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POTENTIAL INCLUSION OF INTELLECTUAL PROPERTY TO THE SCOPE OF THE HAGUE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

BUSINESSEUROPE has recently been made aware of the ongoing negotiations on the proposed Hague Convention on the Recognition and Enforcement of Foreign Judgments. We would like to provide our preliminary views on the potential inclusion of intellectual property (IP) rights within the scope of this Convention.

BUSINESSEUROPE is of the view that the inclusion of IP rights in the draft Convention should not be decided at the upcoming Special Commission meeting on 13-17 November 2017 without a broad consultation and involvement in the process of all relevant stakeholders. We are concerned about the likely complications from the proposed inclusion of intellectual property in the Convention. At the very least, these complications could negate any potential benefits from the Convention. However, they could well also potentially result in greater uncertainty, unwelcome forum shopping, and increased litigation, all to the detriment of IP rights holders and those against whom they seek to enforce their IP.

IP rights are inherently a matter of national law and national territorial scope, which are traditionally adjudicated on by the courts of the country concerned, with the exception of some copyright cases. Furthermore, intellectual property law, outside of the copyright area, is only loosely harmonised, meaning that different courts must apply divergent national laws, frequently arriving at different outcomes. We believe that, in general, this points to a regime of national recognition and enforcement only.

We also note that, in the vast majority of IP disputes, the primary remedy sought by the IP holder is that of an injunction. While Article 12 of the draft would mean that injunctions would not be enforceable internationally, the result is that only financial remedies (e.g. damages or an account of profits) would have the potential to be enforceable. Given that such financial remedies are usually only a secondary objective for IP owners, and that such remedies can usually be enforced in the country concerned in any event, the potential benefits of the convention could be very limited.

In this context, BUSINESSEUROPE is of the preliminary position that at least patents, trade marks and designs should be excluded from the scope of the Convention, as e.g. copyrights could function differently in some cases.

In any case, as we are continuing discussions at national level with our member federations on the potential implications of this draft Convention, we ask the European Commission not to commit to any decisions but to launch a broader discussion at EU and national level on this issue.
