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**Legal and Ethical Issues
Intermediate Report**

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1 Introduction

The results of the EU project FESTA¹ include the consideration of legal and ethical issues which need to be addressed during the preparation and the execution of a Field Operational Test (FOT). These considerations are predominantly based on the legal situation and the legal framework which is applicable for Germany. Consequently FOT studies carried out so far have identified a certain lack of precise information on the legal background in other EU Member States.

As already pointed out in the FESTA Handbook² carrying out an FOT gives rise to quite a variety of legal and ethical issues to be addressed such as obtaining necessary permissions, ensuring that vehicles are safe to operate in public road traffic, going through any required ethical and human subject review procedures, obtaining participants' consent, complying with data protection laws, insuring vehicles, insuring project workers for indemnity and so on. It was also emphasized that it is not possible to provide a comprehensive guide to all the legal issues that can arise in a particular FOT as these may be very dependent on the system(s) to be tested and on the study design adopted. Moreover, national regulations and laws may vary from country to country and even where there are laws and regulations on the European level (as for data protection and privacy or as for product liability) the interpretation of these may also vary between countries. The differences in laws and regulations between the countries were not addressed in the FESTA handbook – in fact, the findings there referred very much to the German legal situation based on the view of a German lawyer.

Nevertheless, national as well as international projects carrying out FOTs in more than one country or carrying out such FOTs which potentially involve cross-border traffic will have to consider the legal implications in all relevant countries. That is where FOTNet2 project's approach comes into play in this context – a legal questionnaire was developed considering any legal issue that might be thinkable in the context of an FOT: data privacy, criminal law, liabilities/insurance, ethical approval, special licenses, product liability and contractual agreements. The information necessary in this field is available only from legal experts in the respective EU Member States which were contacted within the framework of the FOTNet2 project via the organizational structure of a user association. That is why the aforementioned questionnaire was distributed via FIA to automobile clubs' legal experts from most of the EU Member States. Elaborate answers could be gathered from experts in France, Italy, the Netherlands and Spain. The information contained in this document is based on – and at the same time, of course, limited to – the input and the suggestions given by the experts of the:

- Spanish Clubs RACC (Real Automóvil Club de Cataluña) and RACE (Real Automóvil Club de España),
- Italian Automobile Club ACI (Automobile Club d'Italia),
- Dutch ANWB (Algemene Nederlandse Wielrijdersbond),
- French Automobile and Touring Club ACAFA (L'Automobile Club, Association Française des Automobilistes).

¹ Field Operational Test support Action, funded by the European Commission DG Information Society and Media in the 7th Framework Programme

² downloadable via the FESTA website: <http://www.its.leeds.ac.uk/festa/index.php>

The present document not only summarizes the answers gathered from the aforementioned experts, but also points out similarities as well as peculiarities of the different national laws so that it provides an overview of which legal issues need to be addressed in different EU Member States when testing within an FOT. On the other hand this document is not meant to replace a detailed legal analysis or legal advice concerning the execution of an FOT which should be sought with regard to each FOT site beforehand. Note must be taken that this document can only describe the legal framework as of the time it is being written – since also law is subject to a permanent and continuous development process involving new or revised legal acts or legal practice (case law) and permanently developing jurisdiction. In so far this document represents a “snapshot” of the legal situation existing in the middle of the year 2012.

2 Basic Groundwork: Legal Questionnaire

For a better and more comprehensive understanding of the legal issues addressed by the questionnaire developed within FOTNet2 its text is depicted in the following:

“Introduction

A Field Operational Test is “a study undertaken to evaluate a function, or functions, under normal operating conditions in environments typically encountered by the host vehicle(s) using quasi-experimental methods” [FESTA Handbook, 2008]. As far as the technical architecture of data logging equipment in the host vehicle is concerned, the Naturalistic Driving Study involves many elements already present in a Field Operational Test (FOT). Naturally the Naturalistic Driving Study is not meant to “evaluate a function” but focussed on naturalistic driving in public traffic. From a legal point of view on the relevant technical architecture, for a FOT a wider scope of legal issues needs to be covered than for a Naturalistic Driving Study. Naturally this will not exclude the relevance of specific issues.

The legally relevant technical architecture of the host vehicle will include data recording equipment tailored to the research hypothesis. This will usually (but not necessarily or exclusively) cover GPS-Data, video-recording and data on other interactions of the driver with the machine interface. Additionally, from a legal point of view, it must be taken into account that for the FOTs the functions evaluated might be prototype systems.

The corresponding legal issues for FOTs and Naturalistic Driving Studies (NDS) are cross-sectional in nature as this information is necessary to enable testing. The issues legally relevant for test execution (privacy, criminal law, liability, special licensing, ethical approval – if applicable) are still subject to national legislation and will differ to some degree between the EU Member States. The following questionnaire is tailored in order to compile these legal aspects as advice for researchers throughout the EU. The specific questions will allow for a standardised compilation on the aspects covered. [...]

I. Data privacy

1. Is video recording within the vehicle subject to a ban in terms of national data privacy law in your country?

- a. *If yes, which possibilities are there to authorise this video recording (is there possibly a “generally” applicable exception due to the research purpose behind a Field Operational Test (FOT) / Naturalistic Driving Study)?*
 - b. *What would be needed for a valid consent of the user participating in a FOT (e.g. declaration in written form)? Will other passengers in the car be required to consent to video data recording, too (in case they are affected)?*
 - c. *In case the other passengers in the car are children: Who will be required to consent to the video data recording (the collection of their personal data)?*
2. *Is video recording of the vehicle’s surroundings (i.e. video recording in open traffic) subject to a ban in terms of data privacy law in your country?*
- a. *Which possibilities are there to authorise this video recording by law (since obtaining the other road users’ consent is not realistic in this case)?*
 - b. *In case such video-recording cannot be authorised: Will very low camera resolution – no longer allowing to identify a person – still be subject to this ban?*
 - c. *Will a vehicle’s number plate / registration number be considered personal data under your countries’ data privacy law?*
3. *Would location-data recorded on the vehicle be subject to a ban due to privacy law, too? How can the recording be authorised? (please point to the answers in question No. 1, in case the same applies! – e.g. consent)*
4. *What about behavioural data recorded in the vehicle (speed, indicator-usage, etc.) – would this be considered subject to a ban by data-privacy law in your country, too? How can the recording be authorised? (please point to the answers in question No. 1, in case the same applies!)*
5. *What else can you think of that is relevant according to your country’s data privacy law?*

II. Criminal law

1. *In case of an accident, the data recording in the vehicle will potentially allow to retrieve video and / or behavioural data. Would it be possible for the police or any public prosecution authority (if so, which authority?, please name and provide contact data!) – in case of criminal prosecution – to confiscate this data?*
2. *Would it be possible for the test-management (research organisation) to hold back this data?*
3. *Would there be any consequences according to the principle of “nemo tenetur se ipsum accusare” (the ban of self-incrimination) in case this data would be used for a criminal lawsuit? Please consider consequences not only for the test-participant but also for FOT management. (It may be assumed that the test-participants have been informed in the test-user agreement that this is a possible consequence of test-participation.)*

III. Liabilities/ insurance

1. *Who will be held liable for damages occurring during the FOT, i.e. because of a traffic accident?*
2. *Who must insure the vehicle (third-party liability): is it the owner or the vehicle's registered keeper (the two are not necessarily identical)?*
3. *Is there a regime of strict liability for the use of a road vehicle in your country?*
 - a. *What are the elements of liability? (e.g. in Germany: vehicle operation and causal link of vehicle operation to the damage)*
 - b. *Are there any exceptions from liability? (e.g. in Germany: 'force majeure')*
 - c. *To whom is strict liability assigned? (e.g. in Germany: The "keeper", which is the person who comes up for the vehicles costs and has the economic benefit out of its operation)*
4. *Is the driver liable, too?*
 - a. *What are the elements of this liability?*
 - b. *Is this strict liability?*
 - c. *How is the relationship with liability of other parties (such as the keeper or the insurance) formed?*
5. *How is the insurance involved into the regime of liability? Is an immediate liability of the insurance in place (by law) or is the insurance only obligated by contract together with the driver or keeper, etc.?*
6. *Is there an automobile third-party insurance – compulsory by law?*
 - a. *Are there any exceptions from insurance coverage for damages (apart from gross negligence in case of drink-driving or obviously risky driving manoeuvres?)*
 - b. *Does the third-party insurance cover damages to the other passengers in the car causing the accident?*
 - c. *Will the third-party insurance also cover the risk of an injury of the driver / test-user or damage to his / her property?*
 - d. *Which insurance will cover these damages?*
7. *Is there usually an exclusion or limitation of liability in the respective insurance contracts in case the vehicle is used (also) for testing purposes?*
8. *What does the comprehensive coverage including collision insurance cover in your country? (Does this type of insurance cover any other damages than those to the vehicle itself?)*

- a. *Will this type of insurance also cover damages to retrofitted computers etc. (e.g. for data-collection in case of an FOT). Will this insurance also cover the risk of theft of these computers?*
 - b. *If no, which type of insurance would cover this risk? Please name or circumscribe.*
 - c. *Is there any common possibility to insure the risk of a personal injury to the driver (or the passengers, if not covered by the automobile third-party insurance)? Please name insurance or circumscribe.*
9. *Will these insurances cover the risk involved in case of test-vehicles in an FOT? (These vehicles might contain prototype systems that are not yet ready for marketing).*
- a. *What are the limiting issues?*
 - b. *How would you consider systems that only take indirect effect by informing / warning the driver?*

IV. Ethical approval

1. *Testing might involve naive subjects that are confronted with a challenging situation on a test-track. Would this be permissible in your country?*
 - a. *Would such a test-design need to be made subject to an ethical approval according to national law?*
 - b. *Please specify the legal background.*
 - c. *Please describe possibilities, limits and some details on the approval procedure.*
2. *Please name – or give a vivid example – of how the correct authority in terms of ethical approval can be determined in your country (If possible: Name, address, link over the internet, etc.).*
3. *Is there any kind of “ethical committee” in your country that needs to be applied to for the testing of systems in Road Traffic as would be the case in FOTs or NDS?*
 - a. *Is the application made mandatory?*
 - b. *At which stage of the FOT is this required?*
 - c. *Which level of information would have to be provided?*
 - d. *Can a negative result or recommendation of the ethical approval hinder the execution of the FOT, i.e. is the ethical recommendation binding in this respect?*
4. *If there potentially is a need for an ethical approval in your country in case of testing, please provide additional information on this committee (e.g. Address, homepage, application forms, procedure, etc.).*

V. Special licenses

1. *Will the vehicle-license be affected in case the car / vehicle is retrofitted with additional technical equipment for the FOT? (Explanation: Normally equipment for an FOT will at least require data-recording equipment which will depend mostly on the vehicle's power supply. Additionally, additional equipment (displays, buttons, etc.) might be fitted to the dashboard, etc. On top of this, some equipment might even need to be attached to the vehicles CAN-BUS, the vehicles "Controller Area Network" which links the different electronic control units in a vehicle to each other. The additionally fitted equipment would then be substantially engaged into the vehicles electronic architecture. Finally, even certain functions might be modified – such as additional speed limiting equipment, etc.)*
 - a. *To whom / to which organisation or administrative body would such a license have to be applied for?*
 - b. *Will there be any limitations to the right of "normal" drivers to drive a vehicle modified for a FOT? Is the driver required to have any special driver's license or would vehicle guidance be restricted to certain drivers only – e.g. test drivers of the vehicle manufacturer, etc.?*
 - c. *Is it possible to obtain a special license in terms of regulatory law (the national Road Traffic Code)?*
 - d. *How is this achieved and to whom would such a license have to be applied for?*
2. *In case the FOT covers so called Cooperative Systems, the transfer of information may rely on wifi-technology involving a radio-frequency presently under standardisation as 802.11p. The use of this radio frequency bandwidth for testing will therefore usually require an exceptional licensing according to national law.*
 - a. *What are the respective legal regulations concerning the use of radio frequencies in your country?*
 - b. *Where must this special license be applied for? (Organisation, contact details)? Which public authority is in charge of distributing radio frequencies?*

VI. Product liability

1. *What is the respective legal framework concerning product liability claims against the vehicle manufacturer in your country?*
2. *Will a prototype – vehicle that is left to naive subjects – be considered a product in the sense of your product liability law? Have such requirements developed according to national jurisdiction?*
3. *Which additional risks will a vehicle manufacturer or supplier face in case a prototype system is being tested within a FOT? Can this lead to an increased risk of product liability according to your national product liability act or respectively to tort liability for product defects?*
4. *Are any specific regulations in place as far as instructing the user of a product is concerned?*

5. *Are there any specific requirements for the testing of prototype systems (apart from the rather general requirement following from product liability to instruct carefully on the system's limits and features)?*

VII. Contractual agreements

1. *In general, in contracts, arrangements can be made freely. Which limitations are in place according to your national law and jurisdiction? (e.g. according to the General Terms and Conditions Act in your country, etc.!)*
2. *Is it possible for the test participants to consent to a full exclusion of liability or is full exclusion of the liability risk limited to property damages only?*
3. *Which other relevant aspects – apart from the specific issues already addressed above – need to be dealt with in the contractual agreement according to your knowledge on national law and jurisdiction for FOT's and NDS?*

VIII. Open Question

Apart from the issues already covered by your answers given above, are there any further issues that need to be taken into consideration in your country? Please describe.”

Based on the answers to the questionnaire gathered from the legal experts of the automobile clubs in different EU countries the following legal findings have been compiled. This compilation and analysis allows for a broad overview of the legal framework relevant for FOTs in France, Italy, the Netherlands and Spain. The legal framework in Germany was already taken into account for the analysis of the legal issues in the FESTA handbook. Conclusions on which legal issues are likely to be similar throughout the EU can be drawn from the findings in the FESTA handbook combined with the results of the survey carried out using the questionnaire detailed above. This will allow for a more precise pre-evaluation of the legal issues which have to be addressed at any stage of an FOT (design, preparation, execution, wrap-up). On the other hand, the present document cannot replace a detailed legal analysis to be carried out by a lawyer who studied the law of the country where the respective test site is located. Nevertheless, this document contributes to a better understanding of which legal issues will need to be addressed when preparing and executing an FOT in different EU Member States.

3 Data Privacy

Video recording within the vehicle as well as video recording of the vehicle's surroundings (i.e. video recording in open traffic) is subject to the different national privacy laws taken into account within the FOTNet2 project.

3.1 Spain

Generally, Spanish privacy law bans the collection of personal data via video recording. This kind of data collection is included in the definition of personal data laid down in the Spanish Act on Data Protection (*Ley Orgánica 15/1999, de 13 de diciembre, de Protección de Datos de Carácter Personal*). Therefore the Spanish Automobile Club's (RACC) answer to the legal

questionnaire points out the following main legal obligations of those aiming at collecting personal data:

- I. Information: the data collector shall inform about which data is collected and processed, as well as about the policies or purposes of the treatment.
- II. Consent: the data collector shall obtain the consent of the individual to the collection and processing of his or her personal data, as well as to any prospective communication of data to third parties.
- III. Rights: the data collector shall inform the individuals about their rights to access to data files, and to amend or cancel its content.
- IV. Technical Protection Measures: the data collector shall devise the necessary technical protection to avoid that the personal data can be accessed by third parties.
- V. Registry: the data collector shall inform the Spanish Agency on Data Protection (Agencia Española de Protección de Datos) about the kinds of data collected and the purposes of their processing.

According to Spanish law, consent would be needed to authorize video recording within the car. The Spanish Act on Data Protection establishes two exceptions for statistical or scientific purpose which do not seem to apply to a FOT:

- I. Section 11.2.e) provides a safe-harbour for data collectors: it is not necessary to obtain the individual's consent in cases in which the data collector is a public authority and communicates the collected data to another public authority for statistical or scientific reasons.
- II. Section 4.2 provides another safe-harbour for data collectors: data processing must be developed according to the policies or purposes that have been explained to the individual. However, it is possible to analyze the data afterwards for statistical and scientific purposes regardless of whether the individual has been informed about such purposes.

Considerable parts of the following passages referring to Spanish law were implemented directly from the RACC's answer into the present document since they are very condensed on the one hand and very comprehensive on the other hand so that it did not seem to generate any additional value to shorten or rearrange these passages (this also applies to the following chapters): According to section 6.1 of the Spanish Act on Data Protection, any data processing would require the unequivocal consent of the individual, unless another section establishes otherwise. Consent is defined in Spanish regulations as "any sign of an individual by which it may be inferred that willingly, specifically and with sufficient information he/she agreed to the data processing" (section 5.1.d). A declaration in written form is not necessary in each case, although it may be advisable. According to section 14 of the regulations, an opting-out system is available: if the data processor provides comprehensive information about the purposes of the data processing, provides a free and user-friendly tool for opting out the data processing, and the individual does not disagree with the data processing within 30 days, it is assumed that he/she has consented to the data processing. As for other passengers in the vehicle, consent to the video data recording would also be needed. Either asking for a written consent or using the opt-out mechanism would be possible. Section 13 of the Regulations sets out the rules concerning consent for children data processing. Minors aged 14 years old or older (up to 18 years) may directly agree to the data processing, unless a specific rule provides that consent may be obtained from the

child's legal representative or custodian. Information addressed to a minor about the purposes of the data processing shall be easily understandable. In case of processing data related to younger minors, consent shall be obtained from parents or guardians. Concerning the recording of the vehicle's surroundings there is no legal exception for similar cases in Spanish privacy law, so that one may resort to the aforementioned opting-out system. However, it must be taken into account that in such cases, the data processor shall provide the individual with a user-friendly tool for opting out the data processing. This latter requirement may become also unrealistic. An alternative solution is to avoid any kind of data processing by using a very low camera resolution – inasmuch as low camera resolution is used and identification of third parties becomes impossible or unreasonably costly no data privacy obligations would be involved in the FOT or NDS. It must be acknowledged that consent is not required in cases in which information or data is publicly available and its processing is deemed necessary for the purposes stated by the data processor. It may be interpreted that the organizer of an FOT or NDS processes data from drivers and passengers for scientific purposes but, in doing so, some ancillary public data is necessarily recorded and processed as well (because it is being recorded in an open space). Nonetheless, as far as can be seen, there is no Spanish case-law holding such interpretation. A vehicle's number plate / registration number would be considered personal data under Spanish privacy law, because it may indirectly be used to identify one individual or to connect him/her to other data. Spanish data privacy law only applies to the data of individuals, but not to data of companies, associations or other legal entities. Therefore, number plates / registration numbers of vehicles not owned by individuals would not be controlled by the Spanish data privacy law. Inasmuch as location data or behavioural data (speed, indicator-usage etc.) of a vehicle may be linked to a specific individual (driver or passengers), processing would be banned. Moreover, it should be taken into account that processing of data by third parties on behalf of the data collector as well as communication of personal data to third parties would require separate consent. It is important to take into account further restrictions regarding the international transfer of personal data.

3.2 Italy

With regard to Italian law it seems generally difficult to video record within a vehicle in public road traffic, on the other hand, it seems that exceptions are possible in bounded private test areas. With regard to Italian proprietary law all activities taking place in private areas have to be authorized by the owner of these areas – the inside of a car seems to be comparable to the inside of a house in that respect according to Italian proprietary law. Activities taking place in public areas, such as video recording, must be authorized (and can only be authorized for public reasons) by the public authority in charge of protection of these areas. Of course, the public authority has to respect absolute individual rights and privacy rules since each public power serves the public interest which is in charge of. In respect of Italian personal rights, the authorization of the recorded individual has to be obtained, nevertheless this right might be constrained in cases of prior public interest such as possibly road-safety. However, in Italy this kind of public priority does not exist at the moment. Moreover, with regard to video recording, Italian law requires obtaining the written consent of the users participating in an FOT (whether driver or passenger [as far as affected] in the FOT-car). Where passengers in the car are children, the consent has to be obtained from the person(s) who exercise(s) the parental authority. As far as a video record contains persons or personal data, the recording of the vehicle's surroundings (i.e. in open traffic) is subject to a ban in terms of Italian data privacy law. With regard to Italian law, data subjects should be informed that they are going to access or find themselves in an area under video surveillance

(according to the Italian video surveillance guidelines issued by the Italian Data Protection Authority 8th April 2010). The ban mentioned before is not applicable where very low camera resolution is chosen for video recording since Italian data privacy law is applied only in cases of personal data and when it is possible to identify a person. A vehicle's number plate / registration number is considered as personal data in terms of Italian law. Location data and behavioural data (speed, indicator-usage etc.) are subject to a ban in terms of Italian data privacy law. Nevertheless, behavioural data recorded in the vehicle would presumably not be considered to be subject to this ban if those data are not traceable to a specific person but used only for statistical purposes. In general, it is possible to use data as far as they are not related to a specific person and used only for statistical purposes.

3.3 Netherlands

In general, with regard to Dutch law only anonymous data should be collected. Provided that participants have given their consent, data should only be used for the purpose for which they have been collected and not retained longer than is necessary. In the Netherlands it is possible to authorize video recording within the car depending on various conditions such as what can be seen on the video and if the filmed person has given his/her approval. Dutch law requires consent to video recording to be obtained from any person inside the car (whether driver or passenger [as far as affected]). Consent must be clear, though it is not obligatory that it be in written form. As far as children as passengers in the car are concerned, the consent has to be obtained from their legal representatives. The Dutch automobile club ANWB advises to consult the Dutch *Data Protection Authority* (www.dutchdpa.nl) for more information in terms of data privacy. Video recording of the vehicle's surroundings is subject to a ban in terms of data privacy law in the Netherlands if the recording makes other persons identifiable. So it is recommended that other road users should be unidentifiable. Registration plates can be qualified as personal data in terms of Dutch privacy law. The recording of location data and behavioural data (speed, indicator-usage etc.) is also subject to a ban due to Dutch data privacy law – nevertheless the same possibilities to authorize this recording are applicable as for video data. Such recording which does not allow to identify a person (e.g. due to a very low camera resolution) is not subject to the aforementioned ban. Moreover, in the Netherlands a code of conduct for scientific research has to be accounted for also in terms of data privacy.

3.4 France

In France, video recording is subject to a ban in terms of national privacy law as far as it is not a private video recording. It depends on the purpose of the recording of personal data as to whether an authorization or simply a declaration is needed in order to authorize this video recording. The French automobile club ACAFA advises to approach the *CNIL (Commission Nationale de l'Informatique et des Libertés, www.cnil.fr)* for further information on that point. With regard to users participating in an FOT, French law requires written authorization to be obtained for all passengers in the car who are affected by the video data recording. Moreover, they have to be informed on the data's purpose, what kind of data are collected, the duration for which the collected data may be stored and the persons who have access to data recording. The users participating have to be informed on their rights of access, of rectification and of opposition as well as on the procedure of exercising these rights. If the other passengers in the FOT-car are children, the authorization of the persons having the parental authority is required. Video recording of the vehicle's surroundings is subject to a ban in terms of French data privacy law. This kind of video recording could be authorized by making the recorded persons unidentifiable (e.g. by blurring out other road users' faces or

using a very low camera resolution). A vehicle's number plate / registration number is considered as personal data according to French law. With regard to the recording of location data and behavioural data in France, the same applies as for the recording of video data (see above). Moreover, security and confidentiality of the data have to be preserved as well as private life and the protection of personal data has to be respected.

3.5 Summary concerning Data Privacy

In summary, all of the four countries' legal systems considered in the FOTNet2 project impose a general ban on video data recording, location data and behavioural data (speed, indicator-usage etc.) Recorded data which refers to an individual person is classed as personal data. However, video data as well as location data and behavioural data may be recorded legally for the purposes of an FOT by adhering to certain procedures detailed above for the four EU Member States considered herein. The following similarities can be deduced (exceptions in brackets):

- The recording of video data within the vehicle requires the consent of every passenger in the car – including the driver, of course. In case of minors respectively children the parents' / legal representatives' consent has to be obtained (in case of 14-year-old and older minors in Spain only in some cases obligatory). The requirements concerning the consent differ (Netherlands and Spain: clear / unequivocal consent, France and Italy: written consent) – in favour of the burden of proof of having obtained the required consents it is advisable to obtain the consent in written form.
- As far as the vehicle's surroundings are subject to video recording it has to be made certain that other road users are not identifiable – e.g. by using a very low camera resolution.
- A car's registration number / number plate has to be considered as personal data (for Spain this does not refer to company-owned cars) in terms of data privacy law.

However, there are certain national exceptions which have to be accounted for: In Italy for example, activities taking place in public areas – such as video recording – must be authorized (and can only be authorized for public reasons) by the public authority in charge of protecting these areas.

4 Criminal Law

Criminal law may also play a certain role in the context of FOTs in the case of traffic accidents, the data recording in the vehicle will potentially allow the retrieval of video and/or behavioural data (e.g. for the police or for another public prosecution authority).

4.1 Spain

In Spain, in case of a crime investigation, certain public authorities can access the data recording and even confiscate the data in some cases. Depending on the stage of the crime investigation, public authorities entitled to access the data may include a judge ("*Juez Instructor*"), a public attorney ("*Ministerio Fiscal*") or the judicial police ("*Policía Judicial*"). Judicial police may confiscate any object related to a crime scene (section 4 of the Regulation on the Judicial Police (*Real Decreto 769/1987, de 19 de junio, sobre regulación de la Policía Judicial*)). In cases of traffic accidents in which a crime may have been committed, the judicial police is entitled to confiscate a vehicle and any object or system inside the vehicle. Data and elements confiscated by the Judicial Police would not be regarded as evidence in further criminal proceedings but may be used as signs or

circumstantial evidence if confirmed by other pieces of evidence. Confiscation of data in the facilities of the organizer of the FOT or NDS would generally require judicial authorization or consent by the organizer (sections 573 to 578 of the Criminal Procedure Act (*Ley de Enjuiciamiento Criminal*). Any person may be required to show objects or papers which are suspected to be related to a crime (section 575 of the Criminal Procedure Act). If the individual refuses to show the information or the devices in which the information is stored he/she may be criminally prosecuted for disobedience to authority (section 556 of the Criminal Code), unless the individual was the author of the crime, a receiver (“receptador”, sections 298 to 304 of the Criminal Code) or an accessory after the fact (“encubridor”, sections 451 to 454 of the Criminal Code). In such cases, the individual is protected by the fundamental right to not self-incriminate or provide evidence incriminating her (article 24.2 of the Spanish Constitution). If data was obtained during the investigation of a crime by the judicial police, it cannot be used as evidence of a crime; it can only be used as circumstantial evidence. It could be used to initiate criminal proceedings either against the test-participant or the test manager/s. On the other hand, data legally obtained with judicial authorization and compliance with all legal requisites may be used as evidence in criminal proceedings.

4.2 Italy

In Italy it is also possible to retrieve and confiscate this data by the police and judiciary. The test-management (research organization) can get the confiscated data back after the conclusion of the police investigation respectively, in case of prosecution, after the judgment.

4.3 Netherlands

In general, in the Netherlands the police or other authorities have the corresponding power of investigation to confiscate the video and/or behavioural data collected during the FOT in case of criminal prosecution. For information on whether or not data can be used by the prosecution authorities and/or the police the Dutch automobile club ANWB advises to contact the Public Prosecution Service (*Wetenschappelijk Bureau van het Openbaar Ministerie, Lange Voorhout 7, 2514 EA 's-Gravenhage telefoon +31 - (0)70 - 7569200 fax +31 - (0)70 - 3611469*). In general, it is not possible for the test-management (research organization) to hold back this data unless the authorities request it in a disproportional way. In the Netherlands, little impact is assumed to result from the “*nemo tenetur se ipsum accusare*” principle (ban of self-incrimination) in this context since the recorder and the recorded data do not belong to the person accused.

4.4 France

According to French law it is possible for the police or another public prosecution authority to confiscate this data in some cases. The test-management (research organization) is not entitled to hold back this data but it can be returned after the investigation or the judgment. Generally, there is a right of silence. The test-management is not liable for the test-participant. It can be emphasized in a formal agreement that the test-management is not liable for offences committed by test-participants.

4.5 Summary concerning Criminal Law

As a result it can be stated that all of the legal systems considered within the FOTNet2 project show the similarity that the police or another public prosecution authority are authorized to confiscate the data recorded during an FOT in case of an accident.

5 Liabilities/Insurance

Liabilities relating to insurance issues have also to be taken into account in the field of FOTs, of course. The first question which arises in this context is who is to be held liable in the case of a damage occurring during an FOT, i.e. resulting from a traffic accident?

5.1 Spain

In Spain, liability in this context may depend on a variety of factors including, but not limited to, the kind of damage, the origin of damage, the characteristics of victims and behaviour of the individuals involved in the causation of damage. For instance, if the damage was caused or aggravated by a defective product (e.g. airbags, seatbelts) product liability rules may be applied. If causation may be established between damage and the FOT arrangements, general civil liability would be applied. In this regard, depending on whether the victim was in a contractual relationship with the FOT organizer (e.g. the driver) or not (e.g. other passengers), liability for breach of contract or tort liability (extra-contractual liability) may be applied. Besides, criminal liability may arise in some scenarios. For example, in cases in which the traffic accident was caused by an individual driving under the influence of drugs or alcohol or driving with reckless disregard for driving safety rules, the Spanish Criminal Code (*Ley Orgánica 10/1995, de 23 de noviembre del Código Penal*) may be enforced. Sections 109 to 122 of the Spanish Criminal Code govern civil liability arising from a crime. There are some differences with the general civil liability regime. To avoid complexities posed by the heterogeneity of damages that may arise in a FOT or NDS, the following considerations concerning Spanish law will focus on damages caused in a traffic accident in which none of the individuals involved committed a crime. According to section 2.1 of the Spanish *Act on Civil Liability and Insurance in the area of Vehicle Driving (Texto refundido de la Ley sobre responsabilidad civil y seguro en la circulación de vehículos a motor, aprobado por el Real Decreto Legislativo 8/2004, de 29 de octubre)* the owner must purchase a third-party liability insurance, at least covering the minimum thresholds established in the Act. However, the owner may be relieved from this obligation if the insurance is purchased by any person having an interest in insuring third-party liability, for instance, the vehicle's user or registered keeper. According to section 4 of the Regulation developing the former Act (*Real Decreto 1507/2008, de 12 de septiembre, por el que se aprueba el Reglamento del seguro obligatorio de responsabilidad civil en la circulación de vehículos a motor*), it is presumed that the owner of a vehicle is the person who registered the vehicle. The Spanish *Act on Civil Liability and Insurance in the field of Vehicle Driving* establishes a dual liability system. On the one hand, a strict liability rule governs personal injuries. On the other hand, a negligence liability rule governs damages to property. In the case of personal injuries, drivers are held strictly liable for the damages arising from a traffic accident. Vehicle operation and causal link of vehicle operation to the damage are generally required as elements of liability. The rules set forth in the Spanish *Act on Civil Liability and Insurance in the area of Vehicle Driving* govern liability for damages arising from vehicle operation ("hecho de la circulación"). Vehicle operation is defined in section 2 of the *Regulation on Civil Liability and Insurance in the area of Vehicle Driving* as "risk-generating events created by vehicle driving activities in parking lots, garages, public or private roads or other traffic facilities and commonly used pathways". Vehicle operation in terms of Spanish law does not include:

- I. accidents in sports and competitions using vehicles.
- II. accidents in the use of vehicles in agricultural or industrial tasks (this exception does not include accidents arising from driving such vehicles in public roads).

III. accidents in facilities not included in the aforementioned provision (e.g. harbours, airports).

IV. use of a vehicle to commit a crime.

Liability arising from accidents in which vehicle operation is not established would be governed by other liability rules (Civil Code, Criminal Code and specific regulations).

Two exceptions from liability are legally established:

I. The defendant may prove that the injury was exclusively caused by the negligence or behaviour of the victim ("*culpa exclusiva de la víctima*").

II. Force majeure. A defect in the vehicle or in one of its components and the breakage or failure of one of its devices are not considered as force majeure events.

The contributory negligence of the victim (comparative negligence, "*concurrència de culpas*") may be assessed to reduce the amount of damages both for personal injuries and damages to property.

Liability is primarily assigned to the driver but the owner of the vehicle can also be held liable in some cases.

As mentioned before, the Spanish *Act on Civil Liability and Insurance in the field of Vehicle Driving* establishes a dual liability system (section 1). On the one hand, a strict liability rule governs personal injuries. On the other hand, a negligence liability rule governs damages to property. Owners of a vehicle (different from drivers) may be held liable for personal injuries and damages to property caused by a driver if the owner and the driver are in one of the specific relationships established in section 1903 of the Civil Code or section 120.5 of the Criminal Code. In this regard, owners of vehicles may be held liable for traffic accidents caused by its employees acting under the scope of the employment. Also, a parental relationship or a legal custodian relationship may be used to hold owners of vehicles liable for damages caused by respectively a minor driver or an adult unable to manage his/her own affairs. In case of a crime or misdemeanour committed in a traffic accident, owners of vehicles may be held liable for damages caused by its employees, representatives or any other authorized users. Owner's liability shall cease when the owner can prove that he/she used the diligence of a prudent person to prevent the damage. However, in case the owner failed to purchase third-party liability insurance, he/she would be held jointly liable with the driver for the damages and injuries arising from a traffic accident, unless he/she can show that the vehicle had been stolen.

Section 6 of the Act establishes the immediate and direct insurer's liability ("*acción directa*"). Therefore, a victim's claim may be brought against the insurer, notwithstanding the possibility that the insurer would bring a further claim for reimbursement against the insured owner, the driver or a third party.

The insurer may not raise the following objections against the claimant victim:

- I. The existence of particular coverage exclusion not established by law.
- II. The fact that the driver had not a valid driving license.
- III. The fact that the insurance purchaser or driver failed to comply with specific technical regulations regarding safety.
- IV. The fact that the use of the vehicle was not authorized by the insured, except when the vehicle had been stolen.
- V. The fact that a contractual exclusion was agreed according to which insurance would not be valid in cases in which the driver had a traffic accident under the influence of alcohol or drugs.

VI. The existence of a coverage exemption in the insurance contract.

Damages exceeding the amount covered by the compulsory third-party insurance or not covered by the insurance shall be defrayed by the tortfeasor (generally the driver, but other individuals may be also held liable) or through additional voluntary insurance.

The owner of a vehicle must purchase third-party liability insurance, at least covering the minimum thresholds established in section 4.2 of the Act. Compulsory third-party insurance would provide compensation for the following maximum amounts: death and personal injuries – up to € 70 million for each accident (irrespective of the number of victims); damages to property: up to € 15 million for each accident. Compensation for death and personal injuries is fixed according to a system of caps and schedules (“baremos”). The rules governing such compensation are set forth in the Appendix to the Act.

Some damages are exempted from compulsory insurance coverage (section 5): driver’s death; personal injuries suffered by the driver; damages to the vehicle or other goods inside the vehicle; damages to goods owned by the vehicle owner, the driver or the insured person, as well as by their spouses and other relatives; any damage arising from an accident caused by a vehicle which has been robbed. The concept of robbery (“*robo*”) – as opposed to theft (“*hurto*”) – is established in section 237 of the Criminal Code. In such cases, damages to third parties are compensated through a public compensation fund (Consortio de Compensación de Seguros).

Nevertheless, voluntary first-party insurance may be purchased to cover personal injuries or death to the driver, as well as to cover damages to his/her property, including damages to the vehicle. It should be pointed out that insurance contracts can include an exclusion or limitation of liability in case the vehicle is used for testing purposes. First-party insurance is informally known as “*seguro de accidentes*”.

Comprehensive coverage insurances are not generally regulated in Spain and their content may vary from one insurance company to another. Besides, insurance companies may offer different comprehensive coverage insurance products. Comprehensive coverage insurance is informally known as “*seguros de daños*” and is usually combined with other insurance products. The combination of first-party insurance and comprehensive coverage insurance is informally known as “*seguro a todo riesgo*”. Comprehensive coverage insurance usually includes damages to the vehicle caused in a traffic accident not covered by someone else’s third-party insurance, and damages to the vehicle arising from, but not limited to, fires, vandalism, storms, floods or other acts of God. Other possible coverage may include damages to windshields or damages arising from car robbery or theft. Comprehensive coverage insurances usually include damages to the goods inside a vehicle and to its components. That is why insurance premiums usually include a deductible (exempted threshold for damages to property) in order to avoid moral hazard phenomena. Some comprehensive coverage insurance may include losses by theft of goods stored in a vehicle. In this case an exempted threshold would usually apply.

In Spain, voluntary insurance policies may cover the risks involved in case of test-vehicles in an FOT. However, in most cases it might be advisable for the organizer of an FOT to purchase additional insurance coverage to insure eventual damage arising from the uses of prototype systems in vehicles.

5.2 Italy

In Italy, according to Art. 2054 of the Italian Civil Code, the driver is liable for damage occurring on public roads. The vehicle's owner, who at the same time has to be the vehicle's registered keeper in Italy, is jointly and severally liable with the driver. There is a regime of strict liability, assigned to the vehicle's owner, for the use of a road vehicle in Italy the elements of which are vehicle operation, causal link of vehicle operation to the damage and a damage resulting on road areas – public or private (only if it is open for public circulation/traffic). Exceptions from liability can be found in Art. 141 of the Italian Code of Private Insurance: "Except in case of fortuitous event, the damage suffered by third transported shall be compensated by the insurance on the vehicle". Moreover there are contractual terms that exclude coverage of risk and therefore the compensation in the event of a claim (driver under influence of alcohol or drugs or driving without license). Given these limitations, the insurance company is still forced to liquidate any damage, but the insurance has the right of a claim against the contractor, i.e. to ask the total or partial refund.

The driver's liability includes elements of third-party liability and contractual liability. For the owner this is a strict liability. The owner is obliged to insure against liability towards third parties (third-party liability) by making a contract with an insurance company (contractual liability). The insurance is immediately involved by law; in case of an absence of insurance, the liability is personal. Italian law stipulates an automobile third-party insurance including an immediate liability of the insurance company. Third-party insurance covers the risk of an injury of the driver/test-user or damage to his/her property only as far as it is included in the specific insurance policy. For the direct compensation procedure (*d.lgs.n.209- 07.09.2005*, entered into force as from 01/27/2007) the driver's insurance will cover the damage suffered by the insured only in case of his total reason or part of reason. The driver's insurance will cover the risk when the injury of the driver does not exceed 9% of permanent disability. It will also cover the damage to the driver's property. Direct compensation can be applied for in the following cases: actors must be identified with the amicable accident report; the accident must not have involved more than two motor vehicles; vehicles must have been registered in Italy or in the Republic of San Marino or the Vatican State (must have an Italian license plate); drivers must also accept a policy of insurance with a company authorized to practice in Italy or with a foreign company which has acceded to the procedure of direct compensation. Regarding serious injury, the risk is covered by the insurance company of the vehicle responsible for the accident. There usually is no exclusion or limitation of liability in the respective insurance contracts in case the vehicle is used (also) for testing purposes because the insurance is compulsory by law and only for the use permitted by law (Highway Code and Criminal Code).

Concerning comprehensive coverage including collision insurance there are several types of insurance policies which usually cover damages to the car and property carried therein only if it is owned by the car's owner or driver. This type of insurance includes the coverage of damages to or the theft of test equipment (e.g. retrofitted computers for data-collection in case of an FOT) as far as it is included in the respective insurance contract. In how far the risk of a personal injury to the driver (or the passengers, as far as not covered by the automobile third-party insurance) is covered, depends on the specific provisions of the insurance contract signed by the FOT management concerning the test program.

5.3 Netherlands

In general, in the Netherlands the person/car who/that causes the accident is responsible. But this may be different if the cause of the accident lies in the FOT, e.g. if it overrides the driver's will/intention. The person in whose name the car is registered must insure the vehicle (third-party liability). There is a regime of strict liability for the use of a road vehicle in the Netherlands only in case of traffic accidents between motor vehicles and pedestrians/cyclists (non-motorised traffic participants). The elements of liability are a wrongful act for which the wrongdoer is culpable and for which he can be held accountable and a causal link between the wrongful act and the damage. There are no exceptions from this liability in the Netherlands. Strict liability is assigned to the driver in the Netherlands – it requires a wrongful act for which a person is legally responsible – regardless of personal fault.

The victim has the right to claim his damages directly from the insurer of the responsible party (immediate liability). Third-party motorinsurance is compulsory in the Netherlands (*Wet aansprakelijkheidsverzekering motorrijtuigen – WAM*).

There are no exceptions in the third-party insurance coverage for damages. However the victim can have his/her claim for damages denied if he/she has contributed to his/her damages, for instance if he/she has not used the seatbelt and if this has aggravated the injuries in comparison to having used the seatbelt. The third-party insurance also covers damages to the other passengers in the car causing the accident provided the driver can be held liable. This insurance will not cover the risk of an injury of the driver/test-user or damage to his/her property but a comprehensive motor insurance will cover the damage to his car it will also cover other damages than those to the vehicle itself. The answer to the question of whether there is an exclusion or limitation of liability in the respective insurance contracts in case the vehicle is used (also) for testing purposes depends on the motor insurance policy. It might be that equipment necessary for data collection in case of an FOT is not insured under a comprehensive motor insurance – this also depends on the insurance policy but in general the risk of theft is covered by a comprehensive motor insurance. A first-party motor vehicle insurance and/or the insurance that covers the risk of personal injury of car occupants is a common possibility to insure the risk of a personal injury to the driver or the passengers. The answer to the question of whether these insurances cover the risk involved in case of test-vehicles in an FOT (since these vehicles might contain prototype systems that are not yet ready for marketing) depends on the respective insurance policy – it might be a limiting issue that a test-vehicle is involved.

5.4 France

In France the policy holder is liable when damages are caused by his/her vehicle. It can either be the driver who is liable for damages which he/she causes personally if no insurance plays a part in the compensation of the damages. If the driver is not the policy holder, he/she can be liable for his/her acts for damages in case of insurance failing. With regard to penal law the driver is liable for his/her acts anyway, if he/she has committed a traffic offence. It is either the vehicle's registered keeper or the owner who has to insure the vehicle in France. There is a regime of strict liability for the use of a road vehicle in France which can be found in Art. 1382 of the Civil Code which indicates that a person who causes damage to someone has to repair his/her fault (*"Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer."*). Moreover there is a specific law (*Loi n° 85-677 du 5 juillet 1985 tendant à l'amélioration de la situation des victimes d'accidents de la circulation et à l'accélération des procédures d'indemnisation*) which

manages the traffic accident to ensure compensation for victims of road. The elements of (the driver's as well as the policy holder's) liability are a damage, an event giving rise to the damage (cause) and a causal link between these two elements. There are exceptions from liability in case of force majeure, fault of the victim and exterior causes. In case of the driver it is necessary to prove his liability of driver – in case of an accident including a pedestrian it is a strict liability except in cases of fault of the victim. In case of an accident it is the policy holder who makes an accident claim to his insurance with all necessary elements (name of the opposite side, his insurance, witness). The insurance intervenes when there is an accident claim. Furthermore, in France there is an automobile third-party insurance which is compulsory by law (Art. L211-1 of the Insurance Code) and which also covers damages to the other passengers in the car causing the accident. Exceptions from insurance coverage for damages are (apart from gross negligence in case of drink-driving or obviously risky driving manoeuvres): false declaration, according to contract options, racing (sport competition). Third-party insurance will not cover the risk of an injury of the driver/test-user or damage to his/her property if the driver is liable for the accident. In case the driver is not liable for the accident the third-party insurance will cover these risks because it is the opposite side who will assume damage. There is no specific exclusion or limitation of liability in the respective insurance contracts in case the vehicle is (also) used for testing purposes but the insurance has to be informed because this could modify the guarantees – this will depend on the insurance contract.

In France the comprehensive insurance covers damages caused by the driver to other vehicles or to persons or objects – depending on the insurance contract. Retrofitted computers in the FOT vehicles can be included in such an insurance contract. The risk of personal injury to the driver or the passengers can be included in the insurance contract too: In cases where the driver or the passengers are victims they can be compensated; in cases where the driver is responsible this will depend on the specific insurance contract. Moreover, in France there is a guarantee fund which can compensate victims in certain conditions. It may be negotiable with the insurance company, with particular limitation (depending on the insurance contract), to cover the risk involved in case of FOT vehicles containing prototype systems. Systems taking only indirect effect by informing/warning the driver do not affect the insurance coverage.

5.5 Summary concerning Liabilities/Insurance

For a better view on the results concerning the answers to the questionnaire's liabilities/insurance-related issues please find the summary in the following table:

Liabilities / Insurance	Spain	Italy	France	Netherlands
Responsible for insuring the vehicle (third-party liability)	Owner (may be relieved from this obligation in case the user or the keeper [anyone having an interest in insuring third-party liability] purchases the insurance)	Owner must necessarily be vehicle's registered keeper	Owner or vehicle's registered keeper	Vehicle's registered keeper
Strict Liability	Strict liability governs personal injuries; negligence liability governs damages to property; in case of personal injuries the driver is strictly liable	yes (for the owner)	yes (for the insurance policy holder); also for the driver in case of accidents involving pedestrians except it is the victim's fault	for the driver - only in case of accidents between motor vehicles and pedestrians / cyclists (non-motorised traffic participants)
Elements of Liability	Vehicle operation + causal link of vehicle operation to damage + damage	Vehicle operation + causal link of vehicle operation to damage + damage	Damage + event giving rise to the damage + causal link between these two elements	Wrongful act which the wrongdoer is culpable and can be held accountable for, causal link between wrongful act and damage
Exceptions of Liability	"culpa exclusiva de la victima" or Force Majeure; contributory negligence of the victim may reduce liability	Art. 141 Code of Private Insurance: "fortuitous event"	Force majeure Fault of victim Exterior cause	-
Insurance Involvement	immediate liability	immediate liability	insurance intervenes in case of accident claims	Immediate liability
Third-Party Insurance	compulsory by law	compulsory by law	compulsory by law	compulsory by law
Exclusions / Limitations of Liability in Case the Vehicle is used for Testing Purposes	Insurance contracts can include exclusions / limitations in this case	No exclusions / limitations, because third-party liability insurance is compulsory by law and only for the use permitted by law	Not specifically, but the insurance must be informed because guarantees could be modified - depending on the insurance policy	Depending on the insurance policy

Moreover the liabilities-/insurance-related questions in the legal questionnaire brought up quite a variety of answers which make it clear that whilst of course there are similarities on the one hand – but that details may be quite different on the other hand.

Vehicle third-party liability insurance is compulsory by law throughout the EU Member States considered herein. Nevertheless, there are slight differences in who is responsible for making the insurance contract – in Germany, the Netherlands and Italy it is the vehicle's registered keeper (who in Italy has to be the owner at the same time) whereas in France it can either be the owner or the keeper; in Spain it may be the owner or another person having an interest in insuring third-party liability. Generally speaking, third-party insurance covers damages to the other passengers in the car causing the accident (this does not apply to Spain in case of a robbery, neither does this apply to Italy in case of a fortuitous event; in the Netherlands this does not apply if the driver cannot be held liable). In Spain, Italy and the Netherlands the third-party liability insurance will not cover the risk of an injury of the driver/test-user or damage to his/her property – this cover would require a specific insurance (voluntary first-party cover / comprehensive motor insurance cover). In contrast to that, in France third-party insurance covers the risk of an injury of the driver or damage to his/her property if the driver is not liable for the accident.

In Spain, France and the Netherlands it depends on the provisions of the insurance contract if liability is excluded or limited in case the vehicle is used for testing purposes; in Italy there usually is no such contractual exclusion or limitation of liability.

Technical equipment the FOT vehicles are retrofitted with (e.g. computers for data collection) can be included in a comprehensive coverage insurance in Spain, France, Italy and the Netherlands if specified in the insurance contract.

Any other potential insurance issues (risk of a personal injury of the driver or of the passengers – if not covered by the vehicle third-party insurance) depend very much on the precise, voluntary, insurance contract which should be negotiable between the FOT management and the insurance company.

6 Ethical Approval

The question can be asked as to how far FOTs may require any kind of ethical approval with regard to the different national legal frameworks? - since testing might involve naïve subjects who are confronted with a challenging situation on a test track.

6.1 Spain

According to Spanish law, ethical approvals are only required in some specific biomedical research and clinical trials. Regulations and ethical recommendations would normally not apply to FOT and NDS tests. So, this part of the questionnaire has been left unanswered for the Spanish legal framework.

6.2 Italy

The Italian automobile club ACI did not have any information with regard to the questions referring to ethical approval.

6.3 Netherlands

The Dutch automobile club ANWB did not have any specific information on the questions dealing with ethical approval either – but it could be stated that testing involving naïve subjects being confronted with challenging situations on a test-track is permissible in the Netherlands provided that the test subjects are fully informed about the test, what it involves, the consequence etc.

6.4 France

In France, tests confronting test subjects with a challenging situation on a test track are permissible if the type of testing does not run contrary to human rights. Tests may require the advice of a medical doctor but there is no need for an ethical approval. According to the French automobile club ACAFA, there are no specific laws in that respect but a set of law has to be respected. The correct authority to contact in France is the *Comité Consultatif National d'Éthique* (www.ccne-ethique.fr). The Committee's approval is not required but it can give its opinion. A negative recommendation of an ethical approval does not seem to hinder the execution of an FOT in France, i.e. the ethical recommendation does not seem to be binding in that respect.

6.5 Summary concerning Ethical Approval

Summing up, none of the answers to the questionnaire suggests that an FOT requires ethical approval by a certain institution. In France, the correct authority to contact in this context is the *Comité Consultatif National d'Éthique* (www.ccne-ethique.fr) whose approval is not required but can be applied for – on the other hand a negative recommendation of an ethical approval does not hinder the execution of an FOT in France.

7 Special Licenses

Usually, FOT equipment at least requires data-recording equipment which will depend mostly on the vehicle's power supply. Moreover, additional equipment (displays, buttons, etc.) might be fitted to the dashboard, etc. On top of this, some equipment might even need to be attached to the vehicles CAN-BUS, the vehicles "Controller Area Network" which links the different electronic control units in a vehicle to each other. The additionally-fitted equipment would then be substantially engaged into the vehicles electronic architecture. Finally, even certain functions might be modified – such as additional speed limiting equipment, etc. That is why the question arises as to how far the vehicle-license may be affected. Furthermore, as far as the FOT covers so-called Cooperative Systems, the transfer of information may be based on wifi-technology. That is why the use of this radio frequency bandwidth for testing might be subject to exceptional licensing.

7.1 Spain

For the legal background in Spain the Spanish RACC summed up the situation as follows: According to section 47 of the General Regulation on Vehicles (Real Decreto 2822/1998, de 23 de diciembre, por el que se aprueba el Reglamento General de Vehículos), special permissions may be obtained for testing and extraordinary research trials conducted by vehicle manufacturers and public laboratories. In this regard, permission or authorization may be obtained to:

- Perform exceptional tests on highways, expressways and other roads, for which it is necessary to exceed the speed limitations established for each type of road. In such cases, the competent authority would establish the maximum speed permitted which may not exceed 30 kilometers per hour over the legally established limit which depends both on the specific road and the type of vehicle.
- Drive or use the vehicle with the devices and people needed for testing.

An application for each vehicle should be submitted to the *Traffic Department (Dirección General de Tráfico)*, justifying the need for the requested permission. The *Traffic Department*, in view of the documentation provided and, if necessary, of a preliminary report drafted by the regional government (*Comunidad autónoma*), may authorize a modified vehicle. Authorization shall include the description of the testing, activities to be performed, itinerary, duration and other conditions to be developed. In addition to the license plates and permits, vehicles shall be identified with special signs or plates. This special permission only applies to vehicle manufacturers and public laboratories. Moreover, according to section 47.3 of the *General Regulation on Vehicles*, vehicles for testing purposes shall be driven by the holder of the permit or by one of its employees. In cases in which driving by other parties is required, the *Traffic Department* shall previously provide authorization.

In Spain, radio frequency bandwidths used for wireless networks and especially the wi-fi equipment are legally classified as shared-use or common-use frequencies. Characterization as a common-use frequency allows multiple operators or users to simultaneously use these frequencies, in accordance with the technical standards established by regulation to mitigate the potential for interference between emissions. Unlike other bandwidths in the radio spectrum, a license is not required to operate wi-fi technologies. However, the fact that it is not necessary to obtain a license to operate does not mean that the use of these bandwidths is not subject to specific conditions. Technical regulations set out limits to radiations, and communication protocols may be used to ensure the common use of these frequencies of the radio spectrum without interferences. Most of these use conditions and limitations are

established in regulations set by the Spanish *Ministry of Industry* regarding the use of public airwaves. In particular, the *National Table of Frequency Allocations (Cuadro Nacional de Atribución de Frecuencia (CNAF))* lists the conditions of spectrum use, emission power and protocols to be used for each bandwidth. Limiting emission maximum power aims at balancing access-points' coverage and possible interference between providers. In the case of common-use bandwidths, maximum equivalent isotropic radiated power (EIRP) is limited to 100 mW (20 dBm) (Norm UN-85 of the CNAF). Norm UN-128 of the CNAF specifies conditions for using 5 GHz bandwidth for wi-fi networks. The maximum EIRP is limited to 200 mW between 5.15 and 5.360 GHz and 1 W in the bandwidth between 5.470 and 5.725 GHz, provided that power control techniques are implemented. Use of the bandwidth between 5.15 GHz and 5.25 GHz is limited to indoor installations. Licenses for spectrum use, when needed, have to be applied to the *State Secretary for Telecommunications and Information Society (Secretaría de Estado de Telecomunicaciones y para la Sociedad de la Información (SETSI))*. It is one of the departments included in the *Ministerio de Industria, Turismo y Comercio* (Contact details: C. Capitán Haya, 41 28046 , Madrid [Spain], Phones: (0034) 902 44 60 06 / (0034) 91 349 46 40).

7.2 Italy

The Italian ACI's answer to this point of the questionnaire declares that the Italian Highway Code does not provide for these kinds of vehicle licences, because this kind of vehicle should be considered as a prototype which requires a specific type of approval (Ministry of Transport). There are no special driver's licenses in Italy with regard to driving a vehicle modified for an FOT.

Concerning the use of certain radio frequencies by so-called Cooperative Systems integrated in the test vehicles the ACI points to the Italian Authority for the Communications (www.agcom.it) which manages the respective regulations and the competitive tender for allocation of wave bands.

7.3 Netherlands

In the Netherlands, the *Rijksdienst Wegverkeer* (www.rdw.nl) is in charge of vehicle licenses. If a special driver's license is necessary the *Centraal Bureau Rijvaardigheidsbewijzen* (www.cbr.nl) is the organization to issue driver's licenses.

The relevant legal regulation concerning the use of radio frequencies in the Netherlands is the Dutch *Telecommunicatiewet*. The authorities in charge of special licenses concerning radio frequencies and concerning the distribution of radio frequencies are the Dutch Ministry of Economic Affairs (Minister van Economische Zaken, Landbouw en Innovatie, www.rijksoverheid.nl/ministeries/eleni) and the Antennebureau (www.antennebureau.nl).

7.4 France

French law does not seem to require a special authorization in cases where the vehicle is slightly altered. Nevertheless, an authorization for the road use by the French Ministry of Transport is required if the vehicle is strongly modified. The DRIRE (*Direction régionale de l'Industrie, de la Recherche et de l'Environnement* – national level) or the DREAL (*Direction régionale de l'Environnement, de l'Aménagement et du Logement* – regional level) are the administrative bodies to whom such a license would have to be applied for and who can provide the right to drive on public roads. With regard to driving the vehicles modified for an FOT no special driver's license is needed.

As far as the use of radio frequency bandwidth by so-called Cooperative Systems in the FOT test vehicles is concerned the French ACAFA points to the French authority for the communication (*l'Autorité de Régulation des Communications Electroniques et des Postes*, ARCEP, www.arcep.fr) to obtain the information if special licenses are required and what the relevant legal framework is in this respect.

7.5 Summary concerning Special Licenses

Concerning the question as to how far the vehicle-license is affected in cases where the vehicle is retrofitted with additional technical equipment for the FOT, the answers show remarkable differences:

In Spain the *Traffic Department* may authorize a modified vehicle – authorization shall include the description of the testing, activities to be performed, itinerary, duration and other conditions to be developed. This special permission only applies to vehicle manufacturers and public laboratories. Moreover, vehicles for testing purposes shall be driven by the holder of the permit or by one of its employees. In cases in which driving by other parties is required, the Spanish Traffic Department shall previously provide authorization. In Italy vehicles modified for FOTs may be considered as a prototype which requires a type approval by the Italian *Ministry of Transport*; no special driver's licenses are stipulated. In the Netherlands the *Rijksdienst Wegverkeer* (www.rdw.nl) is in charge of vehicle licenses; the *Centraal Bureau Rijvaardigheidsbewijzen* (www.cbr.nl) is the competent authority in case a special driver's license is needed. Also in France, no special driver's licenses are needed; nevertheless, the vehicle requires an authorization for the road use by the French *Ministry of Transport* if the vehicle is strongly modified.

With regard to the question of how far the use of certain radio frequency bandwidths requires exceptional licensing the competent national institutions respectively authorities should be contacted beforehand.

8 Product Liability

Product liability law might also play a certain role in carrying out an FOT. This field of law has been harmonized throughout the EU up to a certain degree due to the Product Liability Directive 85/374/EEC; nevertheless national law may present certain differences. That is why this aspect was also included in the legal questionnaire.

8.1 Spain

In Spain product liability is currently regulated in sections 135 to 149 of the *Act for the Protection of Consumers and Users* (Texto Refundido de la *Ley General de Defensa de Consumidores y Usuarios*, aprobado por Real Decreto-Legislativo 1/2007, de 16 de noviembre). These sections are a transposition to Spanish law of the Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. The producer is held strictly liable for damage caused by a defect in a product. A product is deemed defective when it does not provide the safety which a person is entitled to expect (consumer expectations test), taking all circumstances into account, including: (a) the presentation of the product; (b) the use to which it could reasonably be expected that the product would be put; and (c) the time when the product was put into circulation. Liability of the producer shall not

be reduced when the damage is caused both by a defect in product and by the act or omission of a third party. However, in cases in which the damage is caused both by a defect in the product and by the fault of the injured person or any person for whom the injured person is responsible, liability of the producer may be reduced or even disallowed. According to section 140 of the Spanish Act, the producer shall not be liable if he proves:

- (a) that he did not put the product into circulation; or
- (b) that, taking into account the circumstances, it may be presumed that the defect did not exist at the time when the product was put into circulation; or
- (c) that the product was neither manufactured by him for sale or any form of distribution for economic purposes nor manufactured or distributed by him in the course of his professional or business activity; or
- (d) that the defect is due to compliance of the product with mandatory regulations; or
- (e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered.

Besides, section 140.2 establishes that in the case of a manufacturer of a component, the producer shall not be liable if the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product. The producer's total liability for damage resulting from a death or personal injury and caused by identical items with the same defect is limited to € 63.106.270,96. In addition, a deductible of € 500 is established for damages to property.

It has to be pointed out that a prototype vehicle would not be considered a product for product liability law purposes in Spain. According to section 140 of the Spanish Act, the producer of a prototype vehicle shall not be liable if he may prove that the prototype was neither manufactured by him for sale or any form of distribution for economic purposes nor manufactured or distributed by him in the course of his professional or business activity.

Liability for damages caused by a prototype (system being tested within an FOT) would be governed by general tort or civil liability law. No requirements regarding prototypes in the field of product liability have been established in Spain. Compensation would include damages not covered by product liability rules but a negligence liability rule would apply. These two elements do not necessarily result in an increased risk of liability.

With regard to user instructions, three possible sources can be described regarding a producer's duty to instruct a user about the risks of a product:

I. Product liability law

A defective product is generally defined as a product that does not provide the safety which a consumer is entitled to expect. Spanish case-law usually distinguishes three kinds of product defects: a) manufacturing defects; b) design defects; and c) warning or information defects. The latter category would include those cases in which a product is considered to be defective because it does not contain warnings, instructions or labels that apprise the user in regard to the dangers or proper uses of the product.

II. Safety Regulation Law

Spanish Regulation on general product safety (*Real Decreto 1801/2003, de 26 de diciembre, sobre seguridad general de los productos*) is a transposition of Directive 2001/95/EC of the European Parliament and the Council of 3 December 2001 on general product safety. According to section 4.1 of the Regulation on general product safety, producers shall place only safe products on the market. According to section 4.2: "*Within the limits of their respective activities, producers shall provide consumers and users with the relevant*

information to enable them to assess the risks inherent in a product throughout the normal or reasonably foreseeable period of its use, where such risks are not immediately obvious without adequate warnings, and to take precautions against those risks". Besides, producers shall:

- Adopt measures commensurate with the characteristics of the products which they supply, enabling them to be informed of risks which these products might pose.
- Immediately inform the competent authorities, on the basis of the information in their possession or their professional skills, that a product that they have placed on the market poses risks to the consumer incompatible with the general safety requirements.
- Take appropriate actions including warning consumers about the risks of a product and proceeding to the withdrawal from the market or to a recall from consumers.

III. Specific products or services regulations

Specific regulations may set forth other warning and instruction requirements.

Moreover, specific product regulations may define additional requirements for testing a prototype product in Spain.

8.2 Italy

All EU consumer protection legislation has been collected into a consolidated Act called "Consumer Code" in Italy (*Legislative Decree n. 206, dated 6 September 2005 which came into force on 23 October 2005*). It brings together and coordinates all existing consumer protection provisions, synthesising them into 146 articles (the number of articles has been increased to 170 since its 2007 update). The approval of the Consumer Code can be considered a milestone in the consumer protection field in Italy, especially for the importance that the new legislation acquires in terms of public policy law: consumer issues were previously covered by specific regulations that were adopted from time to time, without coordination, mostly to implement EU Directives. For the provision of Art. 114 "producers shall be liable for any damages caused by product defect".

In Italy, a prototype-vehicle will be considered a product in the sense of Italian product liability law. The Italian ACI could not answer if there is any specific regulation concerning specific requirements or additional respectively increased risks resulting from testing prototype systems in an FOT, but as for all tests, the persons involved have to be informed about the characteristics of the test, relative risk and they must give their consensus about the use of the prototype.

8.3 Netherlands

The respective legal framework concerning product liability claims against the vehicle manufacturer is laid down in the *Burgerlijk Wetboek* (Civil Code of the Netherlands) article 6:185 in the Netherlands. Concerning the question of whether a prototype-vehicle that is left to naive subjects will be considered a product in the sense Dutch product liability law, the answer depends on whether or not the vehicle has been brought into circulation. The producer can be held liable for defective parts which are used in an FOT. The questions if there are any specific regulations in place as far as instructing the user of a product is concerned and if there are any specific requirements for the testing of prototype systems (apart from the rather general requirement following from product liability to instruct carefully on the system's limits and features) have been left unanswered for the Netherlands.

8.4 France

In France, manufacturer liability may be brought only on the defects of the vehicle untransformed. If the fault occurs on a transformation, only the liability of the transformer can be pursued. Possibilities of lawsuits are in the civil code, the code of consumption, and European standards. In France, prototypes can be considered as a product; national law considers that a vehicle, even if modified, is a product.

The question of which additional risks a vehicle manufacturer or supplier will face in France in cases of a prototype system is being tested within a FOT respectively if this can lead to an increased risk of product liability according to national product liability act or respectively to tort liability for product defects was answered as follows: Responsibility of the manufacturer or the organizer of the test may be pursued.

With regard to the question of whether any specific regulations are in place in France as far as instructing the user of a product is concerned, the French ACAFA answered that even if instructions are provided, the manufacturer or the organization may be liable if a fault is committed; there is no specific legislation, only the principle of responsibility. ACAFA is not aware of specific obligations concerning testing of prototype systems; however, it is obvious that the subject must be aware of a maximum of information and must consent to participate in the tests.

8.5 Summary concerning Product Liability

With regard to product liability, the question of whether a prototype vehicle left to naïve subjects will be considered as a product in terms of product liability law was answered quite heterogeneously: In France, a prototype (including modified vehicles) can be considered as a product. The same also applies for Italy whereas in Spain a prototype vehicle would not be considered a product for product liability law purposes. In the Netherlands the vehicle seems to be considered as a product not earlier than when it has been brought into circulation.

9 Contractual Agreements

Generally, contractual agreements allow for freely chosen arrangements (freedom of contract). Nonetheless the questionnaire also aimed at finding out in how far certain limitations according to national law exist.

9.1 Spain

In Spain, freedom of contract is established in section 1255 of the Civil Code. According to this provision, parties to a contract can agree to any term except those that are contrary to law, public policy and morality. Section 8 of the Spanish General Terms and Conditions Act (*Ley 7/1998, de 13 de abril, de Condiciones Generales de la Contracción*) establishes that general terms contrary to an imperative legal rule or to a legal prohibition which negatively affect the interests of the adherent party may be reputed null and void, unless the infringed imperative norm establishes an alternative legal consequence. In case of using general terms in consumer contracts, abusive terms and conditions would be considered null and void. Moreover, section 7 of the Spanish General Terms and Conditions Act provides that some general terms shall be considered not included in a contract. This happens when:

- I. The adherent party lacks any possibility whatsoever of effectively knowing the general terms when entering into the contract.

II. The general terms were not signed by the adherent party when such signature was legally compulsory.

III. The general terms are illegible, ambiguous or non-understandable.

Exclusion of liability that is negotiated and agreed by the parties to the contract is usually considered a result of freedom of contract and generally enforceable (section 1104 of the Civil Code). However, Spanish case-law and legal commentators resort to a common distinction between liability arising from negligence and liability arising from fraud or a crime. Exclusion of the latter is not permitted because it would involve infringing public policies.

Exclusion of liability arising from negligence is generally admitted except in consumer contracts. Section 86.2 of the Spanish Act for the Protection of Consumers and Users (*Texto Refundido de la Ley General de Defensa de Consumidores y Usuarios, aprobado por Real Decreto-Legislativo 1/2007, de 16 de noviembre*) states that a general term excluding or limiting liability for death and personal injuries is abusive and, consequently, to be considered null and void.

Limiting liability arising from negligence for property damages is governed by the same rules that apply to exclusion of liability.

9.2 Italy

Art. 1322 of the Italian Civil Code, entitled "freedom of contract", says that "the parties may freely determine the content of the contract within the limits imposed by law." In the second paragraph of that article legislature was concerned to clarify the full authority to conclude contracts also do not belong to types having a particular discipline, that does not fall into the category of so-called contracts "typical", as the rental, sale, etc. The only limit is clearly the purpose: contracts must still be directed to realize interests worthy of protection under the legal system.

According to the Italian ACI's answer, it is not possible for the test participants to consent to a full exclusion of liability.

9.3 Netherlands

The question of how far the freedom of contract is limited in the Netherlands has been left unanswered. According to the Dutch ANWB's answer it is not possible for the test participants to consent to a full exclusion of liability.

Moreover, the answer concerning the question of which other relevant aspects are needed to be dealt with in a contractual agreement according to Dutch law and jurisdiction for FOT's and NDS emphasizes the questions of whether participants get income or compensation of costs (then to be handled) or if they get an extra insurance.

9.4 France

Art. 1101 of the French Civil Code provides the principle of contractual freedom, i.e. anyone can contract with anyone and the principle is the freely agreed. The only limit is that the contract must not contain abusive clauses under the French legal framework.

Concerning the question of whether it is possible for the test participants to consent to a full exclusion of liability or if full exclusion of the liability risk is limited to property damages only, the French ACAFA answered that liability may be limited but that a full exclusion cannot be.

9.5 Summary concerning Contractual Agreements

Generally, the principle of freedom of contract underlies all contractual agreements in the legal systems of Spain, Italy, the Netherlands and France (as well as Germany). Nonetheless freedom of contract may be limited in some respects due to national law – at least one limitation seems to be in common: participants of an FOT cannot effectively agree to a full exclusion of liability by contracting with the FOT management (or any other person / institution responsible for the FOT). Moreover, there may be more limitations according to national laws, e.g. that a contract must not contain abusive clauses (French law). It might be presumed to be a common rule that contracts must be directed to realize interests worthy of protection under the legal system – the ACI answered so with regard to Italian law.

10 Other issues

Not many additional issues could be identified by the contributors to the questionnaire. Only the Dutch ANWB identified the issues that fiscal authorities can ask for data, too (in order to prove that a person was at a certain location, to prove income sources and to prove the amount of kilometres which are subject to tax).

Moreover, the ANWB criticized that the questionnaire did not cover questions on how the data will be protected; how long for and for which official purpose the files will be compiled. At this point, it has to be emphasized that these questions would have been out of the scope of the legal questionnaire developed within the FOTNet2 project: the questionnaire was meant to examine the different national legal frameworks that FOTs are facing and therefore was addressed to legal experts. It was not meant to define standards on how to protect data in an FOT.

11 References to the FESTA Handbook

In the aforementioned FESTA³ Handbook it was already pointed out that carrying out an FOT gives rise to a considerable number of legal and ethical issues (obtaining the necessary permissions, ensuring that the vehicles are safe to operate on the public highway, going through any required ethical and human subject review procedures, obtaining participants' consent, complying with data protection laws, insuring the vehicles, insuring the project workers for indemnity and so on). It was also mentioned that it is not possible to provide a comprehensive guide to all the legal issues that can arise in a particular FOT since these may be very dependent on the system(s) to be tested and on the study design adopted. Moreover it was pointed out that those projects carrying out FOTs in more than one country or carrying out FOTs that potentially involve cross-border traffic may need to consider the legal implications in all relevant countries. The differences in laws and regulations between the countries were not addressed by the FESTA Handbook – as an example of what can arise on a national level, the view of a German lawyer was included there for consideration. The present document refers to the respective chapter 3 (Legal and Ethical Issues) and Annex A (Legal and ethical issues in the execution of FOTs – Worked Example) of the FESTA

³ Field opErational teSt supportT Action, funded by the European Commission DG Information Society and Media in the 7th Framework Programme

Handbook and gives additional information as far as the legal situation in Spain, Italy, the Netherlands and France is concerned.

11.1 Participant Agreement

The important issues to be formalized in a written participant agreement were already detailed in the FESTA Handbook (chapter 3.3). With regard to the findings based on the FOTNet2 project's legal questionnaire, it should be added that if including a clause aiming at excluding or limiting the FOT management's liability for damages inflicted on the participants, the respective wording in the agreement has to be chosen very carefully in order to avoid a possible legal ineffectiveness of such a clause. It has to be taken into account that this kind of liability most probably cannot completely be excluded (for example according to Spanish law a general term excluding or limiting liability for death and personal injuries is abusive and, consequently, to be considered null and void [the Section 86.2 of the Spanish Act for the Protection of Consumers and Users [*Ley General de Defensa de Consumidores y Usuarios*] – there is a similar provision in the German Civil Code [§ 309 No. 7 a BGB – Bürgerliches Gesetzbuch]).

11.2 Data Privacy (including Video Data Collection)

The FESTA Handbook (chapter 3.4) already pointed out that an FOT will give rise to data protection and privacy issues – also with regard to the collection of video data (chapter 3.9 of the FESTA Handbook). The compilation of the data privacy related answers to the respective questions in the questionnaire showed that all of the four countries' legal systems considered in the FOTNet2 project share the similarity of imposing a general ban on the recording of video data, location data and behavioural data (speed, indicator-usage etc.) as far as data is recorded that can be qualified as personal data, i.e. which can be referred to an individual person. Nevertheless, video data as well as location data and behavioural data may be recorded legally for the purposes of an FOT by adhering to certain procedures detailed above for the four EU Member States considered herein. Similarities and differences in that respect are described in the respective chapter 3 (above).

11.3 Approval for On-road Use

With regard to an approval for on-road use of vehicles which are modified for the purposes of an FOT or retrofitted with additional equipment for an FOT the FESTA Handbook (chapter 3.7) emphasized that before it is certain that it is legal to operate a modified vehicle on public roads, a check must be made with the appropriate authorities. The present document provides more detailed information for Spain, Italy, the Netherlands and France in chapter 7 (above).

11.4 Insurance

Insurance issues which the FESTA Handbook (chapter 3.8) points to are substantiated in chapter 5 (above) and in the following section of this chapter.

11.5 Ethical Approval

The FESTA Handbook (chapter 3.10) also mentions ethical approval procedures which might have to be conducted on national level before carrying out an FOT. None of the answers to the FOTNet2 project's questionnaire suggests a binding ethical approval procedure in Spain, Italy, the Netherlands or France in the context of an FOT (cp. chapter 6 above).

11.6 Legal and ethical issues in FOTs – common findings as a basic level

Annex A of the FESTA Handbook includes a worked example on which legal issues will prove to be relevant in planning and carrying out an FOT. In consideration of the legal importance of details in test arrangements, the FESTA Handbook points out that it is vital to involve legal expertise from the country in question when planning an FOT. Even though the present document includes more detailed information on the specific legal background in several EU Member States this advice is still applicable: The overview given in this document cannot – and is not meant to – substitute legal advice in a particular case.

The guidance the FESTA Handbook gives concerning

- the information provided to test persons
- the information on system boundaries
- the information on possible malfunctions
- the information on data recording
- agreements on cost allocation and liabilities
- informing systems
- intervening, overrideable systems
- intervening, non-overrideable systems
- cooperative systems

do not have to be modified or completed based on the information which can be extracted from the answers to the legal questionnaire.

With regard to data privacy, it can be stated that all of the four EU Member States' legal systems considered in the FOTNet2 project provide for a general ban of recording of video data, location data and behavioural data (speed, indicator-usage etc.) as far as data is recorded that can be qualified as personal data, i.e. which can be referred to an individual person. Nevertheless, video data as well as location data and behavioural data may be recorded legally for the purposes of an FOT by adhering to certain procedures (detailed above in chapter 3 for the four EU Member States considered herein). The following similarities can be deduced (exceptions in brackets):

- The recording of video data within the vehicle requires the consent of every passenger in the car – including the driver, of course. In case of minors respectively children the parents' / legal representatives' consent has to be obtained (in case of 14-year-old and older minors in Spain only in some cases obligatory). The requirements concerning the consent differ (Netherlands and Spain: clear / unequivocal consent, France and Italy: written consent) – in favour of the burden of proof of having obtained the required consents it is advisable to obtain the consent in written form.
- As far as the vehicle's surroundings are subject to video recording it has to be made certain that other road users are not identifiable – e.g. by using a very low camera resolution.
- A car's registration number / number plate has to be considered as personal data (for Spain this does not refer to company-owned cars) in terms of data privacy law.

The aforementioned similarities can be considered as a common basic level in the field of data privacy. Nevertheless, still certain national differences have to be accounted for: In Italy for example, activities taking place in public areas – such as video recording – must be authorized (and can only be authorized for public reasons) by the public authority in charge

of protection of these areas. Peculiarities with regard to German data privacy law have already been pointed out in the FESTA Handbook.

With regard to the implications of criminal law, the FESTA Handbook points out the results of the FOTNet2 project's legal questionnaire show that all of the legal systems considered herein share the similarity that the police or another public prosecution authority are authorized to confiscate the data recorded during an FOT in case of an accident. The FOT management as well as the FOT participants, i.e. the test users, should be (made) aware of this fact.

In the context of criminal law, the FESTA handbook emphasizes the principle that (based on the perspective of a German lawyer) a suspected person always has the right to remain silent in order to avoid self-incrimination i.e. that the accused is not obliged to cooperate actively in the own conviction: "nemo tenetur se ipsum accusare". The different answers to the legal questionnaire from the countries considered herein concerning this topic imply that the "nemo tenetur" principle is not perceived as an issue which may turn out to be a major obstacle to the execution of an FOT. Against this background it seems even more advisable to inform test participants by implementing a respective clause in the test participant agreement which describes the possibility that prosecution authorities might confiscate the recorded data in case of a traffic accident (or possibly even in case of an offence).

The FESTA Handbook's section concerning liabilities and insurance issues goes into some detail into the legal situation in Germany as far as road traffic liability and the associated insurance issues are concerned. The liabilities-/insurance-related questions in the FOTNet2 project's legal questionnaire brought up quite a variety of answers so that not too many common findings could be identified – of course there are similarities on the one hand – but the details may be quite different on the other hand. The following sections are meant to illustrate how similar, but also how different insurance issues may be with regard to national law.

It turned out as a common finding that a vehicle third-party liability insurance is compulsory by law throughout the EU Member States in which respective information could be gathered. Nonetheless, there are slight differences in who is responsible for making the insurance contract – in Germany, the Netherlands and Italy it is the vehicle's registered keeper (who in Italy has to be the owner at the same time) whereas in France it can either be the owner or the keeper; in Spain it may be the owner or another person having an interest in insuring third-party liability.

Another common finding is that – generally speaking – third-party insurance covers damages to the other passengers in the car causing the accident (this does not apply to Spain in case of a robbery, neither does this apply to Italy in case of a fortuitous event; in the Netherlands this does not apply if the driver cannot be held liable).

In Spain, Italy and the Netherlands the third-party liability insurance will not cover the risk of an injury of the driver/test-user or damage to his/her property – this cover would require a specific insurance (voluntary first-party cover / comprehensive motor insurance cover). In contrast to that, in France third-party insurance covers the risk of an injury of the driver or damage to his/her property if the driver is not liable for the accident.

In Spain, France and the Netherlands it depends on the insurance contract if liability is excluded or limited in case the vehicle is used for testing purposes – on the other hand, in Italy there usually is no such contractual exclusion or limitation of liability because this kind of

insurance is compulsory by law and only covers the use permitted by law (Italian Highway Code and Criminal Code).

Technical equipment the FOT vehicles are retrofitted with (e.g. computers for data collection) can be included in comprehensive coverage insurances in Spain, France, Italy and the Netherlands if specified in the insurance contract.

Further insurance issues (risk of a personal injury of the driver or of the passengers – if not covered by the vehicle third-party insurance) depend very much on the precise – voluntary – insurance contract which should be negotiable between the FOT management and the insurance company.

With regard to the question of how far vehicle-licenses are affected in the case the vehicles are retrofitted with additional technical equipment for the FOT the answers show remarkable differences which make it difficult to draw conclusions in terms of common findings. Considering the question of how far the use of certain radio frequency bandwidths requires exceptional licensing the competent national institutions respectively authorities should be contacted beforehand.

The FESTA Handbook outlined the importance of the 1968 Vienna Convention on Road Traffic which formulates a minimum set of requirements in purpose of free (and safe) flow of cross-border transport between the signatory states. The Convention has had strong influence on the development of national Road Traffic codes and the all-underlying idea of full control of a human driver has thus found its way into many legal provisions concerning road traffic in Germany as well as other countries throughout the EU (and worldwide) – these findings are common for the EU at large and must be taken into consideration, in case a system shall be evaluated in an FOT that overrules full control of the driver (cp. the respective considerations in the FESTA Handbook).

With regard to product liability, the crucial common finding resulting from the legal survey described herein is that product liability law has been harmonized throughout the EU due to the 1985 Product Liability Directive (85/374/EEC). On the other hand the application of the respective national laws which transposed the Directive can largely differ since a prototype vehicle may in some states be seen as a product in terms of national product liability law, in some states not. The respective question was answered quite heterogeneously: In France, a prototype (including modified vehicles) can be considered as a product. The same also applies for Italy whereas in Spain a prototype vehicle would not be considered a product for product liability law purposes. In the Netherlands the vehicle seems to be considered as a product not earlier than when it has been brought into circulation.

The crucial common finding with regard to contractual agreements is as general as it is for product liability: Generally, the principle of freedom of contract underlies all contractual agreements in the legal systems of Spain, Italy, the Netherlands and France as well as Germany. However, freedom of contract may be limited in some respects due to national law – at least one limitation seems to be in common: participants of an FOT cannot effectively agree to a full exclusion of liability by contracting with the FOT management (or any other person / institution responsible for the FOT). Moreover, there may be more limitations according to national laws, e.g. that a contract must not contain abusive clauses (French law). It might be presumed to be a common rule that contracts must be directed to realize interests worthy of protection under the legal system.

12 Conclusions

The evaluation of the legal questionnaire developed in the FOTNet2 project and the compilation of the present document showed that – despite several common findings which are applicable for all EU Member States considered herein, there are still remarkable differences concerning the legal framework relevant for FOTs on the national levels. These differences may on the one hand be rooted in the historical development of the several legal systems in the different EU Member States since not all of the national regulations have been harmonized so far, of course. On the other hand, these differences are rooted in the fact that even if and as far as law has been harmonized, law is applied on the national level. Often national courts decide on how a certain law has to be interpreted which does not have to be homogeneous throughout the EU.

As already stated in the FESTA Handbook, prohibitive difficulties neither from a legal nor from an ethical point of view are in so far to be expected. As long as the advice provided in the FESTA Handbook and the present document is considered, potential risks that are presently foreseeable can be addressed adequately. However, it will remain highly advisable to seek for further support on legal and ethical issues within the concrete FOT – this is, last but not least, also due to the fact that law, like other disciplines, is not static, but is constantly evolving.