the fact that some goods or services may, under certain circumstances, be exchanged for purposes other than for making a profit (including, for example, when supplied free of charge) does not imply that those goods or services are not traded. Article 4(4) of the Marrakesh Treaty, in referring to accessible format copies which *'cannot be obtained commercially under reasonable terms [in the] market'* implies that a market exists in which that type of goods is traded under commercial terms. As the Commission pointed out at the hearing, the economic operators which are active in that market will necessarily be affected by the rules of the Marrakesh Treaty.

54. It is significant that, in Daiichi Sankyo, (28) the Court confirmed that the whole of the TRIPS Agreement falls within the scope of Article 207 TFEU. Yet, the TRIPS Agreement also includes rules on services or goods supplied for non-commercial use. (29) Likewise, the Berne Convention, which, since it is referred to in Article 2.2 of the TRIPS Agreement, may be considered partially incorporated into the latter, also includes provisions regulating the use of protected works for certain non-commercial activities. (30) It is noteworthy that none of those agreements excludes in toto non-commercial transactions or uses of protected works from their scope.

55. In this context, it is interesting to note that, in the decisions of the WTO adjudicatory bodies, artistic works and other works of the intellect are generally treated in the same way as other commercial goods, even when traded on non-commercial terms or exploited for non-commercial uses. (31) Even where the term 'commerce' appears in the WTO Agreements, that term is interpreted very broadly, as encompassing *'all exchanges of goods'*, regardless of the *'nature or type of "commerce", or the reason or function of the transaction'*. (32) The applicability of WTO rules cannot depend on the private decision of an operator on how to carry out its business activities. In fact, certain WTO rules appear to presuppose that some transactions are effected on non-commercial terms. For example, the WTO Anti-Dumping Agreement (33) concerns, among other matters, exports of products that do not meet their full cost of production. (34) Thus, far from requiring a profit, WTO rules also apply to transactions effected at a loss, unless otherwise provided.

56. What Article 207 TFEU excludes from the ambit of the common commercial policy are only the non-commercial aspects of intellectual property rights. This means sectors of intellectual property law which are not strictly or directly concerned with international trade. That is clearly a residual category. Indeed, broadly speaking, intellectual property rules are meant to confer certain exclusive rights regarding the exploitation of creations of the intellect in order to foster creativity and innovation. Those exclusive rights are nothing but sui generis forms of monopolies which may limit the free circulation of goods or services. Thus, by their very nature, intellectual property rules are mostly trade-related. An example of a non-trade-related aspect of intellectual property is that relating to moral rights which, in fact, are excluded from the scope of the TRIPS Agreement. (35) At any rate, in the present case it is not necessary to delve deeper into that concept: suffice it to say that neither moral rights nor any other aspect of intellectual property which is not related to trade is governed by the Marrakesh Treaty.

57. Be that as it may, it seems to me that the arguments presently examined are based on

a false premiss. As the Commission points out, the Marrakesh Treaty by no means requires that the reproduction, distribution and making available of accessible format copies is to be free of charge. As Article 4(5) of that treaty states, *'it shall be a matter for national law to determine whether limitations or exceptions under this Article are subject to remuneration'*.

58. At the hearing, however, the Italian Government stated that the *'remuneration'* referred to in Article 4(5) of the Marrakesh Treaty should not be understood as a real *'remuneration'* but more as a mere compensation for the copyright owners.

59. That objection is, to my mind, unfounded. First, I would observe that the Italian Government has not submitted any element to support its interpretation of Article 4(5), which seems at odds with the wording of that provision. Second, and more importantly, the fact that the amount of money which might be payable to copyright owners may not correspond to a full market price by no means excludes the commercial nature of the underlying transactions. (36)

60. In essence, the Marrakesh Treaty requires Contracting Parties to enact a standard set of limitations and exceptions to copyright rules in order to permit the reproduction, distribution and making available of accessible format copies, and to permit the cross-border exchange of those works. That treaty does not regulate the commercial or non-commercial character of the transactions through which those operations take place. In any event, some of the transactions covered by the Marrakesh Treaty certainly do have a commercial character.

61. For the sake of completeness, I would also note that, by virtue of Articles 4(4) and 5 (3) of the Marrakesh Treaty, the obligations set out in Articles 4(1) and 5(1) of that same treaty may also be fulfilled by the Contracting Parties by providing limitations or exceptions in copyright laws which are not limited to the activities of non-profit entities.

c) The links with the TRIPS Agreement

62. Second, the French, Hungarian, Romanian and Finnish Governments emphasise that the Marrakesh Treaty was negotiated within WIPO, an agency of the United Nations which does not have as its mission the liberalisation and promotion of trade. The Hungarian and United Kingdom Governments also point to the

fact that the Marrakesh Treaty, arguably, only has weak links to the TRIPS Agreement.
63. Those objections, too, fail to persuade me.
64. To begin with, where and in what context an international agreement is negotiated is only of limited relevance. Although those elements may, at times, give some useful indications about the intentions of the drafters of the agreement, what really matters are the aim and content of the agreement, as they emerge from its wording.
65. For example, the Court has ruled that the Council Decision on the signing, on behalf of the Union, of the European Convention on the legal protection of services based on, or consisting of, conditional access (37) had to be based on Article 207 TFEU, even though that agreement was adopted by the Council of Europe, an organisation primarily concerned with the protection of human rights, democracy and the rule of law. (38) On the other hand, WIPO does administer other international agreements which appear to have clear links to international trade: for instance, the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods. (39)
66. To that, I would only add that the Court has already confirmed that commercial aspects of intellectual property fall within the scope of the common commercial policy regardless of whether they are included in international agreements which are part of the WTO Agreements (or negotiated in the context of the WTO). (40)

d) The aim of the Marrakesh Treaty

67. Third, the Finnish and United Kingdom Governments emphasise that the aim of the Marrakesh Treaty is not to liberalise trade, but to contribute to the complete development of persons with visual impairments. Those governments consider that the legal issue in the present case is, mutatis mutandis, similar to that examined by the Court in the cases concerning the Cartagena Protocol on Biosafety (41) and the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal. (42) In those cases, the Court considered the environmental component of the agreement predominant over its trade component.
68. At the outset, I would recall that Article 207 TFEU makes it clear that *'the common commercial policy shall be conducted in the context of the principles and objectives of the Union'*s external action'. In turn, Article 21 TEU — which lays down those principles and objectives — states that the Union's action on the international stage is to be guided, inter alia, by the principles of equality and solidarity and should aim, inter alia, to *'foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty'*.
69. As mentioned above, modern trade agreements often pursue a variety of objectives at the same time. Purely economic-related objectives are only some of those objectives. Humanitarian, development and environmental objectives, for example, frequently play a central role in the negotiation of international agreements the essential content of which remains, nonetheless, clearly trade-related. (43) To give an example, in the last few years, in continuation of a process that began with the Doha Declaration on the TRIPS Agreement and Public Health, (44) the WTO Members have adopted a number of decisions, amending or implementing the TRIPS Agreement with regard to the patentability (45) and licensing (46) of pharmaceutical products, to the benefit of the least-developed countries. Those measures undoubtedly pursue development and health objectives: to ensure access to medicine (especially anti-HIV products) for all in the poorest countries. Nonetheless, in the light of their content and context, I believe that few would dispute the fact that those measures have a specific link to international trade. (47)
70. That is why the EU Treaties, especially after the entry into force of the Treaty of Lisbon, assign to the Union's external action (including that in the field of the common commercial policy) (48) a number of objectives, both of economic and of non-economic nature. That also explains why the Court, even before the entry into force of the Treaty of Lisbon, consistently found that objectives relating to, for example, economic development, (49) environmental protection (50) or foreign policy (51) could be pursued in the context of the common commercial policy.
71. In the end, the common commercial policy is essentially the external dimension of the internal market and the customs union. In that respect, I would recall that Article 114 TFEU constitutes the main provision used by the EU legislature to adopt the measures necessary for the establishment and functioning of the internal market. It is well established that, once the conditions for recourse to Article 114 TFEU as a legal basis are fulfilled, the EU legislature cannot be prevented from relying on that legal basis on the ground that the pursuit of other objectives of general interest (52) (such as, for example, public health (53) or consumer protection (54)) is a decisive factor in the choices to be made. For reasons of coherence, the same principle should, in my view, apply with regard to the common commercial policy.
72. I consider that the Finnish and United Kingdom Governments are mistaken in drawing a parallel between the Marrakesh Treaty and the abovementioned Cartagena Protocol and Basel Convention. In those cases, the Court held that the trade component of those agreements was only secondary to their environmental component. A simple glance at the text of those agreements cannot but confirm that the number, scope and importance of the trade-related provisions in the overall scheme of those agreements were neither preponderant, nor of equal importance to those of the environment-related provisions. Indeed, most of the provisions of those agreements concerned environmental regulation, trade regulation being merely one of the instruments used for the pursuit of the environmentrelated objectives.
73. On the contrary, as explained above, the increase of international trade with regard to accessible format

copies is very much at the heart of the system established by the Marrakesh Treaty. The simplification and growth of the cross-border exchange of accessible format copies is one of the key means devised by the drafters of that treaty to further their objectives.

74. One could even say that, simply put, the effect of the Marrakesh Treaty is to replace one type of trade in accessible format copies with another. Currently, cross-border trade in those goods is very limited, since it takes place according to the normal market rules. In the future, trade in those goods will be facilitated since copyright owners will have limited rights for the purpose of opposing the reproduction, distribution and circulation of their works in the situations specified in the Marrakesh Treaty.

75. The French Government is thus mistaken when it argues that the Marrakesh Treaty does not aim to liberalise or promote trade. In any event, according to settled case-law, it is sufficient that an agreement governs trade, for example by limiting or even prohibiting trade, for it to fall within the scope of the common commercial policy. (55)

76. That said, it is true that, as a number of governments point out, the trade-related objectives in the Marrakesh Treaty serve a purpose of a different nature. This is why I take the view that Article 207 TFEU cannot be the sole basis of the decision at issue.

2. Article 19(1) TFEU

77. The preamble to the Marrakesh Treaty makes it clear that, as the Czech, Finnish and United Kingdom Governments argue, the ultimate aim of that treaty is to contribute to the complete development of persons with visual impairments or with other print disabilities. Emphasis is placed, in particular, on the principles of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in society. In that context, the second recital refers to the intention that the visually impaired should receive information on an equal basis with others. The fourth recital, for its part, refers to the barriers of persons with visual impairments or with other print disabilities to access published works and achieve equal opportunities in society.

78. The preamble also refers to the Universal Declaration of Human Rights and the United Nations Convention on the Rights of Persons with Disabilities ('the UN Convention'). The link between the UN Convention and the Marrakesh Treaty is, in fact, obvious. Article 30(3) of the former provides: *'States Parties shall 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.'* The Marrakesh Treaty can, accordingly, be regarded as implementing the commitment undertaken in that provision.

79. In that regard, it is worthy of note that the UN Committee on the Rights of Persons with Disabilities ('the UN Committee'), established within the framework of the UN Convention, has expressly pointed to the link between the two agreements. In commenting on Article 9 of the UN Convention (entitled 'Accessibility'), the UN Committee wrote that the Marrakesh Treaty *'should ensure access to cultural material without unreasonable or discriminatory barriers for persons with disabilities'*. (56)

80. Against that background, I take the view that the Marrakesh Treaty pursues one of the aims referred to in Article 19(1) TFEU. According to the terms of that provision, *'the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'*. Disability is, thus, one of the grounds of possible discrimination listed in that provision against which the Union may take appropriate action.

81. In this context, I observe that it was precisely on the basis of Article 19 TFEU that the Union adopted a variety of legal instruments intended to combat discrimination, ensuring equal treatment and equal opportunities for all citizens. I refer, notably, to Directive 2000/43/EC on racial equality (57) and Directive 2004/113/EC on gender equality. (58)

82. I also refer, more importantly, to Directive 2000/78/EC on equal treatment in employment and occupation. (59) According to Article 1 of that directive, its purpose *'is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment'*. (60)

83. It seems to me that the EU measures just mentioned — as much as the international instruments mentioned in point 78 above — have a significant anti-discrimination component in common with the Marrakesh Treaty.

84. However, the Commission objects to that conclusion, pointing out that the Marrakesh Treaty is not a general measure aimed at fighting all possible forms of discrimination which people with disabilities may suffer: the subject matter of that treaty is confined to copyright only. In addition, the Commission points out that Articles 9 and 10 TFEU require the Union, inter alia, to combat social exclusion and discrimination when defining and implementing all its policies and activities.

85. I am not convinced by those arguments. First, nothing in the text of Article 19(1) TFEU indicates that its scope is limited to measures of general nature or of broad scope. Second, the Marrakesh Treaty does not only require Contracting Parties to amend their copyright laws for the benefit of persons with visual impairments. It also places other obligations on them: for example, to introduce specific measures to protect the privacy of persons with visual impairments (Article 8), or to cooperate with the relevant bodies of WIPO in order to facilitate the cross-border exchange of

accessible format copies (Article 9). Article 13 also establishes an assembly with the task, inter alia, of developing the rules of the Marrakesh Treaty. Third, the need to combat discrimination, ensuring equal opportunities for persons with visual impairments, has not merely been taken into account when negotiating the Marrakesh Treaty but provides the rationale for that treaty.

86. In the light of the above, I take the view that Article 19(1) TFEU should be one of the legal bases of the decision at issue.

3. Article 114 TFEU

87. The Commission, supported on this point by the Czech, Finnish, French and Lithuanian Governments and the European Parliament, considers that Article 114 TFEU should be one of the legal bases of the decision at issue.

88. I do not share that view.

89. There is no doubt that the conclusion of the Marrakesh Treaty may entail a further harmonisation of EU copyright rules. It is also beyond dispute that, internally, measures concerning those matters may generally be based on Article 114 TFEU. Finally, it is selfevident that implementation by the Union of the provisions laid down in the Marrakesh Treaty will have a positive effect on cross-border trade within the Union.

90. Nevertheless, those elements do not seem to me to provide sufficient grounds for concluding that the internal market component of the Marrakesh Treaty is predominant or, at least, has a weight equal to the trade and anti-discrimination components.

91. It is settled case-law that a measure adopted on the basis of Article 114 TFEU must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. (61) A mere finding of disparities between national rules is not sufficient to justify having recourse to Article 114 TFEU. That provision requires the existence of differences between the laws, regulations or administrative provisions of the Member States which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market. (62)

92. In the present case, no party has shown that there are significant disparities between the national laws of the Member States on the aspects of copyright regulated by the Marrakesh Treaty. Clearly, in the light of Article 5(2) and (3) of Directive 2001/29, it is possible (or even likely) that differences exist between the laws, regulations or administrative provisions of the Member States as regards the exceptions or limitations to the authors' rights to the benefit of persons with visual impairments. However, a mere possibility is not enough to justify recourse to Article 114 TFEU.

93. In fact, as the United Kingdom Government points out, there has been no analysis of how those presumed disparities affect the functioning of the internal market. Yet, recital 31 of Directive 2001/29 states that the degree of harmonisation achieved as regards the exceptions and limitations was *'based on their impact on the smooth functioning of the internal market'*. From that, I would infer that, when Directive 2001/29 was adopted, the EU legislature considered that the exceptions and limitations for the benefit of people with a disability did not have any significant impact on the smooth functioning of the internal market. Had it been otherwise, the EU legislature would arguably have required a greater level of approximation of the Member States' laws on that matter. There are reasonable grounds for supposing that the situation in that regard would not be any different today.

94. The fact that those aspects have not been examined in detail by the Commission or the EU legislature supports the view that the harmonisation of the internal market was not one of the main aims which prompted the Union to negotiate (and, potentially, conclude) the Marrakesh Treaty. The positive contribution that the conclusion of that treaty might make to the strengthening of the internal market appears, therefore, a rather secondary objective, or an indirect effect.

95. The fact that any internal measure with the same content would probably be based on Article 114 TFEU (alone, or in combination with other legal bases) is, in this context, of little relevance. As mentioned above, since the common commercial policy forms the external dimension of the internal market, equivalent measures are frequently based on Article 114 TFEU when their effects are purely internal to the Union, and on Article 207 TFEU when adopted with a view to regulating the relationship between the European Union and third countries.

96. In fact, the Union could, internally, achieve equivalent results by simply amending Directive 2001/29 (as the Council requested the Commission to do on 19 May 2015). However, the objectives pursued by the Marrakesh Treaty can be achieved effectively only if the rules contained therein are implemented in many other countries, well beyond the boundaries of the Union. Indeed, the seventh recital of that treaty states that there is a continuing shortage of accessible format copies despite the fact that *'many Member States have [already] established limitations and exceptions in their national copyright laws for persons with visual impairments or with other print disabilities'*.

97. In the light of all those considerations, I take the view that Article 114 TFEU should not be included as one of the legal bases of the decision at issue.

4. Social policy

98. Finally, the Hungarian Government takes the view that the decision at issue should also include a reference to Article 4(2)(b) TFEU, since the objective of the Marrakesh Treaty is one of social policy.

99. At the outset, I should like to point out that Article 4 TFEU, like Articles 3, 5 and 6 TFEU, only enumerates the areas of EU competence, according to the nature of that competence. The definition and delimitation of those areas of competence, and the rules on the exercise by the Union of those competences are, instead, to be found in other provisions of the EU

Treaties. Articles 3 to 6 TFEU cannot, accordingly, constitute substantive legal bases for any EU measure.
100. Therefore, the arguments put forward by the Hungarian Government should, in my view, be examined as if they referred to the provisions on social policy: Articles 151 to 161 TFEU. Among those provisions, it seems to me that it is arguable that a possible legal basis for the decision at issue would be Article 153 TFEU.
101. Article 153 TFEU sets out the acts and procedures that the Union is to follow to achieve the objectives of Article 151 TFEU. In turn, the latter provision identifies the social policy objectives of the Union as follows: *'the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion'*. (63)
102. In the light of that provision, an element of social policy can certainly be found in the Marrakesh Treaty. Indeed, the ninth recital of that treaty recognises the *'need to maintain a balance between the effective protection of the rights of authors and the larger public interest, particularly education, research and access to information, and that such a balance must facilitate effective and timely access to works for the benefit of persons with visual impairments or with other print disabilities'*. (64)
103. Nevertheless, it does not seem to me that such an objective has, within the scheme of the Marrakesh Treaty, a central role. The real 'social' objective of that treaty is rather to improve the life of the people with visual impairments generally. A more effective access to employment for those people would be merely a consequence of the removal of certain barriers which limit their freedom of expression, including their freedom to seek, receive and impart information and ideas of all kinds, their enjoyment of the right to education, and the opportunity to conduct research.
104. The Union's social policy is very much focused on improving what can, broadly speaking, be described as the working or economic life of Union citizens, (65) whereas, as mentioned above, the aim of ensuring equal treatment and opportunities for, inter alia, people with disabilities is rather the subject matter of the anti-discrimination measures envisaged in Article 19 TFEU.
105. Therefore, since the two provisions partly overlap, (66) I take the view that, as concerns the social component of the Marrakesh Treaty, the centre of gravity is to be found more in Article 19 TFEU than in Article 153 TFEU.

5. Article 209 TFEU

106. At the hearing, the French Government changed its position, arguing that Article 209 TFEU should also be included as a legal basis for the decision at issue, alongside Article 114 TFEU. Indeed, in its view, the Marrakesh Treaty pursues a development objective.
107. It is true that the preamble to the Marrakesh Treaty acknowledges that *'the majority of persons with visual impairments or with other print disabilities live in developing and least developed countries'* and expressly refers to the development agenda of WIPO.
108. However, it seems clear to me that, in the overall scheme of the Marrakesh Treaty, the development objective is purely ancillary, or at least secondary to the other objectives. It should be recalled, in that regard, that the main objective of development cooperation is the eradication of poverty in the context of sustainable development. (67) It is self-evident that that objective is not at the heart of the Marrakesh Treaty.
109. First, the reference to the development objective in the preamble is made only in passing, whereas the commercial and anti-discrimination objectives of the Marrakesh Treaty are more fully explained.
110. Second, no specific provision of that treaty specifically addresses development policy. A brief mention of the needs of least developed countries is made only in Articles 12 and 13 of the Marrakesh Treaty. Neither of those provisions is, however, of central importance. Article 12 has merely an interpretative function: it recognises the Contracting Parties' right to implement, in their national law, other copyright limitations and exceptions than are provided for by that treaty for the benefit of beneficiary persons. In the case of least developed countries, reference is made to those countries' *'special needs and [their] particular international rights and obligations and flexibilities thereof'*. In turn, Article 13 states that the Contracting Parties must have an assembly. It also provides that, whilst the expenses of each delegation is to be borne by the Contracting Party that has appointed the delegation, in the case of delegations of Contracting Parties that are developing countries, the Assembly may ask WIPO to grant financial assistance to facilitate their participation.
111. Third, as mentioned in point 69 above, the Court has made clear that development objectives can also be pursued in the context of the Union's common commercial policy.
112. Fourth, and more importantly, the rules laid down in the Marrakesh Treaty are clearly meant to improve the conditions of beneficiaries in all the Contracting Parties, and not only (or primarily) those of beneficiaries living in developing or least developed countries.

6. Interim conclusion

113. In the light of the foregoing, I take the view that the decision at issue should be based on Articles 19 and 207 TFEU. Moreover, there is no reason, in my opinion, to consider that the procedures laid down in those two provisions are incompatible: only the Council's voting requirement may possibly differ.
114. International agreements falling within the scope of Article 19 TFEU are, by virtue of Article 218(6)(v) and (8) TFEU, to be concluded through the adoption of a decision of the Council, acting unanimously on a proposal by the Commission, after obtaining the consent of the European Parliament.
115. International agreements falling within the scope of Article 207 TFEU are, pursuant to Articles 207(4)

and 218(6)(v) TFEU, to be concluded by the adoption of a Council Decision, on a proposal by the Commission, after obtaining the consent of the European Parliament. As for the Council voting requirement, qualified-majority voting is the rule, whereas unanimity is exceptionally required in the three situations laid down in the second and third subparagraphs of Article 207(4) TFEU.

116. For the purposes of the present proceedings it is, however, unnecessary to determine whether, for its trade component, Article 207 TFEU would have in principle required the Council to decide by unanimity or by qualified-majority. The stricter requirement set out in Article 19 TFEU inevitably prevails. (68)

117. Consequently the decision at issue, if based on Articles 19 and 207 TFEU, is to be adopted by the Council, acting unanimously on a proposal by the Commission, after obtaining the consent of the European Parliament.

C – The nature of the EU competence

118. According to Article 3(1)(e) TFEU, which codifies long-standing case-law, (69) the common commercial policy is an area of exclusive competence of the Union. Conversely, there is no reference to an area of competence which covers or includes anti-discrimination measures in any of the provisions of Title I of Part One of the FEU Treaty, which is entitled *'Categories and areas of Union competence'* (Articles 2 to 6). Thus, by virtue of Article 4(1) TFEU, (70) such an area must be considered to be shared between the Union and the Member States.

119. Nonetheless, unlike what the Hungarian Government contends, that does not imply that the Marrakesh Treaty necessarily must be concluded as a mixed agreement. At the outset, I would point out that, even if Article 3(2) TFEU were not applicable as regards the Marrakesh Treaty, (71) conclusion of the treaty would not inevitably call for the adoption of a mixed agreement. The choice between a mixed agreement or an EU-only agreement, when the subject matter of the agreement falls within an area of shared competence (or of parallel competence), (72) is generally a matter for the discretion of the EU legislature.

120. That decision, as it is predominantly political in nature, may be subject to only limited judicial review. The Court has consistently held that the EU legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. It concluded from this that the legality of a measure adopted in those fields can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue. (73)

121. That may be the case, for example, where a decision to conclude a mixed agreement might, because of the urgency of the situation and the time required for the 28 ratification procedures at national level, seriously risk compromising the objective pursued, or cause the Union to breach the principle pacta sunt servanda.

122. Conversely, a mixed agreement would be required, generally, where an international agreement concerns coexistent competences: that is, it includes a part which falls under the exclusive competence of the Union and a part which falls under the exclusive competence of the Member States, without any of those parts being ancillary to the other. (74) That, however, is clearly not the case of the Marrakesh Treaty.

123. More importantly, however, an agreement which, because of its objective and content, is within an area of competence which is, in principle, shared must necessarily be concluded as an EU-only agreement when that competence, by virtue of its exercise by the Union, has become exclusive externally. That is, as I shall explain below, precisely the case for the Marrakesh Treaty.

1. On Article 3(2) TFEU

124. Article 3(2) TFEU provides: *'The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.'*

125. That provision confers an additional source of exclusive competence on the Union, which is specific to the conclusion of international agreements. Therefore, a competence which may be shared internally may become exclusive for the conclusion of international agreements. The reason is self-evident: internally, the principle of primacy will ensure that, where there are differences between the EU rules and the domestic rules, the former will prevail. (75) In the event of a legal dispute, the Court of Justice may be called upon to clarify the matter, for example on the basis of Articles 258 to 260 TFEU. It is entirely different when Member States enter into international agreements with third countries. Those agreements may easily create obstacles, both at the political and at the legal level, to the correct functioning and, possibly, the future development of EU law. (76)

126. In the present proceedings, only the last part of Article 3(2) TFEU is relevant. The Commission and the Parliament argue that the Union enjoys exclusive competence to conclude the Marrakesh Treaty because its conclusion may affect or alter the scope of the provisions of Directive 2001/29.

127. The last part of Article 3(2) TFEU codifies the so-called ERTA case-law. (77) In ERTA, the Court established the principle that, where common rules have been adopted, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules. In such a case, the Union has exclusive competence to conclude international agreements. (78)

128. The common rules are affected, naturally, where the Union has completely harmonised the area which forms the subject matter of the international agreement. (79) Moreover, there is a risk that the EU rules might

be adversely affected by international commitments undertaken by Member States, or that the scope of those rules might be altered, when those commitments fall within the scope of those rules. (80)

129. Therefore, complete harmonisation of the area covered by an international agreement is not a necessary precondition for the exclusive competence of the Union to arise in that respect. It is sufficient that the area is already covered to a large extent by the EU rules concerned. (81) In other words, the relevant international and EU rules do not necessarily need to fully coincide for that to happen. (82) The Court has already rejected an approach under which an international agreement would be examined, provision by provision, in order to determine whether each of those provisions corresponds to an analogous provision of EU law. The Court has stated that the nature of the competence must be determined on the basis of a comprehensive and detailed analysis of the relationship between the international agreement envisaged and the EU law in force. (83)

130. This case-law, however, begs the question: when is an area sufficiently covered by EU rules to exclude Member States' competence to act externally (unless, obviously, they are authorised or granted delegated powers to that effect by the Union)?

131. To answer that question, one must go back to the very raison d'être of the ERTA caselaw and, more generally, to that of Article 3(2) TFEU. As the Court has explained, that caselaw (and, consequently, the new treaty provision which codifies that case-law) is meant to ensure a uniform and consistent application of the EU rules and the proper functioning of the systems which those rules establish, in order to preserve the full effectiveness of EU law. (84)

132. In the light of that principle, it must be determined whether the rules contained in an international agreement may affect the uniform and consistent application or the effectiveness of the relevant EU rules. That analysis can, obviously, be carried out only on a case-by-case basis, by looking at the two sets of rules (EU and international), focusing on their scope, nature and content. (85)

133. To that end, account must be taken not only of EU law as it stands when the agreement is to be concluded, but also of its future development, insofar as that is foreseeable at the time of that analysis. (86) Otherwise, any possible future development of EU law would risk being precluded, or at least significantly hampered. (87)

134. That is why the Court has found there to be an exclusive EU competence where, for example, the conclusion of an agreement by the Member States would undermine the unity of the common market and the uniform application of EU law; (88) or where, given the nature and content of the existing EU provisions, any agreement in that area would necessarily affect the functioning of the system set up by the EU rules. (89)

135. By contrast, the Court found that the Union did not have exclusive competence where, for example, because both the EU provisions and those of an international convention laid down minimum standards, there was nothing to prevent the full application of EU law by the Member States; (90) or where, although there was a chance that bilateral agreements would lead to distortions in the flow of services in the internal market, there was, in the Court's view, nothing in the Treaty to prevent the institutions from arranging, in the common rules laid down by them, concerted action in relation to third countries or from prescribing the approach to be taken by the Member States in their external dealings. (91)

136. In light of these principles I shall now consider whether the Marrakesh Treaty falls within the exclusive competence of the Union.

2. On the Marrakesh Treaty and Directive 2001/29

137. As mentioned, the Marrakesh Treaty regulates certain aspects of copyright law. It requires Contracting Parties to introduce a standard set of limitations and exceptions to copyright rules in order to permit the reproduction, distribution and making available of published works in formats accessible to persons with visual impairments, and to permit the cross-border exchange of those works.

138. At the Union level, copyright is regulated by Directive 2001/29, which establishes a legal framework for the protection of copyright and related rights. That instrument harmonises certain aspects of Member States' copyright laws, in order to implement the four freedoms in that respect, while leaving unaffected the differences between those laws which do not adversely affect the functioning of the internal market. (92)

139. Several of the Member States which have submitted observations in the present proceedings discuss whether Directive 2001/29, in Article 5, achieves a complete harmonisation of the exceptions and limitations. They also address the question of whether the discretion conferred by that provision on the Member States implies that they have retained competence on those aspects (as a number of governments argue), or whether they have been authorised to act or have been granted powers to do so by the Union (as the Commission and the European Parliament contend).

140. To my mind, those issues are irrelevant for the purposes of the present proceedings. At the outset, I should point out that neither in Padawan (93) nor in Copydan Båndkopi (94) did the Court state that Article 5 of Directive 2001/29 achieves only a minimum harmonisation. More importantly, as explained in point 129 above, complete harmonisation is not necessary for the Union's exclusive competence to arise. What is crucial in that regard is whether the area covered by the international agreement is already largely covered by EU rules so that any Member State competence to act externally in respect of that area would risk affecting those rules.

141. It cannot be disputed that exceptions and limitations are a part of copyright law which is largely regulated by Directive 2001/29. As specified in recital 32 of that directive, those exceptions and limitations

are exhaustive. Moreover, under the terms of Article 5(5) and recital 44, all the exceptions and limitations must be applied according to the so-called threestep test. (95) Furthermore, the Court has made clear that the discretion which the Member States enjoy when they make use of the exceptions under Article 5 of Directive 2001/29 *'must be exercised within the limits imposed by EU law'*. (96) Finally, the Court has also stated that many of the concepts found in Article 5 constitute autonomous concepts of EU law which must be interpreted in a uniform manner in all Member States, irrespective of the domestic laws of those States. (97)

142. In fact, in the Broadcasting case, the Court observed that, as regards the international agreement in question in that case, the elements concerning, inter alia, the limitations and exceptions to the rights related to copyright were covered by common EU rules, and that the negotiations on those elements were capable of affecting or altering the scope of those common rules. (98) I do not see any reason why that conclusion would not be warranted in the present case too.

143. It is clear that the conclusion of the Marrakesh Treaty will require the EU legislature to amend Article 5 of Directive 2001/29. Currently, paragraph 3(b) of that provision leaves it to the Member States whether to provide exceptions or limitations in case of *'uses, for the benefit of people with a disability, which are directly related to the disability and of a noncommercial nature, to the extent required by the specific disability'*. Thus, in order to comply with the rules included in the Marrakesh Treaty, the exceptions and limitations provided for the benefit of a specific category of persons with a disability (persons who are blind, visually impaired or otherwise print disabled) can no longer be optional and would have to be made mandatory.

144. Admittedly, there may be different ways of implementing the Marrakesh Treaty and the EU legislature might well decide that there is no need to fully harmonise the subject matter of that treaty. Nevertheless, that is a decision for the EU legislature to take as the text of Directive 2001/29 would in any event need to be amended. In particular, the current wording of Article 5(3)(b) of that directive reflects neither the letter nor the spirit of the Marrakesh Treaty and Member States cannot de facto alter or undermine that EU rule by taking on autonomous international commitments. (99)

145. It is not irrelevant, in that context, to note that recital 44 of Directive 2001/29 states that the application of the exceptions and limitations provided for in the directive ought to be *'exercised in accordance with international obligations'*.

146. In addition, the scope of Article 6 of the directive, concerning the obligations as to technological measures and, in particular, paragraph 4 thereof, would also appear to be affected by Article 7 of the Marrakesh Treaty. The latter provision requires Contracting Parties to take appropriate measures to ensure that, when they provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures, this legal protection does not prevent beneficiary persons from enjoying the limitations and exceptions laid down in that treaty.

147. It therefore seems to me that the conclusion of the Marrakesh Treaty will, to use the wording of Article 3(2) TFEU, inevitably *'affect common rules or alter their scope'*.

148. This is the issue at the heart of Article 3(2) TFEU. After all, the Court has recently confirmed that the fact that the EU rules in question allow considerable latitude to the Member States for the purposes of the transposition and implementation of those rules does not rule out exclusive competence. (100) Nor is it of any relevance, in that regard, that not only the Union, but also the Member States, may need to change their national rules to implement an international agreement. As stated above, a competence may be exclusive externally while being shared internally. If that is so, the exercise of internal competence is governed by Article 2(2) TFEU, not Article 3(2) TFEU. 149. That conclusion is not called into question by the fact that, as the United Kingdom Government points out, the Member States might implement the Marrakesh Treaty by amending their copyright laws, without formally breaching Directive 2001/29. As the Court has repeatedly held, EU rules may be affected by international commitments even if there is no possible contradiction between those commitments and the EU rules. (101) In any event, as mentioned in point 143 above, the optional nature of the exceptions and limitations provided for in Article 5(3)(b) is clearly not in keeping with the spirit and text of the Marrakesh Treaty: implementation of that treaty at EU level would inevitably require that provision to be amended.

150. The exclusive nature of the competence to be exercised for the conclusion of the Marrakesh Treaty is also confirmed by the fact that the Court, in response to a request for a preliminary ruling concerning the interpretation of Article 5(2)(d) of Directive 2001/29, held that, by adopting Directive 2001/29, the EU legislature *'is deemed to have exercised the competence previously devolved on the Member States in the field of intellectual property'*. Accordingly, it ruled that, within the scope of Directive 2001/29, the Union must be regarded as having taken the place of the Member States, which are no longer competent to implement the provisions of the Berne Convention which inspired the rules contained in that directive. (102) Those findings appear mutatis mutandis very relevant in the present case.

151. Finally, inasmuch as foreseeable developments of EU law must be taken into account in order to determine whether the competence at issue is exclusive or shared, it cannot be overlooked that, on 19 May 2015, the Council decided to request the Commission, under Article 241 TFEU, to submit without delay a legislative proposal to amend the EU legal framework so as to give effect to the rules provided for in the Marrakesh Treaty.

152. It seems to me that, once that amendment is adopted, there can be no question that the Union will have exercised its competence in a manner which is incompatible with the existence of a residual external competence of the Member States. Any action of the Member States, either individual or collective, to undertake obligations with third countries in the area covered by the Marrakesh Treaty will actually affect the EU rules adopted to implement it.

153. In any event, irrespective of that possible amendment, Directive 2001/29 itself appears, in its preamble, to foresee possible future action to bring about further consistency in the area of exceptions and limitations. Recital 32, indeed, expresses the need for Member States to progressively *'arrive at a coherent application [in that area], which will be assessed when reviewing implementing legislation in the future'*. (103)

154. It thus appears that the conditions set out in the last part of Article 3(2) TFEU are satisfied.

IV – Conclusion

155. On the basis of the above considerations, I propose that the Court answer as follows the question raised by the Commission in its request for an opinion pursuant to Article 218(11) TFEU: The European Union has exclusive competence to conclude the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled adopted by the World Intellectual Property Organization (WIPO) on 27 June 2013.

1 – Original language: English.

2 – The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, World Intellectual Property Organization, 27 June 2013, TRT/MARRAKESH/001.

3 – The concept of 'works' refers to literary and artistic works within the meaning of Article 2(1) of the Berne Convention for the Protection of Literary and Artistic Works ('the Berne Convention'), in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media. The concept encompasses works in audio form such as audiobooks.

4 – 'Accessible format copy' means a copy of a work in an alternative manner or form which gives a beneficiary person access to the work. It must be used exclusively by beneficiary persons and must respect the integrity of the original work.

5 – An 'authorised entity', is a government institution or other organisation recognised by the government that provides education, instructional training, adaptive reading or information access to blind, visually impaired, or otherwise print disabled persons on a non-profit basis.

6 – Article 11 must be read in the light of the 10th recital, according to which the Contracting Parties reaffirm their obligations under the existing international treaties on the protection of copyright and the importance of the so-called 'three-step test' for limitations and exceptions established in Article 9(2) of the Berne Convention.

7 – Directive 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).

8 – Recital 34 of Directive 2001/29 also reads: 'Member States should be given the option of providing for certain exceptions or limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by people with disabilities, for public security uses and for uses in administrative and judicial proceedings' (emphasis added).

9 – Council Decision on the participation of the European Union in negotiations for an international agreement within the World Intellectual Property Organisation on improved access to books for print impaired persons; 16259/12.

10 – 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 2014 L 115, p. 1).

11 – COM(2014) 638 final.

12 – See, to that effect, Opinion 2/00 of 6 December 2001, EU:C:2001:664, paragraph 5.

13 – See Opinion 2/92 of 24 March 1995, EU:C:1995:83, paragraph 12, and Opinion 1/08 of 30 November 2009, EU:C:2009:739, paragraph 112.

14 – See judgment of 1 October 2009, Commission v Council, C-370/07, EU:C:2009:590, paragraph 49.

15 – See, to that effect, judgment of 14 June 2016, Parliament v Council, C-263/14, EU:C:2016:435, paragraphs 43 and 44, and Opinion 2/00 of 6 December 2001, EU:C:2001:664, paragraphs 22 and 23 and the case-law cited.

16 – The latter government takes that view only in the alternative, in the event that Article 19 TFEU was not considered a sufficient basis on its own to conclude the Marrakesh Treaty.

17 – See, inter alia, judgments of 22 October 2013, Commission v Council, C-137/12, EU:C:2013:675, paragraph 57; of 18 July 2013, Daiichi Sankyo and Sanofi-Aventis Deutschland, C-414/11, EU:C:2013:520, paragraph 51; and of 12 May 2005, Regione autonoma Friuli-Venezia Giulia and ERSA, C-347/03, EU:C:2005:285, paragraph 75.

18 – Opinion 1/78 of 4 October 1979, EU:C:1979:224, paragraphs 44 and 45. On this issue, see also judgment of 17 October 1995, Werner, C-70/94, EU:C:1995:328, paragraph 9 et seq., and Opinion of Advocate General Kokott in Commission v Parliament and Council, C-178/03, EU:C:2005:312, point 32.

19 – See Opinion 1/94 of 15 November 1994, EU:C:1994:384, paragraph 41.
20 – See judgment of 26 March 1987, Commission v Council, 45/86, EU:C:1987:163, paragraph 19.
21 – See judgment of 18 July 2013, Daiichi Sankyo and Sanofi-Aventis Deutschland, C-414/11, EU:C:2013:520, paragraph 52.
22 – See the fourth recital.
23 – See judgment of 18 July 2013, Daiichi Sankyo and Sanofi-Aventis Deutschland, C-414/11, EU:C:2013:520, paragraphs 58 and 59. See also judgment of 22 October 2013, Commission v Council, C-137/12, EU:C:2013:675, paragraphs 60 to 67.
24 – See, for example, judgment of 18 July 2006, Meca-Medina and Majcen v Commission, C-519/04 P, EU:C:2006:492, paragraph 22.
25 – See judgment of 17 February 1993, Poucet and Pistre, C-159/91 and C-160/91, EU:C:1993:63.
26 – See judgments of 17 June 1997, Sodemare and Others, C-70/95, EU:C:1997:301 and of 11 December 2014, Azienda sanitaria locale n. 5 'Spezzino' and Others, C-113/13, EU:C:2014:2440.
27 – See judgment of 23 April 1991, Höfner and Elser, C-41/90, EU:C:1991:161, paragraph 21.
28 – Judgment of 18 July 2013, Daiichi Sankyo and Sanofi-Aventis Deutschland, C-414/11, EU:C:2013:520.
29 – See, for example, Article 31(b) and (c) and Article 60 of the TRIPS Agreement.
30 – See, for example, Articles II(9) and IV(4) of the Appendix.
31 – For example, in DS160, US — Section 110(5) Copyright Act, the Panel paid very little attention to the parties' arguments on whether or not the exceptions to copyright claims of authors and composers under US laws had to be restricted to non-commercial uses of works in order to comply with the TRIPS Agreement. See Panel Report of 15 June 2000 (WT/DS160/R), paragraph 6.58.
32 – See Appellate Body Report of 7 June 2016 in DS461, Colombia Measures Relating to the Importation of Textiles, Apparel and Footwear (WT/DS461/AB/R), paragraphs 5.34 to 5.36.
33 – Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.
34 – See Article 2.2 of the WTO Anti-Dumping Agreement, and, as regards the EU legal order, Article 2(3) to (6) of the basic anti-dumping regulation (Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51)).
35 – See specifically Article 9.1 of the TRIPS Agreement. On this issue, see Dimopoulos, A., 'An Institutional Perspective II: The Role of the CJEU in the Unitary (EU) Patent System', The Unitary EU Patent System, Hart Publishing, Oxford, 2015, p. 75.
36 – See, by analogy, judgments of 19 December 2012, Ordine degli Ingegneri della Provincia di Lecce and Others, C-159/11, EU:C:2012:817, paragraph 29, and of 4 June 2009, Vatsouras and Koupatantze, C-22/08 and C-23/08, EU:C:2009:344, paragraph 27.
37 – Council Decision 2014/243/EU of 14 April 2014(OJ 2014 L 128, p. 61).
38 – See judgment of 22 October 2013, Commission v Council, C-137/12, EU:C:2013:675.
39 – According to that agreement (which was signed on 14 July 1967 and entered into force on 26 April 1970), all goods bearing a false or deceptive indication of source, by which one of the Contracting States, or a place situated therein, is directly or indirectly indicated as being the country or place of origin, must be seized on importation, or such importation must be prohibited, or other actions and sanctions must be applied in connection with such importation.
40 – See judgments of 12 May 2005, Regione autonoma Friuli-Venezia Giulia and ERSA, C-347/03, EU:C:2005:285, paragraphs 71 to 83, and of 22 October 2013, Commission v Council, C-137/12, EU:C:2013:675, paragraphs 60 to 67.
41 – See Opinion 2/00 of 6 December 2001, EU:C:2001:664.
42 – See judgment of 8 September 2009, Commission v Parliament and Council, C-411/06, EU:C:2009:518.
43 – In that regard, I observe that a number of governments that have submitted observations in the present proceedings seem to emphasise the aim of the Marrakesh Treaty over its content. To do so, in my view, is mistaken. As mentioned in point 33 above, the Court's case-law requires the interpreter of a measure to examine both its aim and its content. After all, the different parties to an international agreement (including, in a mixed agreement, the Union and its Member States) may well understand the goals of that agreement differently, or place varying emphasis on its different components (see De Baere, G., Van den Sanden, T., 'Interinstitutional Gravity and Pirates of the Parliament on Stranger Tides: the Continued Constitutional Significance of the Choice of Legal Basis in Post-Lisbon External Action', E.C.L. Review, vol. 12(1), Cambridge University Press, 2016, pp. 85-113).
44 – Doha WTO Ministerial, 20 November 2001, WT/MIN(01)/DEC/2.
45 – See Decisions of the Council for TRIPS of 25-27 June 2002 (IP/C/25) and of 6 November 2015 (IP/C/73) on the extension of the transition period under Article 66.1 of the TRIPS Agreement for Least-Developed Country Members for certain obligations with respect to

Pharmaceutical products.
46 – See, in particular, Decision of the General Council of 6 December 2005 on the amendment of the TRIPS Agreement (WT/L/641).
47 – In that regard, I note that the EU measures relating to those WTO decisions have been adopted on the basis of Article 207 TFEU, either on its own or in combination with other Treaty articles. See, for example, Council Decision of 19 November 2007 on the acceptance, on behalf of the European Community, of the Protocol amending the TRIPS Agreement, done at Geneva on 6 December 2005 (2007/768/EC) (OJ 2007 L 311, p. 35); and Council Decision (EU) 2015/1855 of 13 October 2015 establishing the position to be taken on behalf of the European Union within the Council for [TRIPS] and the General Council of the [WTO] as regards the request from leastdeveloped country Members for an extension of the transitional period under paragraph 1 of Article 66 of the [TRIPS] concerning certain obligations related to pharmaceutical products, and for a waiver of the obligations under paragraphs 8 and 9 of Article 70 of that Agreement (OJ 2015 L 271, p. 33).
48 – For the common commercial policy, see especially Article 206 TFEU.
49 – Opinion 1/78 of 4 October 1979, EU:C:1979:224, paragraphs 41 and 46.
50 – See, for example, judgment of 29 March 1990, Greece v Council, C-62/88, EU:C:1990:153, paragraphs 15 to 19.
51 – See judgment of 17 October 1995, Werner, C-70/94, EU:C:1995:328, paragraphs 9 to 12.
52 – On this issue, in general, see Opinion of Advocate General Bot in Ireland v Parliament and Council, C-301/06, EU:C:2008:558, point 97.
53 – See judgment of 4 May 2016, Philip Morris Brands and Others, C-547/14, EU:C:2016:325, paragraph 60 and the case-law cited.
54 – See judgment of 8 June 2010, Vodafone and Others, C-58/08, EU:C:2010:321, paragraph 36.
55 – See, to that effect, judgment of 9 March 2006, Aulinger, C-371/03, EU:C:2006:160, and Opinion 1/94 of 15 November 1994, EU:C:1994:384, paragraph 51.
56 – See Committee on the Rights of Persons with Disabilities, Eleventh session, 31 March-11 April 2014, General comment No 2 (2014) (CRPD/c/GC/2), p. 13.
57 – Council Directive of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22).
58 – Council Directive of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373, p. 37).
59 – Council Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).
60 – Emphasis added.
61 – See, in particular, judgment of 5 October 2000, Germany v Parliament and Council, C-376/98, EU:C:2000:544, paragraph 84.
62 – Judgment of 4 May 2016, Philip Morris Brands and Others, C-547/14, EU:C:2016:325, paragraph 58 and the case-law cited.
63 – Emphasis added.
64 – Emphasis added.
65 – The vast majority of the objectives set out in Article 151(1) TFEU are clear on that, as is the reference to the European Social Charter of 1961 and Community Charter of the Fundamental Social Rights of Workers of 1989.
66 – In that regard, see, for example, judgments of 11 July 2006, Chacón Navas, C-13/05, EU:C:2006:456; of 19 April 2016, DI, C-441/14, EU:C:2016:278; and of 13 September 2007, Del Cerro Alonso, C-307/05, EU:C:2007:509.
67 – See judgment of 11 June 2014, Commission v Council, C-377/12, EU:C:2014:1903, paragraphs 36 and 42.
68 – See, to that effect, judgment of 3 September 2009, Parliament v Council, C-166/07, EU:C:2009:499. It is true, as the Commission argues, that the Court seems to have considered incompatible the combination of unanimity and qualified-majority voting in its judgment of 29 April 2004, Commission v Council, C-338/01, EU:C:2004:253. However, in the latter case the differences between the two procedures were not limited to the Council's voting requirement but concerned also the involvement of the European Parliament. In that regard, see Opinion of Advocate General Alber in Commission v Council, C-338/01, EU:C:2003:433, point 55.
69 – Opinion 1/75 of 11 November 1975, EU:C:1975:145.
70 – According to Article 4(1) TFEU, 'the Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6'.
71 – This issue will be examined in the following section of this Opinion.
72 – Such as those mentioned in Article 4(3) and (4) TFEU: respectively, technological development and space, and development cooperation and humanitarian aid. See, to that effect, judgment of 3 December 1996, Portugal v Council, C-268/94, EU:C:1996:461.
73 – See judgment of 1 March 2016, National Iranian Oil Company v Council, C-440/14 P, EU:C:2016:128, paragraph 77 and the case-law cited.
74 – As regards the 'absorption' of the ancillary aspects into the main component, see Opinion

1/94 of 15 November 1994, EU:C:1994:384, paragraphs 66 to 68, and judgment of 3 December 1996, Portugal v Council, C-268/94, EU:C:1996:461, paragraphs 75 to 77.
75 – See Opinion of Advocate General Poiares Maduro in Commission v Austria, C-205/06, EU:C:2008:391, point 41.
76 – Cf. Louis, J.V., 'La compétence de la CE de conclure des accords internationaux', Commentaire Mégret, vol. 12: Relations extérieures, Éditions de l'Université Libre de Bruxelles, Bruxelles, 2005, pp. 57-75. See also Azoulai, L., 'The Many Visions of Europe: Insights from the Reasoning of the European Court of Justice in external relations Law', in Cremona, M., Thies, A., (eds), The European Court of Justice and External Relations Law, Hart Publishing, Oxford, 2014, pp. 172-182.
77 – See, to that effect, judgment of 4 September 2014, Commission v Council, C-114/12, EU:C:2014:2151, paragraphs 66 and 67, and Opinion 1/13 of 14 October 2014, EU:C:2014:2303, paragraph 71.
78 – Judgment of 31 March 1971, Commission v Council ('ERTA'), 22/70, EU:C:1971:32.
79 – Opinion 1/94 of 15 November 1994, EU:C:1994:384, paragraph 96.
80 – Judgment of 26 November 2014, Green Network, C-66/13, EU:C:2014:2399, paragraph 29 and the case-law cited.
81 – See Opinion 2/91 of 19 March 1993, EU:C:1993:106, paragraph 25; Opinion 1/13 of 14 October 2014, EU:C:2014:2303, paragraph 73; and judgment of 26 November 2014, Green Network, C-66/13, EU:C:2014:2399, paragraph 31.
82 – Judgment of 26 November 2014, Green Network, C-66/13, EU:C:2014:2399, paragraph 30 and the case-law cited.
83 – Judgment of 26 November 2014, Green Network, C-66/13, EU:C:2014:2399, paragraph 33.
84 – See Opinion 1/03 of 7 February 2006, EU:C:2006:81, paragraph 128, and judgment of 26 November 2014, Green Network, C-66/13, EU:C:2014:2399.
85 – See, to that effect, Opinion of Advocate General Bot in Green Network, C-66/13, EU:C:2014:156, point 49.
86 – See Opinion 1/13 of 14 October 2014, EU:C:2014:2303, paragraph 74 and the case-law cited.
87 – See, to that effect, what was stated in point 125 above.
88 – Judgment of 31 March 1971, Commission v Council, 22/70, EU:C:1971:32, paragraph 31.
89 – Opinion 1/94 of 15 November 1994, EU:C:1994:384, paragraphs 95 and 96, and judgment of 5 November 2002, Commission v Denmark, C-467/98, EU:C:2002:625, paragraphs 83 and 84.
90 – Opinion 2/91 of 19 March 1993, EU:C:1993:106, paragraph 18.
91 – Opinion 1/94 of 15 November 1994, EU:C:1994:384, paragraphs 78 and 79, and judgment of 5 November 2002, Commission v Denmark, C-467/98, EU:C:2002:625, paragraphs 85 and 86.
92 – See recitals 1 to 7.
93 – In its judgment of 21 October 2010, Padawan, C-467/08, EU:C:2010:620, paragraph 27, the Court merely reproduces an argument put forward by one of the parties.
94 – In its judgment of 5 March 2015, Copydan Båndkopi, C-463/12, EU:C:2015:144, paragraph 88, the Court refers to 'partial harmonisation'.
95 – See footnote 6 above.
96 – Judgment of 1 December 2011, Painer, C-145/10, EU:C:2011:798, paragraph 104.
97 – See, inter alia, judgments of 21 October 2010, Padawan, C-467/08, EU:C:2010:620, paragraph 37, and of 3 September 2014, Deckmyn and Vrijheidsfonds, C-201/13, EU:C:2014:2132, paragraph 15.
98 – See judgment of 4 September 2014, Commission v Council, C-114/12, EU:C:2014:2151, paragraph 88.
99 – See, to that effect, Opinion of Advocate General Sharpston in Commission v Council, C-114/12, EU:C:2014:224, point 157.
100 – Judgment of 26 November 2014, Green Network, C-66/13, EU:C:2014:2399, paragraphs 50 to 60 (in particular, paragraph 54).
101 – Opinion 1/13 of 14 October 2014, EU:C:2014:2303, paragraph 86 and the case-law cited.
102 – Judgment of 26 April 2012, DR and TV2 Danmark, C-510/10, EU:C:2012:244, paragraph 31 and the case-law cited.
103 – Regarding recital 32, see also judgment of 21 October 2010, Padawan, C-467/08, EU:C:2010:620, paragraph 35.