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Legal actions of the european union on the management of intellectual property in the knowledge transfer activities of the universities and public research institutions

1. Introduction

Our research work having been accomplished at the Faculty of Law, Doctoral School of Civilistics, has served the discovery of specialities of intellectual property created at the universities. We found some aspects of intellectual property (IP)¹, which should deserve more attention within the university environment, like for instance: *patentability of R+D results, issues concerning intellectual property created under a labour contract, protection of IP created as a development of an invention (foreground) and questions related to licencing of IP (licensing, research agreements)*. We have reviewed the Hungarian legal history of these legal institutions.² At the present stage of our research work, before getting engaged in comparative analysis of foreign legal systems and the European law in respect of the legal institutions mentioned above we are going to review the legal provisions and experts' reports of the European Union, which are *generally dealing with the management of university intellectual property. We are looking for the answer to the question that how often and in what focus the university intellectual property appears in the legal documents and experts' reports*. Nevertheless, the significance of university IP as topic is shown by the facts on the one hand that the EU draft constitution (has not been adopted yet) also includes it and on the other hand besides several working material and report, in April, 2008 a *committee recommendation* was issued which deals specifically with the management of intellectual property created at the universities³, hereinafter we refer to it simply as proposal No. C(2008)1329. Evidently, the community regulation concerning university intellectual property is the

¹ Throughout the study we use terms IP and IPR (intellectual property right) with equivalent meanings.

² DR. MOLNÁR ISTVÁN: *Iparjogvédelmi intézményeink fejlődése (1895–1995): szabadalmazhatóság, szolgálati találmány, fejlesztések oltalma és licencia*, Acta Universitatis Szegediensis Acta Juridica et Politica, Publicationes Doctorandorum Juridicorum, VII. kötet, 2007.

³ Commission Recommendation C(2008)1329 on the management of intellectual property in knowledge transfer activities and Code of Practice for universities and other public research organizations.
http://ec.europa.eu/invest-in-research/pdf/ip_recommendation_en.pdf

committee regulation upon the block exemption of research agreements⁴, the introduction and analysis of which is left out from the present work for two reasons. *The block exemption clause is in essence a regulation with a nature of competition law and not of IP protection.* It serves the management of the unfair competition created by the exclusivity of IP protection and as such it is to be taken into consideration when concluding a university R+D agreement. Theoretically, however, it still does not regulate intellectual property law but competition law. On the other hand the above mentioned *regulation does not deal specifically with universities*: those contracted parties are included in the subject of regulation which conclude research agreements. (It is true yet, that the party executing the research work is often a university or research institution.) we are going to construe the block exemption regulation in a later section of our work when examining the technology-transfer agreements.

2. The primary legal sources of the European Union

Originally, the Treaty of Rome did not contain regulations concerning the innovation, research and technology policy. In the first part of the Community's research policy, only eight articles were devoted to the encouragement of research activities from the Euratom Treaty. However, this treaty cannot be considered as a framework for a general research policy. We cannot state either that the Treaty was used as the basis for the legitimatization and initiation of the primary legal sources during the development of the Community's research policy. This cannot be derived neither from the nature of the decision making process of the programme creation, nor from the final text of the programmes. Hence, there was no single or clear framework for the Community's research policy between 1957 and 1987. In this period, the Community's research policy focused mainly on the development of the nuclear, steel and agriculture sectors. *For the very first time, the Single European Act formulated specific regulations for research and technological development.* It also extended the role of the Committee for the technological areas. As a result, the Single European Act established the first institutional innovation in Europe in terms of a supra-national innovation set-up.⁵

Title „*The Research and Technological Development*” (Title XVIII.) of the Treaty of Rome contains the specific rules of innovation which has been amended by the Single European Act, the Treaty of Maastricht and the Treaty of Amsterdam. It has been operated since 1 May, 1999.⁶ The regulations can be summarized as the following:

„The Community aims at strengthening the scientific and the technological basis of its industry and supporting the development of its international competitiveness. Moreover, on the basis of the present Treaty, the Community encourages those activities considered to be necessary.”⁷

⁴ Commission Regulation (EC) No 2659/2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements.
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:304:0007:0012:EN:PDF>

⁵ DR. MOLNÁR ISTVÁN: *Legal and Institutional Aspects of the Innovation System of the European Integration*. Periodica Polytechnica – Social and Management Sciences, Vol. 12. No. 1., 2004.

⁶ Treaty Establishing the European Community, Official Journal of the European Communities C 325, 24.12.2002., pp. 105–107. http://eur-lex.europa.eu/hu/treaties/dat/12002E/pdf/12002E_EN.pdf

⁷ Treaty Establishing the European Community, Official Journal of the European Communities C 325, 24.12.2002., p. 105.

For this reason, the Community supports the co-operation of companies, research centres and universities to ensure the companies exploit the possibilities of the internal market to the maximum.⁸ In order to achieve its objectives, the Community and its Member States perform the following:

- (i) bringing into effect the programme of research, development and demonstration with the companies, research centres and universities,
- (ii) promoting the co-operation with third countries and international organizations,
- (iii) the dissemination and commercialization of the results of research activities,
- (iv) promoting the training and mobility of community research.⁹

The Community and its Member States ensure the coherence between their own and international policies.¹⁰

The further regulations of Title XVIII.¹¹ refer to the framework programmes, which will be introduced later in this publication.

Accordingly, within the circle of the *referred provisions of the Treaty of Rome* it is to be emphasised that they *determine the aims of the Community as to the international competitiveness of its industry*, and they declare the coordination between the Community and its member states in order to ensure a mutual coherence between policies. However, *the primary legal sources of the EU do not concern the university research-development, and this way nor the university intellectual property.*

The member states of the European Union signed the treaty on establishing the *European Constitution* on 13 October, 2004, which should regulate the institutional system of the union and the relations between the European Union and its member states as a primary legal source replacing the Treaties of Rome and Maastricht. As it is included in the draft of the *present, not in force* European constitution the Union „*shall promote the scientific and technological advance.*”¹², and in its Articles 73¹³ and 77¹⁴, Part II. it declares the freedom of art and science, and the protection of IP in order. In the draft of the European Constitution one section (nine articles) is assigned to the issue of research, technological development and space research within Part III. The constitution states that the European Union *encourages the enterprises, research centres and universities* within the field of their high standard research and technological development activities.¹⁵ The Union practises activities supplementing those carried out in the member states as follows:

⁸ Treaty Establishing the European Community, Official Journal of the European Communities C 325, 24.12.2002., p. 105.

⁹ Treaty Establishing the European Community, Official Journal of the European Communities C 325, 24.12.2002., p. 105.

¹⁰ Treaty Establishing the European Community, Official Journal of the European Communities C 325, 24.12.2002., p. 106.

¹¹ Treaty Establishing the European Community, Official Journal of the European Communities C 325, 24.12.2002., pp. 106–107.

¹² The EU Constitution, Article I–3. http://ea.euabc.com/upload/rfConstitution_en.pdf

¹³ The EU Constitution, Article II–73.

¹⁴ The EU Constitution, Article II–77

¹⁵ The EU Constitution, Article III–248, paragraph (2)

- (i) executing research, technological development and demonstrative programs through promoting the cooperation with enterprises, research centres and universities and among them;
- (ii) promoting the cooperation with third countries and international organisations within the field of the union research, technological development and demonstration;
- (iii) spreading and utilization of the union research, technological development and demonstrative activities;
- (iv) promotion of the training and mobility of union researchers.¹⁶

The further articles of the Section are dealing with multiannual framework programs, single programs, and the European space policy.

Reviewing the draft of the European constitution we can state that it is a significant move forward from the point of view of our topic and compared to the *Treaty of Rome that the universities are included in it as essential motors of innovation. However, the draft does not compose clear regulations in respect of the management of university IP*; we also think there is no place for such issues in a constitution.

3. Legal actions relating to the framework programmes

The research framework programmes are consecutive, multi-annual and strategic programmes which aim at strengthening the international competitiveness of the European industry (especially in contrast with the USA and Japan) in the developed technological sectors. In the field of science and technology the shared strategies are formed by frameworks. These harmonize with the strategies and policies of the Community. The scientific and technological strategies defined by the framework foreshow the scientific and technological aims to be followed at Community levels, the criteria of selection of the Community activities and, last but not least, the priority and financial characteristics. The role of the framework programmes in the field of the community technology policy is highlighted by the fact that the *general issues of the framework programmes are regulated at a primary legislation level in the Treaty of Rome (Title XVIII)*. In the followings, we briefly summarize the essence of the above-mentioned rules.

The Council of the European Community after consulting the Economic and Social Committee accepts a multi-annual framework programme which unites all Community activities concerning research and technology development. This framework programme:

- (i) determines the scientific and technological objectives to be achieved and attached to priorities,
- (ii) highlights the major lines of activities,
- (iii) defines the maximum amount and the rules of community financial participation in the framework programme and the respective shares of each planned activities. The framework programme must be carried out through specific programmes developed within each activity. Each specific programme determines the implementation, duration and the means deemed necessary. The specific

¹⁶ The EU Constitution, Article III-249

programmes are accepted on a proposal from the Commission after the Council consulted with the members of the European Parliament and the Economic and Social Committee.

The Council, in order to implement the framework programme, defines:

- (i) the participation rules of the companies, research centres and universities and
- (ii) the regulations of the expansion of the research results.

When executing framework programs it is possible to decide on so called supplementary programs, in which only given member states may take part, and financing of which is ensured by these member states through a possible participation of the Community¹⁷.

At the beginning of every year the Commission submits a report to the European Parliament and to the Council.¹⁸

Art. 251 of the Treaty of Rome outlines a really significant provision from the point of view of framework programs, namely it unfolds *the regulations on decision making called „co-decision procedure”*. The essence of it is as follows: The Commission submits a proposal on the framework programme to the European Parliament and to the Council. The Council – after the commitment of the European Parliament – with qualified majority:

- (i) accepts the proposal if no modification is proposed by the European Parliament,
- (ii) accepts a modified proposal, if approves every modification included in the opinion of the European Parliament,
- (iii) in other cases establishes a common position and delivers it to the European Parliament.

If the European Parliament within three months after the submission:

- (i) approves the common position or does not declare itself, the common position is to be considered as approved,
- (ii) refuses the common position, the proposal is to be considered as refused,
- (iii) suggests modifications of the common position, and this way submits the text to the Council and to the Commission, which declare their opinion on these modifications.

If the European Parliament approves all the modifications with qualified majority within three months following its submission, the proposal is approved in the form of the common position modified this way. If the Council does not approve all modifications, the Chairman of the Council assembles the so called Committee of Arbitration. If the Committee of Arbitration approves a common draft within six weeks following its assembling, the European Parliament and the Council has six weeks to approve the proposal according to the common draft. If the Committee of Arbitration does not approve

¹⁷ Treaty Establishing the European Community, Official Journal of the European Communities C 325, 24.12.2002., pp. 106–107.

¹⁸ Treaty Establishing the European Community, Official Journal of the European Communities C 325, 24.12.2002., p. 107.

a common draft within the specified time or if it is not approved by any of the two organs or by both, the proposal is to be considered as refused.¹⁹

The framework programmes have three major parts: the preamble, the operative clauses and the annexes. Basically, the preamble presents those reasons and circumstances that made the development of the programme necessary and the former decisions that ought to be taken into consideration. It also pays attention to those organizations and institutions whose opinion played a vital role in the preparation of the programme. Furthermore, it contains the general outline of the objectives to be achieved by the programme.

The operative clauses mainly refer to the duration of the programme and its objectives, to the general budget of the programme, to the obligations of the controlling, evaluating and reporting activities and their procedure and finally to the methods of funding (e.g. the share of costs) and the implementation of rules.

The operative clauses are followed by the annexes which show the programme's actual objectives and the amount of money devoted to them (sometimes broken down into annual figures). Moreover, it contains a detailed description of priorities belonging to the objectives (these give information about the directions in which the Community intends to influence the development of science and technology and its impact on the Community's innovation). Furthermore, it also exposes the participation rules of the programme and its selection criteria.

The Commission keeps monitoring the implementation of the framework programmes to make sure they are in compliance with their objectives. During the process of implementation (usually annually) the Commission reports on the activities of the previous year and the work programmes of the actual year to the European Parliament and to the Council. At the end of the framework programme, the Commission gives a report on the evaluation of the programme.

It is not connected tightly to the present topic, but it is certainly worth *giving a historical review of the previous framework programmes*. The intellectuality of the framework programmes has been developing for 30 years and they have given an insight to the alternation of the priorities and the K+F objectives of the Community. The first step towards a shared research policy was made in the 1980s when the First Science and Technology Framework Programme (hereinafter: First Framework Programme) was introduced. It established the mid-term planning of research activities at a Community level. *The First Framework Programme, started in 1984*, has doubled the proportion of expenses spent on research and development within the budget of the European Community. However, at that time the largest share was spent on research connected to energy. According to the objectives presented in the preamble of the First Framework Programme, the Community's major tasks were the promotion of a harmonious development of the economic activities, continuous and balanced expansion and an accelerated rising of the standard of living. The most significant thematic priorities of the First Framework Programme were both the increase of the (traditional) industrial competitiveness and the management of energy resources which had a budget of 1 billion ECU. However, the development of the agricultural competitiveness and the management of

¹⁹ Treaty Establishing the European Community, Official Journal of the European Communities C 325, 24.12.2002., pp. 133-134.

raw materials formed a less favoured field. Information technology and biotechnology were not mentioned by name among the priorities of the First Framework Programme.

The Second Framework Programme was introduced in 1987. Approximately 60% of its resources were devoted to the industrial research. However, the majority of the funds aimed at the introduction of new technologies in the sectors of industry. With the Second Framework Programme, a demand for the development of information technology appeared. For this priority, 2,3 billion ECU was spent. An enormous subsidy was given to the energy sector (approximately 1,2 billion ECU) and to the modernization of the industry (over 800 million ECU). In addition, biotechnology appeared within the field of health care, environment and natural resources, but it was given significantly less support (approximately 100 million ECU).

The general objectives of the *Third Framework Programme* were to strengthen and ensure the scientific and technological basis of the European industry in order to make them internationally more competitive. The greatest attention was paid to the information and communication technologies with a subsidy of 2,5 billion ECU. Over 1 billion ECU was devoted to the industrial and material technologies and the energy sector, nearly 500 million ECU was separated to the protection of the environment. The support of biotechnology has increased by 50% compared to the Second Framework Programme. The pre-competitive research and the development of technology were highlighted in the industrial programmes. Much more attention had been paid to the different basic research activities. The role of human capital in the Community innovation has been recognized and received nearly 600 million ECU.

The European Commission proposed originally 14,7 billion ECU to be spent on the *Fourth Framework Programme, which was operative between 1994 and 1998.* It was born after the Treaty of Maastricht had come into force. It involved a whole scale of research and demonstration activities. The international scientific co-operation became part of the programme, and certain research activities, which had been excluded from the Third Framework Programme, were integrated into the Fourth Framework Programme. The Fourth Framework Programme has aimed at enhancing the competitiveness of the European industry and the quality of life with the help of the scientific and technological basis needed for a sustainable development, the environment and the support of shared policies.

The following specific goals have been added to the general objectives of the Fourth Framework Programme:

- (i) providing an effective and safe infrastructure for the Community which matches its transportation and energy policy,
- (ii) providing an effective, safe, clean and environmentally friendly production and taking human factors under consideration,
- (iii) protecting the environment,
- (iv) improving the quality of life, especially in the cases of health care and hygiene.

The subsidy of the framework programme has been divided among "activities" in order to achieve its objectives:

- (i) the First Activity contains research, technological development and demonstration programmes,

- (ii) the Second Activity aims at promoting co-operation with third countries and international institutions in the field of community research and technological development,
- (iii) the Third Activity optimizes and disseminates the results of community research and the activities of technological development,
- (iv) and the Fourth Activity promotes the training and mobility of the researchers in the Community.

The Community's subsidy concentrates on the activities of generic, pre-competitive and technological development covered by the First Activity. The total budget of the Fourth Framework Programme was 13,215 billion ECU which was shared among the sectors of information technology (2 billion ECU), industrial and material technologies (over 1,7 billion ECU) and environment-related activities (nearly 600 million ECU). In addition, the resources provided for biotechnology have been increased so four times more money was separated to in (nearly 600 million ECU) than in the case of the Third Framework Programme.

The priorities of research, technological development and demonstration activities of the European Union for the period between 1998 and 2002 were set out in *the Fifth Framework Programme*. These priorities were selected by shared criteria to reflect the increase of the industrial competitiveness and the main aspects of the improvement of the citizens' quality of life. The Fifth Framework Programme has two main parts: the framework programme of the research activities, technological development and demonstration of the European Union and the Euratom Programme concerning research and training activities in the nuclear sector. This framework programme significantly different from the preceding ones. The objectives of its foundation were to come up with solutions for the problems and to deal with the main socio-economic challenges occurred in Europe in the millennium. In order to maximise its impact, the programme focused on a limited number of research areas combining the aspects of technology, industry, economy, society and culture. Management strategies were planned to simplify the processes and to highlight the role of the key-members in research. The major innovation of the Fifth Framework Programme had been the concept of "key-actions". These flexible tools aimed at providing solutions for the topics of research and technological development in Europe within specific programmes. The "key-actions" mobilised a wide range of scientific and (basic as well as applied) technological disciplines that targeted a specific problem to overcome the existing barriers. A budget of EUR 13,7 billion was separated for the implementation of those parts of the Fifth Framework Programme that are concerned with the European Community. This EUR 13,7 billion together with EUR 1,26 billion that was spent on the Euratom Programme made up the amount of EUR 14,96 billion which gave the total budget of the Fifth Framework Programme separated to its research activities between 1998 and 2002. This means a 4,61% increase compared to the Fourth Framework Programme. The Fifth Framework Programme includes four thematic programmes apart from nuclear energy: the first thematic programme related to a user-friendly information society with a budget of EUR 3,6 billion, the second one is concerned with a competitive and sustainable growth and energy with EUR 2,725 billion, the third one is devoted to the environment sustainable development and energy with the amount of EUR 2,125 billion and, finally, the one which targets the quality of life received a fund of EUR 2,413 billion. In addition, a so-

called "horizontal programme" was created to list those funds that are concerned with the strengthening of the international role of the community research, the encouragement of the participation of small and medium sized enterprises and the improvement of the human research potential.

In the framework of the Lisbon Programme, July, 2000 a group of independent experts, entrusted by the European Commission, gave a report in which they evaluated the European Union's research and technological development programmes between 1995 and 1999. The experts insisted on the continuation and the expansion of the framework programmes as they had had positive results. Those activities connected to infrastructure, training and to the integration of small and medium sized enterprises were regarded as the successful aspects of the framework programmes. The evaluation of the expert group was taken under consideration which led to the adoption of the Sixth Framework Programme for the period between 2002 and 2006. *The Programme came into force on 1 January, 2003.* Its total budget was EUR 17,5 billion from which EUR 16,27 billion was spent on the research programmes of the European Union and EUR 1,23 billion was separated to the Euratom Programme. This figure represents nearly 4% of the European Union's overall budget for 2001 and 5,4% of the budget provided for all non-military research in Europe. The budget, aimed at achieving the objectives of the Sixth Framework Programme and creating the European Research Area, was divided into three main groups:

- (i) integrating and focusing Community research,
- (ii) creating the structure of the European Research Area,
- (iii) strengthening the basis of the European Research Area.

From the EUR 11,285 billion available for the thematic priorities of the Sixth Framework Programme, the lion's share (EUR 3,625 billion) was devoted to the development of information technologies, EUR 1,3 billion was spent on the research of nanotechnology and multifunctional materials, EUR 1,075 billion was put aside for aeronautics and space research and EUR 2,12 billion was allocated to research connected to a sustainable development, global change and the ecosystem. The increase of the information technology and life sciences' role and the support of the concept of a sustainable development were remarkable. There are some major differences between the Sixth Framework Programme and the previous framework programmes. The previous ones promoted the development of scientific and technological co-operation of the member states and they were means to achieve the research objectives. However, according to the reports, they had no durable impact on the development of a greater coherence in Europe. Therefore the Sixth Framework Programme has been set up to match new objectives:

- (i) concentrating European efforts on fewer priorities, especially in areas where the European co-operation undoubtedly represents clear added value,
- (ii) promoting such research activities that are designed to have a long lasting and structuring effect,
- (iii) using the scientific potential of candidate countries to prepare their accession to the European Union.

New means of activities were used in the Sixth Framework Programme, as well. Previously, the framework programmes had been carried out through joint research pro-

jects, however, these had had two major weaknesses: in most cases, the end of a certain research project put an end to the consortium of the partners, in other cases the size of the projects had not reached the minimum that could ensure an appropriate effect. In order to eliminate these weaknesses, the Sixth Framework Programme set two new means into motion: the concept of "center of excellence" and the "integrated project". The objective of the "center of excellence" is the progressive integration of the network partners. The "integrated projects" are complex constituting the critical mass of the research with well-defined scientific and technological goals.

The legal background of the framework program running presently and numbered as the seventh is specified by a European Parliament and Council decision²⁰ (Decision No. 1982) and a regulation of the European Parliament and Council decision.²¹ It is new compared to the earlier ones that there also exists a Competitiveness and Innovation Framework Programme, which was established by another European Parliament and Council decision.²² From the point of view of our topic the question is to what extent *these documents are engaged with the management of university IP.*

Decision No. 1982 defines the most general aim of the *Seventh Framework Programme* as follows: „*The overriding aim of the Seventh Framework Programme is to contribute to the Union becoming the world's leading research area. This requires the Framework Programme to be strongly focused on promoting and investing in world-class state-of-the-art research, based primarily upon the principle of excellence in research.*”²³ The involvement of the universities in the Community innovation planning procedure emerges in the preamble of the decision as follows: „*Taking into account the research needs of all Community policies and building upon widespread support from European industry, the scientific community, universities, and other interested circles, the Community should establish the scientific and technological objectives to be achieved under its Seventh Framework Programme in the period from 2007 to 2013.*”²⁴ It is also perceptible that the separation of the *university innovation* and generally of R&D are desired to be managed on a framework programme level: „*In addition, the dialogue between science and society in Europe should be intensified in order to develop a science and research agenda that meets citizens' concerns, including by fostering critical reflection, and is aimed at reinforcing public confidence in science.*”²⁵ The

²⁰ Decision No 1982/2006/EC of the European Parliament and of the Council concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007–2013). <http://cordis.europa.eu/documents/documentlibrary/90798691EN6.pdf>

²¹ Regulation (EC) No 1906/2006 of the European Parliament and of the Council laying down the rules for the participation of undertakings, research centres and universities in actions under the Seventh Framework Programme and for the dissemination of research results (2007–2013). <http://cordis.europa.eu/documents/documentlibrary/90798681EN6.pdf>

²² Decision No 1639/2006/EC of the European Parliament and of the Council establishing a Competitiveness and Innovation Framework Programme (2007 to 2013). <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:310:0015:0040:EN:PDF>

²³ Decision No 1982/2006/EC of the European Parliament and of the Council concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007–2013), paragraph (4)

²⁴ Decision No 1982/2006/EC of the European Parliament and of the Council concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007–2013), paragraph (6)

²⁵ Decision No 1982/2006/EC of the European Parliament and of the Council concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007–2013), paragraph (9)

thematic classification of the Seventh Framework Programme is also different from the earlier ones; four activities are approved as follows: trans-national cooperation (the „Cooperation” programme), investigator-driven research (the „Ideas” programme), support for individual researchers (the „People” programme), and support for research capacities (the „Capacities” programme).²⁶ The specific programmes are planned to be executed in a more flexible procedure and through more easily available sources for the participants²⁷. The overall amount of the resources devoted for the 7th Framework Programme is EUR 50,521 billion. That amount is distributed among the activities and actions is as follows (in EUR billion): Cooperation 32,413; Ideas 7,510; People 4,750; Capacities 4,097; Non-nuclear actions of the Joint Research Centre 1,751.²⁸ Annex 1 of Decision No. 1982 outlines the scientific and technological aims, topics and activities of the framework program. The calls for proposals are announced through taking this into consideration.

All in all it can be stated that in the overall regulation of the Framework Programme somehow still emerges the principles of innovation accomplished through the cooperation of the university and industry even if it stays unpronounced, and the regulation of the university IPR transfer concomitant to this essentially falls out of the rules of Decision No. 1982.

The practical regulations of the Seventh Framework Programme are defined by a European Parliament and Council Regulation (Regulation No. 1906)²⁹. Articles 39-51 of Chapter III, Regulation No. 1906 compose very significant provisions dealing with IPRs. A *model grant agreement*³⁰ has also been attached to Decision No. 1906 since 2007, the regulations of which are in line with the regulations of the Decision No. 1906. As they inevitably concern the universities taking part in an R&D project, it is not useless to review the regulations included in the two above mentioned documents.

The Commission proceeding in the name of the Community signs a contract with the beneficiaries according to said model grant agreement. The provisions stated in the grant agreement regulate the legal relationships between the Commission and the beneficiaries for the rights connected to the IPRs in harmony with the provisions of the relevant regulations. In the following we give a short summary of the terms most often used.

The term background means the information at the disposal of the participants preceding their joining to the grant agreement and all copyrights and other IPRs connected

²⁶ Decision No 1982/2006/EC of the European Parliament and of the Council concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007–2013), paragraph (13)

²⁷ Decision No 1982/2006/EC of the European Parliament and of the Council concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007–2013), Article 24. However as our experience shows the practical execution of the Seventh Framework Program differs from this significantly: the community bureaucracy is still an extremely time wasting procedure, the project evaluation not rarely lasts for more than one year, which causes delays in the implementation of project initiatives.

²⁸ Decision No 1982/2006/EC of the European Parliament and of the Council concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007–2013), Article 4

²⁹ Regulation (EC) No 1906/2006 of the European Parliament and of the Council laying down the rules for the participation of undertakings, research centres and universities in actions under the Seventh Framework Programme and for the dissemination of research results (2007–2013)

³⁰ http://cordis.europa.eu/fp7/calls-grant-agreement_en.html#standard_ga

to such information, which rights have been applied for by the participants preceding their joining to the grant agreement and which are necessary for performing the indirect activities or for using the results from the indirect activities. Compared to this, the term *foreground* means the results – including information as well – created due to the activities within the framework of the project independently from their patentability. *Such results include rights connected to copyrights, design rights, patent rights, plant variety protection or similar protection types.* Apart from the immaterial properties, the foreground includes the material results of the project as well (e.g. prototypes, microorganisms, etc.) The term of *access right* covers rights of licensing or other exploitation related to the background and the foreground, whilst *dissemination* means the appropriate publication of the foreground, excluding patent publication, however including the publication of the foreground in any media.

Besides defining the terms, the grant agreement governs the already pre-existing rights or those created in the framework of the project (*background*). In case of background, participation in the project does not affect the ownership rights. The foreground originating from the activities of the project is by principle the property of the one who has created it. The European Community can become owner of the foreground in two cases: i) coordination or granting activities aimed at the acquisition of products or services that fall under the public procurement procedure stated in the regulation of the budget; ii) coordination or granting activities related to independent experts.

As to the *ownership of foreground*, Regulation 1906 states that „*Foreground arising from work carried out under indirect actions other than those referred to in paragraph 3 shall be the property of the participant carrying out the work generating that foreground.*”

2. *If employees or other personnel working for a participant are entitled to claim rights to foreground, the participant shall ensure that it is possible to exercise those rights in a manner compatible with its obligations under the grant agreement.*

3. *Foreground shall be the property of the Community in the following cases:*

(a) *coordination and support actions consisting in a purchase of goods or services subject to the rules on public procurement set out in the Financial Regulation;*

(b) *coordination and support actions relating to independent experts.*³¹

According to Regulation No. 1906³² and the model grant agreement, if an employee or a person in other legal relationship of any of the consortium members could be entitled to IPRs related to the foreground (eg. student's relationship, people whose IP is not considered as a service invention), the concerned consortium member must ensure that these rights can be practiced in harmony with the obligations stated in the grant agreement.

If the foreground is the result of a collaborative activity of several beneficiaries and the proportion of on each participant cannot be defined, the concerned parties will have

³¹ Regulation (EC) No 1906/2006 of the European Parliament and of the Council laying down the rules for the participation of undertakings, research centres and universities in actions under the Seventh Framework Programme and for the dissemination of research results (2007–2013), Article 39

³² Regulation (EC) No 1906/2006 of the European Parliament and of the Council laying down the rules for the participation of undertakings, research centres and universities in actions under the Seventh Framework Programme and for the dissemination of research results (2007–2013), Article 39

*common rights on this foreground.*³³ The beneficiaries can sign an agreement concerning the conditions of sharing and practice of these common rights. Without this a *dispositive* regulation of the EU comes in force, that is each person having IPRs has the right to give a non-exclusive licensing agreement – with no sublicensing – with the following conditions: a) all of the other IPR owners must be formerly notified; b) all of the other IPR owners must receive a realistic and fair offset.³⁴ Together with the obligations (including access rights, dissemination) and formerly notifying the other participants, the foreground can be freely transferred. In case of a non-European third entity, this transfer can only take place with the former notification of the Commission (the Commission has veto rights).

If the *foreground* is suitable for industrial or commercial application, the owner must ensure its proper and efficient protection (but it is not compulsory to file a patent application, and it can be transferred to a third party)³⁵. According to Article 43 of Regulation 1906 „the Commission may object to the transfer of ownership of foreground, or to the granting of an exclusive licence regarding foreground, to third parties established in a third country not associated to the Seventh Framework Programme, if it considers that this is not in accordance with the interests of developing the competitiveness of the European economy or is inconsistent with ethical principles or security considerations. In such cases, the transfer of ownership or grant of exclusive licence shall not take place unless the Commission is satisfied that appropriate safeguards will be put in place.”³⁶

³³ Regulation (EC) No 1906/2006 of the European Parliament and of the Council laying down the rules for the participation of undertakings, research centres and universities in actions under the Seventh Framework Programme and for the dissemination of research results (2007–2013), Article 40

³⁴ Regulation (EC) No 1906/2006 of the European Parliament and of the Council laying down the rules for the participation of undertakings, research centres and universities in actions under the Seventh Framework Programme and for the dissemination of research results (2007–2013), Article 40, paragraph 2.

³⁵ "Transfer of foreground"

1. The owner of the foreground may transfer it to any legal entity, subject to paragraphs 2 to 5 and Article 43.

2. Where a participant transfers ownership of foreground, it shall pass on its obligations regarding that foreground to the assignee, including the obligation to pass them on to any subsequent assignee, in accordance with the grant agreement.

3. Subject to its obligations concerning confidentiality, where the participant is required to pass on access rights, it shall give prior notice to the other participants in the same action, together with sufficient information concerning the new owner of the foreground to permit them to exercise their access rights under the grant agreement. However, the other participants may, by written agreement, waive their right to individual prior notice in the case of transfers of ownership from one participant to a specifically identified third party.

4. Following notification in accordance with the first subparagraph of paragraph 3, any other participant may object to any transfer of ownership on the ground that it would adversely affect their access rights. Where any of the other participants demonstrate that their rights would be adversely affected, the intended transfer shall not take place until agreement has been reached between the participants concerned.

5. Where appropriate, the grant agreement may provide that the Commission is to be notified in advance of any intended transfer of ownership or any intended grant of an exclusive licence to a third party which is established in a third country not associated to the Seventh Framework Programme." [Regulation (EC) No 1906/2006 of the European Parliament and of the Council laying down the rules for the participation of undertakings, research centres and universities in actions under the Seventh Framework Programme and for the dissemination of research results (2007–2013), Article 42]

³⁶ Regulation (EC) No 1906/2006 of the European Parliament and of the Council laying down the rules for the participation of undertakings, research centres and universities in actions under the Seventh Framework Programme and for the dissemination of research results (2007–2013), Article 43

The rules of protection in Regulation No. 1906 are the following. „1. Where foreground is capable of industrial or commercial application, its owner shall provide for its adequate and effective protection, having due regard to its legitimate interests and the legitimate interests, particularly the commercial interests, of the other participants in the indirect action concerned. Where a participant who is not the owner of the foreground invokes its legitimate interest, it must, in any given instance, show that it would suffer disproportionately great harm.

2. Where the foreground is capable of industrial or commercial application and its owner does not protect it, and does not transfer it to another participant, an affiliated entity established in a Member State or associated country or any other third party established in a Member State or associated country along with the associated obligations in accordance with Article 42, no dissemination activities may take place before the Commission has been informed. In such cases, the Commission may, with the consent of the participant concerned, assume ownership of that foreground and adopt measures for its adequate and effective protection. The participant concerned may refuse consent only if it can demonstrate that its legitimate interests would suffer disproportionately great harm.”³⁷ As we have seen here, if there is no protection acquired, the Community may get the rights to maintain the protection. This is a very important rule which may result in an obligatory transfer of IP rights from the original owner to the Commission.

As to the dissemination, the beneficiary must ensure that the disclosure of the foreground occurs the fastest possible. In case this is not happening, the Commission has the right of disclosure of the foreground. An additional rule on the dissemination is that it has to be in accordance with the protection of IPR and the confidentiality agreements binding the parties, and the other concerned beneficiaries must be notified at least 45 days in advance (have objection rights).³⁸

According to Regulation No. 1906 an *access right* can only be requested by any parties if it is necessary for the fulfillment of the project or for exploitation of their own foreground. The limits of the access rights must always be exactly defined.³⁹

Questions concerning the protection of IPR are advisable to be regulated both in the grant agreement and in the consortium agreement. The consortium agreement settles

³⁷ Regulation (EC) No 1906/2006 of the European Parliament and of the Council laying down the rules for the participation of undertakings, research centres and universities in actions under the Seventh Framework Programme and for the dissemination of research results (2007–2013), Article 44

³⁸ „Use and dissemination

1. The participants shall use the foreground which they own, or ensure that it is used.

2. Each participant shall ensure that the foreground of which it has ownership is disseminated as swiftly as possible. If it fails to do so the Commission may disseminate that foreground. The grant agreement may set out time-limits in this respect.

3. Dissemination activities shall be compatible with the protection of intellectual property rights, confidentiality obligations, and the legitimate interests of the owner of the foreground.

4. Prior notice of any dissemination activity shall be given to the other participants concerned.

Following notification, any of those participants may object if it considers that its legitimate interests in relation to its foreground or background could suffer disproportionately great harm. In such cases, the dissemination activity may not take place unless appropriate steps are taken to safeguard these legitimate interests.” [Regulation (EC) No 1906/2006 of the European Parliament and of the Council laying down the rules for the participation of undertakings, research centres and universities in actions under the Seventh Framework Programme and for the dissemination of research results (2007–2013), Article 46]

³⁹ Regulation (EC) No 1906/2006 of the European Parliament and of the Council laying down the rules for the participation of undertakings, research centres and universities in actions under the Seventh Framework Programme and for the dissemination of research results (2007–2013), Article 48–51

the internal legal relationship of the beneficiaries. If otherwise not regulated by the call for proposals, all participants of the project are obliged to sign a consortium agreement. The consortium agreement must cover – among others – the following questions: i) the internal organisation of the consortium; ii) the distribution of the Community financial contribution; iii) rules on dissemination, use and access rights, additional to those in Chapter III of the model grant agreement and to the provisions in the grant agreement; iv) the settlement of internal disputes including cases of abuse of power; v) liability, indemnification and confidentiality arrangements between the participants.

Unlike the model agreement concerning the grant agreement, there is not a single model agreement accepted by the Commission for the consortium agreements. Contents of the consortium agreement are defined by the consortium members themselves, but they cannot be against the grant agreement. However there are a few, non-official model agreements for those concerned. One of the most generally used model contracts is DESCA⁴⁰ (*DEvelopment of a Simplified Consortium Agreement for FP7*). DESCA is a comprehensive, modular consortium agreement for the FP7. Initiated by key FP7 stakeholder groups, and co-developed with the FP community, it offers a reliable frame of reference which seeks to balance the interests of all of the main participant categories in FP research projects: large and small companies, universities and public research institutes. Another generally used model agreement is the IPCA (*FP7 Integrated Projects Consortium Agreement*). IPCA has been developed to facilitate the collaboration between the consortia members, by providing a reliable basis for the key European industrial R&D players when entering into agreements with their partners under the ICT theme of FP7. The contracting parties are guided by a table of comparison, as well⁴¹.

Participants of the community framework programmes must always consider the regulations of their own national law as well as that of the other beneficiaries (consortium members). This is because the regulations of the national law must be applied for questions concerning the IPRs between the research institution and the researcher (service invention, professor's privilege, etc.). Furthermore, the community legislation over the framework programmes may contain regulations against the national law (in Hungarian legislation, such an example is the conditions for licensing to third parties in case of joint ownership of rights). *The community law in this case takes priority over the national law as a special rule.*

There is another legal document connected to the framework programmes, this is the Decision No. 1639 on the *competitiveness and innovative framework programmes*.⁴² Decision No. 1639 specifically targets the enterprises it does not compose regulations concerning university IP, that is why we shall not outline it within the present study. Beyond the above mentioned, a general law document related to the university IPRs has not been available for a long time. *At last in April, this year (2008) – recognizing the significance of the topic the European Commission issued a recommendation on the management of university intellectual property [Recommendation No. C(2008)1329 see above].* However, before the introduction of Recommendation No. C(2008)1329 we think it is worth reviewing some experts' reports we consider important, which – indi-

⁴⁰ <http://www.desca-fp7.eu/>

⁴¹ <http://www.ipr->

helpdesk.org/documentos/docsPublicacion/pdf_xml/8_CA_table%5B0000006610_00%5D.pdf

⁴² Decision No 1639/2006/EC of the European Parliament and of the Council establishing a Competitiveness and Innovation Framework Programme (2007 to 2013)

rectly – led to the establishment of Recommendation No. C(2008)1329. These papers were used and are being used by the Commission in the planning, policy making and legislation. The analysis of all such papers would be an almost impossible task; the selected material serves rather giving a general picture. We examined *how much attention is paid to the IPRs in the selected papers and how much they contribute to the legislation of Recommendation No. C(2008)1329.*

4. Management of intellectual property in publicly-funded research organizations – expert group report of the Commission⁴³

The expert group report of 2004 has a large effect related to the management of university IPRs: experts participating in the preparation of the report dedicate the *report directly to the public by founded universities and research organisations (PROs)*. Besides that the report sets out recommendations to the enterprise research institutions and decision makers too, as the overall nature of research procedure points beyond the university and the transfer of technology procedure is typically realised through involving industrial users.

The main recommendation of the *report is the proactive role of a research organisation on the total verticum of research and utilisation*. The emphasis of this recommendation is put on the research side, since the commercialization of IPRs is the furthest point from the research executing task of a university on daily practice level. Consequently the report proposes a complex intellectual property management expanding from the idea until the industrial utilisation.⁴⁴

As the most significant aim of the university IPR management, the report mentions social utility, considering the public-founded nature of the R&D. At the same time it is to be mentioned that in the researches – exactly owing to the Community inspiration of such purpose – the industrial contribution represents a significant weight. Greater part of the research is collaborative, and not only the participants' circle is divided into two but also the financing. Even in case of collaborative researches the preference of social utility can be expected rightfully. The research structure chosen naturally has an effect on the university IPR management practice.⁴⁵

The report – likewise several other community documents later – *reveals the preference of the university IPR management built on industrial connections*. The targeted yields are to be understood here also in social dimensions.⁴⁶ An aimed firmer connec-

⁴³ EUROPEAN COMMISSION: Management of intellectual property in publicly-funded research organisations: Towards European Guidelines (Expert group report), 2004.

⁴⁴ „Without abandoning the Open Science Model, PROs should seriously consider taking a pro active role in the innovation process by managing IPR arising from research results. This is an important strategic decision, which requires establishing a clear mission, realistic objectives, appropriate resources and a dedicated professional transfer office.” [EUROPEAN COMMISSION: Management of intellectual property in publicly-funded research organisations: Towards European Guidelines (Expert group report), 2004., p. 1.]

⁴⁵ „The main objectives should be to maximise the benefits of publicly funded research for society. These benefits can be measured in terms of regional economic development, new products, new companies, new services, new jobs and improved quality of life.” [EUROPEAN COMMISSION: Management of intellectual property in publicly-funded research organisations: Towards European Guidelines (Expert group report), 2004., p. 1.]

⁴⁶ „In Europe, creating and licensing IPR is not sufficient in itself to produce significant benefits. There is a need for a much stronger interaction between PROs and Industry and for a more active involvement in the

tion between the university and industrial partners essentially concerns the university intellectual property management system, and the operational principles are examined also in the context of industrial connections. The report *contributes to the content of Recommendation No. C(2008)1329 in the field of university IP management through establishing basic principles.*

5. A new start for the Lisbon Strategy – communication from President Barroso⁴⁷

In February 2005 within the frames of the evaluation of the Lisbon Strategy, President Barroso issued a communication together with Vice President Verheugen. The presidential communication does not concern directly the management of university IPRs said, management is considered within the knowledge producing institutional role of universities. The strategy considers the university knowledge disseminating practise as a long term pledge of the European competitiveness, in which not only the educational programme but the procedures of creation and utilisation of the intellectual property are also parted roles. The preamble of the *communication* concerning the knowledge producing practise of universities does not separate different functions fulfilled by the university, but it considers *the university's complex activity as a factor, positively influencing the competitiveness.* However, the functional segregation of the tasks appears already in the itemizing sections of the communication. According to the Lisbon Strategy the Union institutions interpret the reinforcement of universities in the context of competitiveness to be reached on a global scale.: „*Spreading knowledge through high quality education system is the best way of guaranteeing the long-term competitiveness of the Union. In particular, the Union must ensure that our universities can compete with the best in the World through the completion of the European Higher Education Area.*”⁴⁸

The issue of *university IPR management* appears not in a specific action plan but rather *in its role played in competitiveness on a community level.* This way the communication allocates a reinforcement of the knowledge producing and disseminating potential of universities. The affirmation of industrial and academic research connections supposes utilisation-oriented forms of university IPRs; the communication aims at the improvement of the university research potential and the quality of research in order to intensify the industrial collaboration capacity. The *communication* does not express direct, *practical proposal* concerning the university IPR management, *but it expresses the desired form of utilisation through the repeated mentioning of collaboration connections.* This way the university IPR management is effected by the community level reinforcement of industrial connections and collaboration researches. The practical accomplishment of management of IPR at university level depends on the depth of co-operational connections, on the status of partners involved in the co-operation (institu-

creation of new technology companies.” [EUROPEAN COMMISSION: Management of intellectual property in publicly-funded research organisations: Towards European Guidelines (Expert group report), 2004., p. 1.]

⁴⁷ Communication COM(2005) 24 from President Barroso in agreement with Vice-President Verheugen: Working together for growth and jobs. A new start for the Lisbon Strategy. http://ec.europa.eu/growthandjobs/pdf/COM2005_024_en.pdf

⁴⁸ Communication COM(2005) 24 from President Barroso in agreement with Vice-President Verheugen: Working together for growth and jobs. A new start for the Lisbon Strategy, p. 9.

tional, enterprise or international, etc.), so the community level support of the enterprise co-operations moves the practise of IPR management to the direction of enterprise-close models: „*the Universities' contribution to the creation and dissemination of knowledge throughout the Union must be reinforced. The Commission will come forward with ideas on how to increase their potential and quality in research, science in order to be more attractive and build better links with industry. The Commission will also propose guidelines to improve their research collaboration and technology transfer with industry. It will address the question of how to enable European universities to compete internationally.*”⁴⁹ *The communication contributed to the principles of Recommendation No. C(2008)1329 by expressing the competitiveness enhancing role of the university's activity and besides that it defined the desired direction of the university-industrial collaborations, which is significant considering the practise of university IPR management. Maybe it is not provable that through the effect of this document, but the Annex II of the proposal eventually deals separately with industrial collaborations and research agreements (see: later).*

6. Putting knowledge into practice: A broad based innovation strategy for the EU⁵⁰

The Commission provided the Council, the European Parliament, the European Economic and Social Committee, and the Committee of the Regions with its innovation strategy in the form of communication. *The strategy concerning the management of the universities' IPRs contains only general directives.* The objective of the strategy related to the education systems from the point of view of university IPR is worth mentioning, *which puts the development of innovation capacities in the centre of educational systems.* The increase in the numbers of the research projects, conducted within the walls of universities influences the rules giving a frame to the management of IPRs, as well. This way the strategy, approaching from the end of the educational system influences the methodology of the IPR management, too.⁵¹

Like in other planning documents, *the role of institutional partnership of enterprises and research centres also appears in the strategy.* The European innovation policy considers these formations as a possible methodological pattern of cooperation, and references on them can also be found in the support programmes (e.g. through inspiring the

⁴⁹ Communication COM(2005) 24 from President Barroso in agreement with Vice-President Verheugen: Working together for growth and jobs. A new start for the Lisbon Strategy, p. 23.

⁵⁰ Communication COM(2006) 502 from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Putting knowledge into practice: A broad-based innovation strategy for the EU
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0208:FIN:EN:PDF>

⁵¹ “*The Member States' education systems should ensure that there is sufficient availability of key skills to support innovation. Education must move with the times. As already agreed within the Integrated Guidelines for Growth and Jobs, Member States are invited to set, as a matter of priority, ambitious targets in their National Reform Programmes that address weaknesses in these areas.*” [Communication COM(2006) 502 from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Putting knowledge into practice: A broad-based innovation strategy for the EU, p. 5.]

<http://www.europe-innova.org/exportedcontent/docs/6/6206/en/EN%20502%20-%20original.doc>

foundation of technological platforms)⁵² The wide-spreading innovation groupings involving universities, enterprises, financial and other institutions not only concern but also indicate basic changes in the IPR regulators. *The elaboration of the unified principles on utilisation of IPR adopted by all cooperating partners means a considerable challenge in the IPR management.*

The strategy refers to the communication titled „*Delivering on the Modernisation Agenda for Universities*”⁵³, which contains an indirect directive, relating to the intellectual property management: the effective university research presence, the determination of autonomic research strategy, and the elaboration of enterprise collaborations have an effect on the daily routine of the IPR management.⁵⁴

The strategy *presents only one action proposal relating to the IPR management.* The inspiration of university and enterprise research collaborations emerges as an goal. The cooperative research environment changes the practise of IPR management, since the planning, establishment and utilisation of IP occurs within a managing system of two participants, unifying the university and industrial interests. The strategy contributes to Recommendation No. C(2008)1329 through setting of the action proposal, in which it expresses the partner connections preferred in the future.⁵⁵

7. Keeping up the pace of change – strategic report on the renewed Lisbon Strategy⁵⁶

The document is a report prepared in 2007 by the Commission to the European Council its form is a communication. The *communication concerning the European growth and employment addresses the topics on knowledge production and research.* As a device

⁵² „*Within the Europe INNOVA initiative, the Commission will develop a more pro-active approach to the creation and support of young innovative SMEs in the service sector. In particular, it will support more efficient links between universities, entrepreneurship and finance, resulting in the creation of a pan European incubation platform in this sector.*” [Communication COM(2006) 502 from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Putting knowledge into practice: A broad-based innovation strategy for the EU, pp. 5–6.]

⁵³ Communication COM(2006) 208 from the Commission to the Council and the European Parliament: Delivering on the Modernisation Agenda for Universities: Education, Research and Innovation <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0208:FIN:EN:PDF>

⁵⁴ The Communication “*Delivering on the Modernisation Agenda for Universities*” already pointed to a number of important steps that could enable European universities to improve their performance, including by contributing more and more efficiently to the innovation process. Key to this is granting universities sufficient autonomy to develop their own strategies. Structured and strategic partnerships between business and universities need to be strengthened. [Communication COM(2006) 208 from the Commission to the Council and the European Parliament: Delivering on the Modernisation Agenda for Universities: Education, Research and Innovation, p. 9.]

⁵⁵ Action 4 : *In order to address the poor up-take of research results in Europe, the Commission will adopt a Communication in 2006 – including voluntary guidelines and actions of Member States and concerned stakeholders – to promote knowledge transfer between universities and other public research organisations and industry.* [Communication COM(2006) 502 from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Putting knowledge into practice: A broad-based innovation strategy for the EU, p. 17.]

⁵⁶ Communication COM(2007) 803 from the Commission to the Spring European Council: Keeping up the pace of change. Strategic report on the renewed Lisbon strategy for growth and jobs: launching the new cycle (2008–2010) http://ec.europa.eu/growthandjobs/pdf/european-dimension-200712-annual-progress-report/200712-annual-report_en.pdf

for effective utilisation of IPR the *European technological platform* is given place in the communication as a basically enterprise-type foundation, yet a formation established at the universities and aiming at the utilisation of IPR.

In respect of university IPR management the communication does not contain direct references, however, *the key role performed in research-development of the universities is put emphasis on*. At the level of the communication a *vision of the unified European sector* also appears, in which researches conducted in the European Union and in the national innovation systems complete each other. The aim hierarchy of the communication *built on research programs may represent a solid basis in connection with the practical implementation of the university IPR management*, the aims to be achieved at the level of university planning also determine the practice to be followed. The principle of research and professional quality gained a highlighted role among the aims of the communication, according to which the most competitive programmes can be financed by the community.

Aiming at a high future added value during the university planning is to be taken into consideration when establishing an IPR strategy. *In the aim hierarchy of the communication appears the preference of solutions promoting easy communication abilities of universities and enterprises.*⁵⁷ However, a group of rules, regulating university intellectual property management and utilisation is a precondition of establishment of co-operational connections is, which serves the aims effectively only if collaborative researches are conducted within a uniform system.

Tools for achieving the aims are declared both on community and national level by the communication, which allocates further requirements from the point of view of university IPR management. The assurance of research frame-conditions is presented as a community task, the target of union of research mobility and sources, from which mainly the issue of mobility means a challenge for the practise of university IPR management. The requirement of composing research aims and assurance of material conditions for researches are represented at national level. According to the similarities of community and national tasks, the issues of university IPR management can be managed uniformly.

⁵⁷ „To reverse this trend Europe needs a "fifth freedom" – the freedom of knowledge – completing the four freedoms of movement of goods, services, people and capital. This "fifth freedom" should spur the EU's transition to an innovative, creative knowledge economy: –one dimension is a genuine European research area where not only the framework conditions are in place to stimulate and reward innovation, but where the EU and national R&D programmes complement each other; where resources are allocated competitively geared towards excellence, where it is easy for universities and businesses to co-operate, where degrees are fully recognised and students, academics, researchers and skill workers can move around freely and cooperate easily with the worldwide scientific community.” [Communication COM(2007) 803 from the Commission to the Spring European Council: Keeping up the pace of change. Strategic report on the renewed Lisbon strategy for growth and jobs: launching the new cycle (2008–2010), p. 14.]

8. Improving knowledge transfer between research institutions and industry across Europe⁵⁸

The document prepared in 2007 can be considered as a resumption of the commission communication outlined in Section 7, above. The Commission puts the analyses of the Lisbon program into disposal to the Council, the European Parliament, the European Economic and Social Committee, and the Committee of the Regions in the form of communication. The industrial collaborations here also gain a strong emphasis within the circle of university partnerships.⁵⁹

The communication repeatedly expresses the aims, appearing also in other documents, that the *universities* should supplement the sources through industrial collaborations, however, on the other hand the *research results should be utilised in line with the industrial demand*.⁶⁰ Such a direction of research financing is illustrated by the communication through examples from the United States. As to the management of IPRs the enterprise-focus aiming at cooperative research influences the overall university intellectual property strategy.

The communication concerns the aims of harmonising the regulation of IPR at the levels of the community member states. In reference to the publicly financed research the communication *suggests the model of unified European intellectual property law*, which considerably affects the *university intellectual property management routine*, too. Having regard to the fact that the contracts, customs, aid material aiming at planning, tracking and utilisation applied at the universities are imprints of national legal regulations at institutional level, the unified university intellectual property regulation regarding all universities, allocates a change in the protocols of intellectual property management. The unified intellectual property management can express its advantageous effect at the universities concerned.⁶¹

⁵⁸ Communication COM(2007) 182 from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Improving knowledge transfer between research institutions and industry across Europe: embracing open innovation. Implementing the Lisbon Agenda.
http://ec.europa.eu/invest-in-research/pdf/com2007182_en.pdf

⁵⁹ „In its broad-based innovation strategy for the EU, the importance of improving knowledge transfer between public research institutions and third parties, including industry and civil society organisations was identified by the Commission as one of ten key areas for action. This Communication responds to this need and it presents a number of orientations for Member States.” [Communication COM(2007) 182 from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Improving knowledge transfer between research institutions and industry across Europe: embracing open innovation. Implementing the Lisbon agenda, p. 2.]

⁶⁰ *European universities and other research institutions are equally realising their changing role in the globalized economy and have undertaken interesting initiatives. They realise that they are no longer simply providing the local area with graduates but that they find themselves competing on a global scale for students, researchers and industrial partners. In turn, they realise that they will have to provide world class research to attract said students and researchers in the future. In order to remain attractive, they will need to open up to business and international collaboration, which may also help leverage new funds Sharing knowledge in particular through R&D collaborations with business – while a potential source of income for research institutions – may well give an important boost to both quantity and quality of the research undertaken.*

⁶¹ „Given that the rules governing the ownership of publicly-funded R&D results still vary across Europe, it may be appropriate to revisit in the near future the question of a single European ownership model for publicly funded research.” [Communication COM(2007) 182 from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Improving

The target of unification mentioned above is supplemented by *a vision of a monitoring system tracking the utilisation of IPRs based on unified principles*. Within the applied practice of intellectual property a considerable weight is represented by the evaluation, comparison of research results, comparing the research and business plans and the operation of a registration system. The elaboration of a unified evaluation system directs the university IPR management practice itself, too, which is attributed by the integration of new technology management solutions as well. *The communication contributes to the content of Recommendation No. C(2008)1329 through composing the multiple levelled unification aims.*

9. Research management in the European Research Area – report of the European Research Advisory Board⁶²

The annual report of European Research Advisory Board (EURAB) was elaborated in the summer of 2007 with the title *Research management in the European Research Area; Education, Communication and Exploitation*. The unified – European level - interpretation of research management, likewise the establishment of firm aims to be achieved for the Commission have a direct effect on the university IPR management. *Determination of a logical order to be followed by the research management, likewise the unification of requirements set up for the personnel accomplishing research management represent a definite step in the elaboration and dissemination of university intellectual property management practice.* The central issues of research management are the measurement, comparison and ranging of research programs. Performances compared based on the different evaluating principles result in misleading information on the potential of the European university intellectual property, and disturb the establishment of reliable competitiveness ranges. That is why it is important, and from the point of view of university IPR management it is an aim to be highlighted *to harmonise the principles of performance measurement.*⁶³

It is substantive from the point of view of university IPR management to discover and manage training deficiencies. In the field of university IPR management, the providing of innovation services cannot be separated from the manager courses aiming at building up professional abilities, since the operational ability of the logically set up modules can be ensured only by well trained managers.

The integration of Gold Standard in the „FP7” programs proposed by the Commission has an effect on the university IPR management practice through the manager training.⁶⁴ The setting up of minimal training requirements within FP7 programs lays

knowledge transfer between research institutions and industry across Europe: embracing open innovation. Implementing the Lisbon agenda, p. 6.]

⁶² EUROPEAN RESEARCH ADVISORY BOARD: *Research Management in the European Research Area. Education, Communication and Exploitation (Final Report), 2007.*

⁶³ *The commission establishes a 'European Gold Standard' in Research Management. "This should define (a) the activities involved in research management and, in each case, what is meant by excellent performance; and (b) the personal attributes and range of skills required to be a research manager and, in each case, what is meant by excellent quality."* [EUROPEAN RESEARCH ADVISORY BOARD: *Research Management in the European Research Area. Education, Communication and Exploitation (Final Report), 2007.*, p. 4.]

⁶⁴ „The commission launches a programme to (a) identify and monitor the shortfalls in the provision of research management education and training, compared with what is needed to achieve the Gold Standard

unambiguous claims against manager training.⁶⁵ As it has already been referred to in other communications and reports, the unification of university IPR management practice is also considered as significant by this report, as well. From the point of view of university IPR management the report inspires changes by *proposing the harmonisation of IPR management rules* in the collaborative researches. The unified rules represent changes on one hand in the relations between the universities and enterprises, on the other hand among the universities.⁶⁶ The report contributes to Recommendation No. C(2008)1329 with defining the unification directions within the field of IPR management, likewise with the setting up of the role of IPR manager training.

It can be seen that the legislation of Recommendation No. C(2008)1329 was preceded by an almost half a decade preoperational work. In the following we are going to sum up the most important statements of the Recommendation concerning the intellectual property management.

10. The C(2008)1329 Commission Recommendation

According to the EU Commission, presently in Europe the state-funded research facilities produce the largest part of novel knowledge, however this does not bring sufficient economic results. *An effort should be made to better convert knowledge into socio-economic benefits.* Therefore, public research organisations need to disseminate and more effectively exploit state-funded research results with an objective to translate them into new products and services.

The legislation of the technology transfer processes is part of the national legal systems. The EU Member States have in recent years taken initiatives⁶⁷ (see: above) to facilitate knowledge transfer at national level, but significant discrepancies between national regulatory frameworks, policies and practices, as well as varying standards in the management of IPRs within public research organisations, prevent or hamper transnational knowledge transfer. On EU Community level an initiative of the EU made a proposal for the elaboration and acceptance of the Charta for IPR management was accepted by the European Council in June 2007.⁶⁸ The Commission accepted Recommendation C(2008)1329 with the title „*Commission Recommendation in the ma-*

across Europe and (b) fill those gaps.” [EUROPEAN RESEARCH ADVISORY BOARD: Research Management in the European Research Area. Education, Communication and Exploitation (Final Report), 2007., p. 4.]

⁶⁵ *The commission encourages member states and requires future Framework Programme actions (in FP7 and its successors, if any) to adopt the Gold Standard, progressively as it becomes established, as a way of encouraging the demand for and uptake of research management education and the general raising of professional and ethical standards. This should include the setting of minimum qualification standards for those managing FP7 projects.* [EUROPEAN RESEARCH ADVISORY BOARD: Research Management in the European Research Area. Education, Communication and Exploitation (Final Report), 2007., p. 4.]

⁶⁶ *EURAB Research Management encourages the greater harmonisation of guidelines and practices across Europe regarding the ownership and exploitation of intellectual property arising from collaborative research.* [EUROPEAN RESEARCH ADVISORY BOARD: Research Management in the European Research Area. Education, Communication and Exploitation (Final Report), 2007., p. 5.]

⁶⁷ See for example: EUROPEAN COMMISSION: Management of intellectual property in publicly-funded research organisations: Towards European Guidelines (Expert group report), 2004.

⁶⁸ Commission Recommendation C(2008)1329 on the management of intellectual property in knowledge transfer activities and Code of Practice for universities and other public research organizations, p. 2.

http://ec.europa.eu/invest-in-research/pdf/ip_recommendation_en.pdf

management of intellectual property in knowledge transfer activities and Code of Practice for universities and other public research organisations". The Recommendation refers to Article 165 of the Treaty of Rome. The 11 specific recommendations of the Commission read as follows: (The Member States should)

„1. Ensure that all public research organisations define knowledge transfer as a strategic mission;

2. Encourage public research organisations to establish and publicise policies and procedures for the management of intellectual property in line with the Code of Practice set out in Annex I;

3. Support the development of knowledge transfer capacity and skills in public research organisations, as well as measures to raise the awareness and skills of students – in particular in the area of science and technology – regarding intellectual property, knowledge transfer and entrepreneurship;

4. Promote the broad dissemination of knowledge created with public funds, by taking steps to encourage open access to research results, while enabling, where appropriate, the related intellectual property to be protected;

5. Cooperate and take steps to improve the coherence of their respective ownership regimes as regards intellectual property rights in such a way as to facilitate crossborder collaborations and knowledge transfer in the field of research and development;

6. Use the principles outlined in this Recommendation as a basis for introducing or adapting national guidelines and legislation concerning the management of intellectual property and knowledge transfer by public research organisations, as well as for concluding agreements concerning research cooperation with third countries, or for any other measures to promote knowledge transfer, or when creating new related policies or funding schemes, while observing State aid rules;

7. Take steps to ensure the widest possible implementation of the Code of Practice, whether directly or through the rules laid down by national and regional research funding bodies;

8. Ensure equitable and fair treatment of participants from Member States and third countries in international research projects regarding the ownership of and access to intellectual property rights, to the mutual benefit of all partners involved;

9. Designate a national contact point, the tasks of which should include the coordination of measures regarding knowledge transfer between public research organisations and the private sector, including tackling trans-national issues, in liaison with similar contact points in other Member States;

10. Examine and make use of the best practices set out in Annex II, taking into account the national context;

11. Inform the Commission by 15 July 2010 and every two years thereafter of measures taken on the basis of this Recommendation, as well as their impact.”⁶⁹

Thus, the Recommendation formulates suggestions for the member states to foster the knowledge transfer processes becoming more efficient at state-funded research facilities.

⁶⁹ Commission Recommendation C(2008)1329 on the management of intellectual property in knowledge transfer activities and Code of Practice for universities and other public research organizations, pp. 3–4.

According to this, the member states support – among others – the adoption of IPR policies at the state-funded research facilities; foster the creation of technology transfer capacities and the enhancement of the IPR consciousness; establish national strategies and directives according to those stated in the recommendation and take steps for elaborating any necessary legislation; take steps to foster the widest possible application of the practical guide that is a part of the recommendation; establish national contact points that would coordinate the actions related to knowledge transfer. The Recommendation seeks to provide member states and their regions with policy guidelines for the development or updating of national guidelines and frameworks, and *public research organisations with a Code of Practice*, in order to improve the way public research organisations manage intellectual property and knowledge transfer.⁷⁰

Formulation of the principles in the regulation of research, development and innovation (RDI) activities performed with the other participants would foster the cooperation becoming more uniform and efficient both inside the member states and between countries. In questions related to IPR protection in the legislation of the member states and third countries there may be parts for which those stated in the Recommendation – serving as some kind of a common reference – could foster the *establishment of international collaborations* and more efficient operation. Accordingly, *it seems reasonable that the contents of the recommendation would be properly exercised by the governments of non-EU member states as well and the state-funded research facilities operating in these countries in their own practice.*

Annex Nr. I. of the Recommendation is a practical guide addressed to universities and other state-funded research institutions, grouping the principles to be implemented by the research institutes around three main topics: IPR protection, knowledge transfer and research collaboration and contract research. The principles for an internal IPR policy constitute the basic set of principles which public research organisations should implement in order to effectively manage the IPR resulting from their – own or collaborative – activities in the field of research and development. The *principles for a knowledge transfer policy* complement those relating to IP policy by focusing more specifically in the active transfer and exploitation of such intellectual property, regardless of whether or not it is protected by IP rights. The *principles for collaborative and contract research* are meant to concern all kinds of research activities conducted or funded jointly by a public research organisation and the private sector, including in particular collaborative research (where all parties carry out R&D tasks) and contract research (where R&D is contracted out to a public research organisation by a private company).

Among the most important aspects of the field of IPR protection are the following: *development of an IP policy* as part of the long-term strategy and mission of the public research organisation; *promotion of the identification, exploitation and where appropriate protection of intellectual property*, in line with the strategy and mission of the public research organisation and with a view to maximising socio-economic benefits; provision of *appropriate incentives* to ensure that all relevant staff play an active role in the implementation of the IP policy.

⁷⁰ Commission Recommendation C(2008)1329 on the management of intellectual property in knowledge transfer activities and Code of Practice for universities and other public research organizations, p. 3.

Related to the promotion of knowledge transfer the following must be ensured: consider all types of potential exploitation mechanisms (such as licensing or spin-off creation) and all potential exploitation partners (such as spin-offs or existing companies, other public research organisations, investors, or innovation support services or agencies), and select the most appropriate ones. Ensure that the public research organisation has access to professional knowledge transfer services including legal, financial, commercial as well as intellectual property protection and enforcement advisors, in addition to staff with technical background. Develop and publish a licensing policy, in order to harmonise practices within the public research organisation and ensure fairness in all deals. Develop and publish a policy for the creation of spin-offs. Establish clear principles on sharing financial returns from knowledge transfer revenues between the public research organisation, the department and the inventors.

As to the legal relationships for both research collaborations and for contract research, the following must be established: IP-related issues should be clarified at management level as early as possible in the research project, ideally before it starts. In a collaborative research project, ownership of the foreground should stay with the party that has generated it, but it can be allocated to the different parties on the basis of a contractual agreement concluded in advance, adequately reflecting the parties' respective interests, tasks and financial or other contributions to the project.

Annex Nr. II. of the Recommendation contains the summary of the best practices identified in the given topics. The application of these is to be considered by all – not exclusively EU-member – states. For example: the proper management of IPR resulting from public funding is promoted, requiring that it was carried out according to established principles taking into account the legitimate interests of industry (e.g. temporary confidentiality constraints). Where it is appropriate, a set of model contracts is to be made available, as well as a decision-making tool helping the most appropriate model contract to be selected, depending on a number of parameters. The pooling of resources between public research organisations at local or regional level is promoted where these do not have the critical mass of research spending to justify having their own knowledge transfer office or IPR manager. When signing international research collaboration agreements, the terms and conditions relating to projects funded under both countries' schemes provide all participants with similar rights, especially as regards to access to intellectual property rights and related use restrictions.

11. Summary

Probably the most significant factor of the competitiveness of the European Union is the national and community innovation. The increasing role of universities as knowledge producing institutions represented in national and community innovative systems is a fact, having been realised and recognised for a long time. Although the research and technical development has been included in the primary legal source of the EU by the Single European Act, *the role of the universities is not named in the primary legal source in the EU. The draft of the European Constitution already puts emphasis on the significance of the university research-development, however – comprehensibly – the regulation regarding the university IPR and its management is kept back at a secondary legal source level. From these the Regulation on the research framework programs and*

Recommendation No. C(2008)1329 are to be highlighted. The elaboration of the Recommendation No. C(2008)1329 was preceded by an almost half a decade long professional preparatory work. During this *the principles* to be applied in the field of university IPR management *were cleared* (2004, see: Chapter 4), *and the competitiveness-increasing role of the university academic activity was expressed, and besides that the desirable direction of the university-industrial collaborations were defined* (see: Chapter 5). Annex II of Recommendation No. C(2008)1329 at its end deals separately with the industrial collaborations and the research agreements. The aim of unifying law and legal practice, which emerges at several places in the working material is also to be put emphasis on (see: Chapters 7, 8. and 9). Recommendation No. C(2008)1329. in 11 sections and 2 Annexes sums up the principles concerning university IPR management. In our opinion the Recommendation is a *really considerable milestone in the management of universities in the innovation system of the EU.* It is important that the participation rules of research framework programmes and the Recommendation together *create a more unambiguous legal situation for the universities from the point of view of managing the European research sources.* The adaptation of the Recommendation by the nations will be expectedly accelerated by the report notice included in the subsection 11 of the Recommendation, but also by the fact that during the cooperation of the universities, the less innovative states will follow the practise of universities from states of greater innovation awareness.

MOLNÁR ISTVÁN

AZ EURÓPAI UNIÓ JOGI INTÉZKEDÉSEI AZ EGYETEMEK ÉS
KÖZFINANSZÍROZÁSÚ KUTATÓINTÉZETEK TUDÁS-
TRANSZFER TEVÉKENYSÉGEIBEN A SZELLEMI TULAJDON
MENEDZSELÉSÉRE VONATKOZÓAN

(Összefoglalás)

Az Európai Unió versenyképességének vitathatatlanul a legfontosabb tényezője a nemzeti és közösségi innováció. Az egyetemeknek mint tudástermelő intézményeknek a nemzeti és közösségi innovációs rendszerekben betöltött, növekvő szerepe régóta felismert és elismert tény. Bár a kutatás és műszaki fejlesztés az Egységes Európai Okmánnyal bekerült az EU elsődleges jogforrási szintű szabályozási körébe, *az egyetemek szerepe nem nevesül az EU jelenleg hatályos elsődleges jogforrásáan. Az Európai Alkotmány tervezete már kiemeli az egyetemi kutatás-fejlesztés fontosságát,* azonban – érthetően – az egyetemi szellemi tulajdonra és menedzselésére vonatkozó szabályozás másodlagos jogforrási szintre szorul. Ezek közül a *kutatási keretprogramok végrehajtási szabályait rendező bizottsági rendelet* és a *C(2008)1329. sz. bizottsági ajánlás* emelendő ki. A C(2008)1329. sz. bizottsági ajánlás megalkotását legalább fél évtizedes szakmai előkészítő munka előzte meg. Ennek során *tisztázták a szellemi tulajdon menedzsment területén alkalmazandó alapelveket* (2004), és *kifejezték az egyetemi tudományos tevékenység versenyképesség-növelő szerepét, emellett meghatározták az*

egyetemi-ipari kollaborációk kívánatos irányát. A C(2008)1329. sz. bizottsági ajánlás II. melléklete végül külön is foglalkozik az ipari kollaborációkkal és kutatási megállapodásokkal. Kiemelendő még a munkaanyagokban több helyen is fellelhető jog- és joggyakorlat-egységesítési célkitűzés. A C(2008)1329. sz. bizottsági ajánlás 11 pontban és 2 mellékletben foglalja össze az egyetemi szellemi tulajdon menedzselésével kapcsolatos alapelveket. Megítélésem szerint az ajánlás igen *jelentős jogi aktus az egyetemeknek az EU innovációs rendszerében való elhelyezésben.* Fontos, hogy a kutatási keretprogramok végrehajtási szabályai és az ajánlás együttesen *egyértelműbb jogi helyzetet teremtenek az egyetemek számára az európai kutatási források menedzselése szempontjából.* Az ajánlás nemzetek általi adaptálását vélhetően gyorsítani fogja az ajánlás 11. pontjában foglalt jelentéstétel, de az a körülmény is, hogy az ajánlással érintett egyetemek nemzetközi együttműködései során a kevésbé innovációtudatos államok egyetemei mint konzorciumi partnerek követni fogják az innovációtudatosabb államok egyetemeinek legjobb gyakorlatát.