The present deliverable has been published and financed within the framework of the EU co-funded Project: *Enhancing Enforcement under Brussels Ia – EN2BRIa, Project funded by the European Union Justice Programme 2014-2020, JUST-JCOO-AG-2018 JUST 831598*.

EN2BRIa

Enhancing Enforcement under Brussels Ia

This Project is funded by the European Union
Justice Programme 2014-2020
JUST-JCOO-AG-2018 JUST 831598

Coordination between *Lex Generalis* and *Lex Specialis*: Principles, Recommendations and Guidelines (with comments)

Introduction

One the goals of the En2Bria Research project was to develop recommendations and guidelines to improve the legal framework concerning judicial cooperation in civil and commercial matters where concurring rules on jurisdiction or recognition and enforcement of decisions are contained in the *lex generalis*, the Brussels Ia Regulation, and in other instruments of EU law acquiring the status of *lex specialis*.

The following recommendations and guidelines have been drafted based on the main criticalities examined. Most of these exigencies can be approached either as a policy-making issue, in the sense that political institutions, most likely at the EU law level, can directly address such problems at the legislative level, or as interpretative questions, which courts and legal practitioners at large may come across and seek to settle in course of their professional activities. On the contrary, only few of the subsequent recommendations and guidelines that follow may be addressed to one single target group, be it political or practitioner in nature.

For the purpose of the present work, to the extent theoretical and operative suggestions are deemed to be directed to some degree at both political institutions and practitioners, these suggestions will fall under the heading of "principles".

If suggestions are more likely directed at political institutions as the content mainly tackles legislative drafting and policy questions, these suggestions will fall under the heading of "recommendations".

Lastly, if due to their content suggestions are mostly directed at legal practitioners, i.e. courts and lawyers, these will fall under the heading of "guidelines".

To the extent possible, and with the goal the keep this instrument accessible, transparent and flexible, each principle, guideline, and

recommendation is accompanied by a comment, offering a direct succinct explanation from a theoretical and practical perspective that grounds the corresponding suggestion, and by an indication of a possible action to be adopted by the relevant targeted group to settle the main criticalities encountered.

The present deliverable will be included in the final publication of the En2Bria Project.

Principle 1: Overlap of concurring provisions (and falsely "clearly disconnected regimes")

Courts and practitioners should carefully determine if another EU law provision triggers art. 67 Brussels Ia Regulation. Similarly, attention should be paid to other regulations whose scope of application might point towards incorrect conclusions on their scope of application.

Comment:

The *lex specialis* principle enshrined in art. 67 Brussels Ia Regulation is only triggered to the extent another EU law act overlaps with its material scope of application.

A number of elements increase the complexity for practitioners in the reconstruction of this first preliminary step. There is in recent times a growing number of concurring acts (growth in fragmentation and specialization of PIL rules in general, and of specific PIL rules in non-PIL acts).

The issue of excessive fragmentation and specialization of rules in diverse acts can in particular be seen in the field of intellectual property; the Brussels Ia Regulation has rules on exclusive jurisdiction in proceedings concerned with the registration or validity of patents, trademarks, designs, or other similar rights required to be deposited or registered. Other proceedings fall under the general torts heads of jurisdiction, unless one of the special heads of jurisdiction (Regulation 2100/94; Regulation 6/2002; Regulation 1257/2012; Regulation 2017/1001; Directive 2019/790) either exclude the application of the exclusive head of jurisdiction under Brussels Ia or of the special head of jurisdiction under Brussels Ia.

International patents courts have been established, yet some Member States have frozen their functioning due to constitutional grounds, raising problems on the coordination of the general and special regimes (see BvR 739/17).

Moreover, when the EU accedes to international conventions containing rules on jurisdiction and free movement of decisions, only some the rules may take precedence whilst other international rules may be excluded from the accession process of the EU (cf the case of the Athens Convention relating to the Carriage of

Passengers), to "save" the *lex generalis*, making it complicated for courts and practitioners to clearly identify the correct legal regime.
Along the same line, also special acts of EU law contain in the first place specific heads of jurisdiction that oust the *lex generalis*, but which also make applicable *some* rules of the Brussels Ia Regulation, making it excessively complicated to reconstruct in immediate, clear and transparent terms the relationships between applicable and derogated provision (see always in intellectual property, Regulation 6/2002 and Regulation 2017/21001).
In other circumstances fragmentation and proliferation of private international law acts does not trigger art. 67 Brussels Ia Regulation, as this becomes of relevance only to the extent there is an overlap in the material scope of application between the concurring instruments. However, also this determination might turn out to be complicated. The Maintenance Regulation (4/2009) is an apt case study. Regulation 44/2001 contained a rule on jurisdiction in maintenance matters; in 2009 the Maintenance Regulation was adopted, the two instruments overlapping in their scope made art. 67 Brussels I applicable. The Brussels Ia Regulation (Recast) excluded maintenance from its scope of application – excluding the operability of art. 67. However, not all maintenance obligation do fall within the scope of application of Regulation 4/2009. Under Italian law, maintenance obligations can be established by contract – these fall outside the scope of application of Regulation 4/2009, but are nonetheless civil and commercial matters, for which the Brussels Ia Regulation remains applicable. In this sense, the establishment of a specific special regime still requires careful consideration of its material scope of application.

Possible actions:
A consolidation of concurring rules, to the extent possible, could be a first solution. Yet, the political relevance of this very specific choice could easily be superseded by creating an easy-to-access list of concurring provision, which could be adjourned every time a concurring rule on jurisdiction or free movement of decisions is adopted. The list could be published as an annex to the Brussels Ia Regulation, even mentioned in art. 67, and made available on the e-justice portal.

Principle 2: The meaning of 'instruments of the Union'

Art. 67 Brussels Ia Regulation provides for the applicability of special rules contained in 'instruments of the Union'. These should be understood as encompassing "EU secondary law", and, more specifically, binding "provisions" (rather than acts) of EU secondary law. Rules on jurisdiction contained in the founding treaties should prevail *proprio motu*¸ rather than due to the disconnection clause contained in art. 67 Brussels Ia Regulation. Customary international

law rules binding for the EU should also fall outside the scope of application of the provision at hand.

Comment:
The wording of art. 67 Brussels Ia Regulation is not widely used in the founding treaties. Interpretative questions have arisen in the case law whether rules on exclusive jurisdiction for the Court of Justice of the European Union in tort matters are to be applied based on a hierarchy approach, or based on the disconnection clause contained in the Brussels Ia Regulation. The case law is not conclusive on this point – yet art. 67 Brussels Ia Regulation, if it is interpreted in the sense that it refers to "acts adopted by the EU", it would exclude from its scope of application all rules binding for the EU that are not adopted by the EU itself, such as the founding treaties that are adopted by the Member States, or by international customary law (eventually entailing negative heads of jurisdiction) that are binding upon the Union but are formed "outside" the legislative procedure of the Union.

Possible actions:
The term "acts" of the Union instead of "instruments" is suggested. This would be consistent with other linguistic versions. Regulation 44/2001 had a recital supporting the reading of the corresponding provision (also art. 67). Recital 24 of Regulation 44/2001 read that "*... for the sake of consistency, this Regulation should not affect rules governing jurisdiction and the recognition of judgments contained in specific Community instruments*". In a possible recast of Brussels Ia, a recital to support the interpretation and application of art. 67 could be added, to specify what "instruments of the Union" (or rather "provisions"), include.

Principle 3: The "survival" of the lex generalis

Provided that certain matters are governed by a special regime which prevails due to art. 67 Brussels Ia Regulation, the latter instrument should still find application for aspects of international civil procedure not covered by the special instrument – to the extent the general rules are not inconsistent with the special rules.

Comment:
Special regimes whilst they might overlap with some aspects of the Brussels Ia Regulations they might not deal with all aspects of international civil procedure. In this sense, it has been widely acknowledged that the *lex generalis* should play a "fill the gap" role. For example, rules on *lis pendens* or connected and related actions, choice of court agreements, as well as rules on free movement on decisions of the

Brussels Ia Regulation should still find application if the special regime entails no special rule on this point. The limit being *consistency* of these general rules with the concurring special regime.

Possible actions:
Courts and practitioners should carefully examine the concurring regime and, once identified the special rule on jurisdiction ousting the general rule on jurisdiction, in pleadings or judgments they should also either identify other rules (choice of court, connected actions), or advocate that general rules not expressly ousted are inconsistent with the system of the special regime. On its side, EU acts might be more clear on the point, also in recitals. The EU lawgiver might expressly instruct courts and practitioners with clear wording whether provisions not clearly ousted by the special head of jurisdiction are intended to survive in the application.

Principle 4: Terminology in concurring acts

Courts and practitioners should carefully evaluate the terminology used in other EU law instruments. Terminology employed in acts concurring with the *lex generalis* has proven sometimes complicated, misleading or inconsistent.

Comment:
In some circumstances, articles are referred to as to dealing with "enforcement" – though dealing with domestic enforcement of agreements, rather than dealing with cross-border aspects of recognition and enforcement (mediation Directive 2008/52, art. 6). In some cases rules on jurisdiction fall under the heading of "jurisdiction" (cf Regulation 6/2002, art. 79 ff, and art. 6 Directive 96/71/EC), other under the heading of "right to an effective remedy" (Regulation (EU) 2016/679, art. 79(2)). In other cases, rules on jurisdiction are expressly qualified as such only at the end of a complex act – this being the case of art. 8(16) Council Regulation 2157/2001 on the Statute for a European company, which is clearly qualified as a jurisdiction clause only in its art. 69(c). In other set of cases again, provisions fall under the heading of "jurisdiction", but in no way set rules for the allocation of international jurisdiction (see art. 6 European order for payment procedure, Regulation 1896/2006).

Possible actions:
The EU lawgiver should adopt a consistent terminology throughout the different concurring acts – possibly referring to international jurisdiction, territorial or local competence, and to cross-border recognition and enforcement of decisions, to make clear these are concepts that are competing with the *lex generalis* of the Brussels Ia Regulation.

Principle 5: Terminology in concurring acts – titles of acts and their contents

Courts and practitioners should carefully evaluate consistency between the terminology used in titles of concurring regimes (their *name*) and their contents.

Comment:
At least in one case the title of an instrument appears to be confusing – Council Regulation 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, whilst it set rules to avoid recognition and enforcement of decisions of third countries (art. 4) does not trigger art. 67 Brussels Ia Regulation, as there is not overlap in the material scope of application, art. 6 of Regulation 2271/96 also speaks of "jurisdiction" in relations to actions for compensation. Here again there is no true substantive overlap in the scope of application between the *lex generalis* and the *lex specialis* in jurisdiction matters as Regulation 2271/96 makes a renvoi to the 1968 Brussels Convention to determine jurisdiction and thus does not trigger art. 67 Brussels Ia Regulation. However, it should also be noted that Regulation 2271/96 has been amended in 2018 and the reference to the Brussels Convention has not been changed, obliging the reader to make recourse to art. 68(2) Brussels Ia to interpret the amended Regulation 2271/96, which uses a heading "jurisdiction" for a rule devoted to coordination, rather than on "jurisdiction" *stricto sensu*. No indications at all are given in the recitals on the rule on coordination on jurisdiction.

Possible actions:
Titles of normative acts could introduce specifications that they also contain indications – directly or indirectly – on international jurisdiction; alternatively, recitals could extensively address the issue.

Principle 6: Breach of lex specialis on jurisdiction and lex generalis on free movement of decisions

Courts and practitioners should pay particular attention on the possibility a special non-exclusive head of jurisdiction is breached, as this raises issues in terms whether the list of grounds to refuse recognition and enforcement under the *lex generalis* – generally interpreted as a *numerus clausus* – can be integrated with additional

grounds not expressly foreseen (neither in the *lex generalis* and in the *lex specialis*).

Comment:
Concurring heads of jurisdiction in *lex specialis* usually pursue specific policy goals and interests – the protection of weaker parties or the protection of intellectual property. To the extent such rules are not exclusive, thus are additional to the ordinary regime, issues might arise. The General data protection regulation (GDPR), at art. 79(2) provides that actions can be started at the place of establishment of the data controller, data processor or at the place of habitual residence of the data subject – the weaker party the instrument wishes to protect. If the data processor starts a negative declaratory action against the data controller at the place of establishment of the latter, this might activate the rules on coordination of proceedings contained in the GDPR, preventing the weak party to start proceedings at his own *forum actoris*. The rule on jurisdiction is unclear whether it is applicable also to actions started by non-weak parties; however, if not, such action might not be unlawful and, if excluded from the scope of application of the GDPR it might still fall under the scope of application of Brussels Ia. The question thus becomes: if a special rule on jurisdiction is breached, either because of procedural tactics employed in the context of an unclear normative scenario, or simply because the seised court wrongfully assumes to be the court identified by the special provision, can art. 45 Brussels Ia Regulation be read also as including the respect of special grounds of jurisdiction, at least to the extent these protect a weaker party or provide a given court with exclusive jurisdiction? On the one side, the possibility to add grounds to refuse recognition and enforcement not listed in art. 45 Brussels Ia seems inconsistent with the general approach that this provision should be narrowly constructed and no further ground other than those expressly provided for can be invoked by the requested court: the free movement of decisions is the rule, the refusal remains the exception. On the other side, adding *lex specialis* rules on jurisdiction for the protection of weaker parties or conferring exclusive jurisdiction to the list already existing under art. 45 Brussels Ia Regulation *might* be in some limited circumstances theoretically consistent with the existing legal framework.

Possible actions:
Special instruments, when adopting additional or exclusive rules on jurisdiction should expressly and clearly give indications to courts and practitioners as per the consequences in terms of art. 45 Brussels Ia Regulation if the relevant special head of jurisdiction is breached. Such guidance could also be given by way of an explicative recital.

Principle 7: "Additional" or "Exclusive" lex specialis on jurisdiction

Courts and practitioners are called to pay particular attention on whether *lex specialis* heads of jurisdiction are a facultative forum concurring with those of the *lex generalis,* or rather is exclusive. Provisions are framed differently, and inconsistency in wording paves the way to uncertainties.

Comment:
Some rules are quite clear in creating exclusive special heads of jurisdiction which exclude any residual application of the general rule expressly ousted [but see *Principle 3* for the questions of survival on general rules not expressly ousted]. This is the case of rules contained in intellectual property regulations to the extent they specifically use a terminology such as "exclusive jurisdiction". In the same vein, art. 6 of the Posting of workers directive is quite clear in creating a mere *additional* head of jurisdiction, as it specifies that actions "*may* be brought" before a given court. Other provisions, such as art. 79 of the General data protection regulation are less clear in that the provision argues that actions "shall be brought" before given courts, yet recitals of the same instrument (recital 147) seems to pave the way to the contextual applicability of special and of general rules to the extent the latter do not prejudice the specific policy goals of the former.

Possible actions:
Consistency in wording should be ensured throughout all *lex specialis*. If the EU lawmaker wishes to create exclusive rules of jurisdiction ousting any other rule in the Brussels Ia Regulation, the special rule should clearly state that the court identified in the special rule holds *exclusive jurisdiction*. If the EU lawmaker wishes to create an additional fora, the terminology used by the Posting of workers directive ("may") is highly advisable and should be replicated in other acts.

Recommendation 1: Mutual trust, favor executionis, and international conventions

Political institutions should monitor the possible implications of the TNT case law (Case C-533/08), following the entry into force of the Brussels Ia Regulation and its disconnection systems.

Comment:
In TNT, the Court of Justice of the European Union argued that amongst the principles that condition the applicability of special conventions between Member States, there is the principle of free movement of judgments and mutual trust in the administration of justice (*favor executionis*) (para. 54). This, in particular, raises the issue of the disconnection clause under the current Brussels Ia Regulation, whose "abolition" of the *exequatur* might be more favorable than the regime contained in a number of treaties concluded outside the European judicial space.

Recommendation 2: Lack of proper disconnection clause

At the current times, there appears that at least one additional disconnection clause could still be drafted and inserted in the Brussels Ia Regulation. This relates to international conventions in specific matters to which the EU becomes party to. The disconnection clause may be used for international treaties to which member States were already party to, or eventually also for new international treaties directly ratified by the EU only.

Comment:
Art. 71 provides for the prevalence of conventions in special matters to which Member States are parties to. Art. 67 provides for the prevalence of provisions contained in other EU law instruments. When the EU accedes to an international treaty to which EU Member States are party to, both disconnection clauses may be relevant, as there is an international treaty (art. 71), and a Council decision (art. 67). The domestic case law has shown inconsistencies – some Italian courts have followed the pathway of the disconnection clause under art. 71; some German courts have applied art. 67. At this stage, no significant indications can be found in the case law of the Court of Justice of the European Union – which, when dealing with the 1999 Montreal Convention, has based its conclusions on both articles 67 *and* 71 (cf *Guaitoli et al*, Case C‑213/18, para. 44). Yet, art. 67 seems more consistent with art. 216 TFEU, as international conventions become part of EU. The consequences of choosing the venue for coordination might be relevant if one accedes to the idea that the TNT case law rendered on art. 71 should not be transposed *sic et simpliciter* on art. 67 [see *Guideline 1*].

Possible actions:
To properly valorize the mixed nature of the act – the external origin of the international convention which becomes EU law though a Council decision that may

set limits to such rules, a possible third disconnection clause may be developed at the normative level.

Recommendation 3: "Optional" second generation regulations after Brussels Ia

The reforms in the field of *exequatur* established by Brussels Ia Regulation should be no reason to abolish "second generation regulations".

Comment:
As second generation regulations generally presuppose a more favorable regime of free movement of decisions based on harmonized and uniform standards and rules of civile procedure (and not simply of *international* civil procedure), and since these optional instruments contribute in the promotion of reducing the number of grounds to refuse recognition and enforcement in the requested Member States, the reform in the field of *exequatur* introduced by Brussels Ia should not induce European political institutions to abandon these optional instruments as they may contribute in the continuous development of uniform rules of (domestic) civil procedure – as well as contribute reducing grounds to refuse recognition and enforcement in the requested Member State.

Recommendation 4: Continuous alignment to EU acquis for acceding States

Consistently with Accession Agreements, Candidate countries should ensure continuous alignment to the European acquis, in particular as per the rules on free movement of decisions.

Comment:
Research has shown that, whilst domestic rules on the recognition and enforcement of decisions in Candidate countires may be applied with approaches that are consistent with the EU case law, some grounds to refuse recognition and enforcement contained under municipal law are still incompatible with the Brussels Ia regime. Even though the direct applicability of an EU regulation would solve the order of priority, an alignment of domestic law with proper discern of the scope of

application of the different rules could possibly help the construction of mutual trust in the process of accession.

Recommendation 5: Consistency in Jurisdiction for EU Agencies

The EU should ensure consistency in rules contained in regulations establishing EU Agencies and addressing the issue of jurisdiction in non-contractual matters.

Comment:
A comparative research has shown that most instruments establishing European agencies contain rules on jurisdiction by virtue of which, consistently with the idea that these are "bodies and agencies of the Union" for the purposes of art. 340 TFEU, the Court of Justice of the European Union is explicitly identified as the sole court having exclusive jurisdiction for non-contractual liability as well. It has however emerged that for the *European Union Agency for Criminal Justice Cooperation* (Eurojust) a different solution has been adopted, in that "*national courts of the Member States competent to deal with disputes involving Eurojust's liability as referred to in this Article shall be determined by reference to Regulation (EU) No 1215/2012 of the European Parliament and of the Council*" .

Possible actions:
Even though the current solution is consistent with the previous normative framework of Eurojust, it could be advisable to ensure that all agencies are subject to the same approach, i.e. their non-contractual liability is reserved to the exclusive jurisdiction of the Court of Justice of the European Union.

Guideline 1: Art. 67 and 71 Brussels Ia – Two different lex specialis

The case law of the Court of Justice of the European Union interpreting art. 71 should not *sic et simpliciter* be transposed to art. 67.

Comment:
The Court of Justice of the European Union has limited the possibility for Member States to apply international conventions in special matters in lieu of the Brussels regime. The condition is that the convention must respect the founding principles of the Brussels rules. Such a condition is not envisaged in art. 71, which governs the

relationship of the regulation with international conventions in special matters. Such a case law should not be applied automatically to art. 67 as well – this appears not only because art. 67 does not require any additional condition for the special rule to be applied, but also because the special rule is part of EU law itself. It should be for the EU lawgiver himself to ensure consistency of the special rule with the "quasi-constitutional" values of civil procedure, not for courts and practitioners on a case by case approach. In course of the research, it has been raised the question whether if there is a *lex specialis* pre-dating a *lex generalis*, should the first always prevail where the general regime introduces significant legislative changes? If the new general rules aim at "modernizing" the system – should these still be ousted by a pre-existing *lex specialis*? For example: provided that under the Brussels I Regulation a *lex specialis* rule creates an expedited *exequatur* procedure in favor of a contractually weaker party, after the applicability of the Brussels Ia Regulation – which "abolishes" *exequatur* tout court, should the *lex specialis* – which has meanwhile become theoretically inconsistent with the *lex generalis* – still be applicable? As mentioned, the example is artificially constructed – yet the problem of the "survival" and automatic precedence of pre-existing provisions (on jurisdiction or enforcement) over an updated legal framework (which evidently promotes certain values) should be kept into account by the lawmaker. In such circumstances, however, no automatic limitation to art. 67 Brussels Ia Regulation should be introduced, either for special rules on (mandatory) jurisdiction or free movement of decisions, being advisable for the court to raise a preliminary question to the Court of Justice of the European Union. However, this should also refrain to replicate the model of art. 71, given that – as argued – it should be for the EU lawgiver the control of its own legal system.

Guideline 2: Severability of actions

Provided that the proper special instrument concurring with the Brussels I regime is identified, this ousts the *lex generalis* only within its own material scope of application. Connected actions (most likely, rules on jurisdiction) might thus be governed at the same time by the special instrument and by the *lex generalis*.

Comment:
This has happened for example in the context of claims for delayed or cancelled flights. To the extent passengers seek compensation for their right to a lump sum standardized compensation under the Air passengers rights regulation, as this does not govern jurisdiction, the competent forum is entirely govern by the Brussels Ia Regulation. Any additional claim for compensation falls within the scope of application of the 1999 Montreal convention, acceded by the Union by way of

Council decision. Even though the possibility to apply the Brussels rules on related and connected actions (art. 30, most notably, art. 30(2)), has not been addressed by the Court of Justice of the European Union, the Advocate General Saugmandsgaard Øe pointed towards the possibility of making use of art. 30 Brussels Ia (AG Opinion in *Guaitoli et al*, Case C‑213/18, para. 51). However, it should be reminded that the provision at hand presupposes that the two courts before which two proceedings are pending are in different Member State (whilst some courts apparently appear ready to make use of the provision also when the connected proceedings are instructed before two courts of the same Member State).
Similar, and more significant problems, have emerged in the field of intellectual property where the fragmentation of rules has led domestic courts, to some extent, to interpret heads of jurisdiction so as to reconcile them one with the other, or to pursue specific policy goals. This appears to have been true to a certain degree in the case of online intellectual property infringement, where in some cases courts have sought to readapt general approach in this specific field to overcome the negative outcomes connected to the territoriality approach followed in some *lex specialis* in intellectual property matters (whereas there might be the possibility to follow universality approaches under art. 7 Brussels Ia ousted by art. 122 Regulation 2017/1001).
The main criticalities in similar circumstances appear to be at least two: avoid forum shopping, and avoid inconsistent decisions being delivered by courts.

Possible actions:
If domestic courts determine the Court of Justice has not delivered yet any clear decision on the possibility to concentrate proceedings (as in cases of air passenger rights), domestic courts and practitioners should in the first place refer the question to the Court of Justice, to allow the Court the possibility to offer clear uniform guidance on the compatibility of concentration mechanisms in the framework of severability of actions.
To the extent domestic courts have developed domestic approaches in the case law to cope with parallel actions being governed by different rules on jurisdiction, EU institutions could develop non-binding guidelines to *uniformly* suggest reconciliations and coordination of the diverse unities of the law so at to discourage forum shopping and avoid inconsistent judgments.

Guideline 3: Brussels Ia and "optional" second generation regulations

Optional regulations which may provide for a special regime on free movement of decisions if the interested party opts for such a regime do not necessarily entail direct rules on jurisdiction; however, practitioners should carefully control if the relevant instrument limits

the available fora under the *lex generalis* to allow for the option in of the special regime.

Comment:
The so called second generation regulations, adopted when Brussels I (Regulation 44/2001) was applicable, can be opted in by the will of the parties. It seems thus that it is a combination of party autonomy and binding provisions that triggers the disconnection clause of art. 67 Brussels Ia, as *proprio motu* these special regimes would otherwise not be applicable. These special regimes contain few of the *lex specialis* rules in the field of free movement of decisions, which were quite innovative at the time. There are no direct rules on jurisdiction, which remains entirely governed by the *lex generalis*. However, for the party to opt in (eventually at the certification stage of the decision that has been issued), the relevant instrument might impose some conditions and limit its applicability only if the decision has been rendered by a specific court amongst those theoretically competent under the Brussels I regime. Under Regulation 805/2004 (recently amended), where a decision may be certified as an European enforcement order for uncontested claims provided a number of conditions are met, amongst such conditions the fact that the court of origin was that of the domicile of the debtor if the debtor was a consumer (see art. 6; thus raising possible practical questions on the possibility of certifying a decision rendered by a court prorogated by a choice of court agreement or by tacit prorogation under art. 26 Brussels Ia Regulation). Similar "limitations" as per the coordination between the special instrument and the *lex generalis*, in the sense that it is only allowed to make recourse to the special rules on free movement of the which limits general rules on jurisdiction, see also art. 6, Regulation 1896/2006 creating a European order for payment procedure, as amended.

Guideline 4: Special rules, negative declaratory actions, preliminary and ancillary questions, and connected and related claims

Special rules on jurisdiction have a well-defined material scope of application; courts and practitioners, in particular to the extent where special rules establish exclusive jurisdiction, should carefully evaluate if and to what extent this jurisdiction extends to ancillary or preliminary questions, as well as to connected and related questions.

Comment:
The case law, in particular in the field of intellectual property, has shown that negative declaratory actions have raised issues whether these also fall within the

scope of application of exclusive heads of jurisdiction (the question generally being answered in the affirmative; cf Case C‑433/16).
Connected and related actions have also been addressed: the *lex generalis* on jurisdiction in tort matters has been excluded to actions for a declaration of abuse of a dominant position and of unfair competition connected to actions for declaration of non-infringement, in so far as granting those applications presupposes that the action for a declaration of non-infringement is allowed. Jurisdiction must be based, for the entirety of the proceedings, on the jurisdiction regime established by regulation 6/2002 (see Case C‑433/16, para. 49).
Also, in another case the Court of first instance, when addressing the liability of the Union and of the European Central Bank for alleged patent violations did not address the cases as the violation of the patent, the pre-condition for determining the liability, was not set by the court having exclusive competence (whilst exclusive competence for liability was with the European court only – see Case T-295/05).
In insolvency matters, before the new European Insolvency Regulation Recast (Regulation 2015/848, art. 6) introduced a clear provision on *vis actractiva concursus*, the Court of Justice of the European Union already did exclude that jurisdiction for actions deriving directly from insolvency proceedings and closely linked with them had to be determined according to the *lex generalis* (cf Case C-339/07).
However, in general terms, *lex specialis* remains the exception to the *lex generalis* and should thus not be subject to an extensive interpretation in any manner whatsoever.

Possible actions:
Instruments providing for additional rules on jurisdiction could clearly determine whether these rules also extend to negative declaratory actions, ancillary or preliminary questions, and connected actions. The solutions most likely being inspired by the exclusive or non-exclusive nature of the concurring head of jurisdiction. Guiding solutions could also clearly instruct that, to the extent special rules do not apply to such fields, these actions remain governed by the ordinary rules on the allocation of international jurisdiction.

Guideline 5: Explicit address of the disconnection clause

Courts and practitioners should clearly address the disconnection clause upon which a *lex specialis* regime takes precedence over the Brussels Ia Regulation.

Comment:
A case law study has shown that, from a methodological point of view, in some circumstances decisions at various levels do not deeply dwell on the proper disconnection clause, or do not dwell on the disconnection clause at all. Sometimes decisions list numerous grounds for international and territorial jurisdiction contained in general and special regimes, concluding for the competence of the seised court as this is apparent in the case at hand. In other circumstances, a well-established and consistent set of case law both at the domestic and supra-national level, as for example happens with regard to the CMR Convention, might induce courts to apply directly the *lex specialis* without paying specific attention to the relevant disconnection clause.
Again, in some cases the court may apply the *lex specialis* as this is directly invoked and not contested by the parties to proceedgins.
This might be understandable from a practical standpoint: if the court is satisfied it has jurisdiction and competence, the *mechanism* for coordination between the *lex generalis* and the *lex specialis* appears to be less relevant (even though the identification of the proper coordination venue eventually calls for relevant interpretative jurisprudence see *Guideline 1*) as the court, resolved just a preliminary matter, has to move the solve the merits of the case. This approach has several consequences. In the first place, the "EU question" of coordination remains somewhat blurred thus possibly dissembling preliminary questions to be raised to the Court of Justice of the European Union. In the second place, if the reference to the relevant provision on coordination is missing, legal research becomes more complicated for courts and legal practitioners themselves, who have to adopt investigation methodologies and techniques based on the *lex specialis* to indirectly identify case law on the *mechanism* of coordination.

Possible actions:
Courts and practitioners should clearly address the disconnection clause in pleading, act, decisions and summary of judgments. This will also increase classification quality of decisions for purposes of data entry in legal databases.

Guideline 6: Qualification

Courts should properly characterize legal relationships following autonomous definitions of EU law, where available, and free from qualifications of the parties.

Comment:
An (intentional or unintentional) incorrect qualification of the legal relationship calls for the application of the wrongful head of jurisdiction, most likely this being the *lex*

generalis being applies in lieu of the *lex specialis* – to the detriment of the mechanism of coordination and disconnection.
The issue of proper characterization may prove particularly difficult in some circumstances, as in the case of passengers, where a number of different provisions concur, namely transport and consumer rules. Here case law has shown the importance of properly characterizing the party either as a "consumer" or as a "passenger" under a multi-layered normative corpus, as travel contracts are excluded from the scope of application of consumer contracts of the Brussels Ia Regulation, even though the general limitation to choice of court agreements in the Unfair terms in consumer contract directive may still be applicable. With the possibility to "revive" protective heads of jurisdiction for consumers also for passengers in the case of "travel packages".

Possible actions:
If any doubt arises on new characterization matters, a request for preliminary ruling to the Court of Justice of the European Union would be advisable.

Guideline 7: Influences in material and private international law

Courts and practitioners should play extreme attention to the *formalistic autonomy* between material law and private international law.

Comment:
It is generally accepted that EU law is a unitary system: terminology may thus be used and employed both at the level of material law and private international law. However, the Court of Justice of the European Union, even though consistency between definition is generally pursued, has advocated for the autonomy of substantive law from private international. This *can possibly lead in some circumstances*, where specific provisions are differently framed, that the same notion acquires a different content and value in substantive law and in private international law – as has been the case in Pillar interpreting the notion of consumer (Case C-694/17).
The importance of the relationship between terminology and concepts becomes evident where a stratification of diverse unities of laws, such as in the field of consumer and transport protection at both substantive and private international law, influence the qualification of the case, thus possibly the erroneous non-application of a special regime (for example, in transport matters if the legal relationship is subsumed in consumer matters).
At the same time, courts and practitioners should also pay particular attention to those instruments that explicitly declare as not setting a rule on jurisdiction or on the

free movement of decision – thus not triggering art. 67 Brussels Ia Regulation. These instruments might nonetheless be of paramount importance in the interpretation and application of Brussels regime as they might impose obligations that shape material elements upon which heads of jurisdiction are to be determined – triggering in this sense a "reverse" substantive coordination between material law and international civil procedure.