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 K. Lenaerts

Registrar President