Report on the Seventh European Traffic Law Days
held in Trier from 18 to 20 October 2006

Chairman Willi Rothley welcomed the more than 300 conference participants. Because of this large number of participants, the conference for the first time was not held in the Academy of European Law, but in the "Europahalle" conference centre. The Chairman drew attention to the following topical issues: Mr Rothley pointed out that the *barème* – which had been developed in the wake of the discussions held during the First Traffic Law Days in Trier – had been introduced as a basis for indemnifying European civil servants. He added that road accidents had practically become the most important field of application within the framework of the Rome II Regulation. He emphasised that a particularly topical issue was the possibility for victims of road accidents to bring action against a foreign motor insurer before a court at the victim's place of residence.

On 26 September 2006, Mr Rothley added, the German Federal Court of Justice (BGH) had decided to submit a question to the ECJ for a preliminary ruling; in its question, the BGH had expressed the view that it supported such domestic jurisdiction. In this context, Mr Rothley drew attention to a publication in the journal NJW 2007, 71 with comments by Professor Ansgar Staudinger from the University of Bielefeld (who had been a speaker at the 2005 European Traffic Law Days in Trier and who shared the view of the BGH).

Mr Paul Kuhn, in-house lawyer of ADAC (the German RAC), presented a report on a project called "Protection of Children in Road Traffic in Europe". To start with, Mr Kuhn drew attention to the EU Commission's demand that the number of persons killed in road accidents should be reduced from 50,000 to half that number by the year 2010. He added that children were affected quite frequently by road accidents. In 2004, for instance, 37,000 children were involved in accidents on Germany's roads; 153 of them were killed.

In 2006, an international study was conducted with the support of the FIA Foundation which was designed to identify measures that can help considerably to reduce these numbers. Mr Kuhn pointed out that the study showed that car accidents were the most frequent cause of injuries suffered by children (as passengers), followed by bicycles accidents. For this reason, Mr Kuhn stated, various options were being considered to reduce the number of accidents involving children; among these options, the following were particularly important:

Traffic law
Improving child restraint systems and their monitoring; requiring children to wear helmets and noticeable clothes when travelling on bicycles; reducing car speeds close to bus stops where children get on and off.

Law governing liability and private insurance
Release from liability for children, at any rate if they under 11 years of age because, according to traffic psychologists, children below this age do not have the necessary capability to understand (*compos mentis*); application of this cut-off age also with regard to contributory negligence; legal guardians to be held accountable when they are at fault; and children to be held liable where this is equitable; appeal to insurance industry to make suitable products available, e.g. modelled after the "assurance responsabilité civile" in France.

Mr Kuhn pointed out that two issues had to be addressed in connection with damages for pain and suffering: When damages for pain and suffering are awarded to a child, they should pass to the heirs – typically the parents – without the heirs having to assert their claims in a court. When a child is killed, parents should be entitled, for each claim, to damages for grief, irrespective of whether there is evidence of mental illness. It had been postulated that the sum insured should be unlimited for personal injuries and that it should amount to 100 million euros for property damage. However, Mr Kuhn reminded conference participants that, under the Fifth Motor Insurance Directive, the minimum sum insured for personal injuries amounted to 1 million euros per victim or 5 million euros per claim, while the sum insured for property damage was limited to 1 million euros.

Social law

Mr Kuhn pointed out that there were demands to the effect that accidents to and from primary schools and nursery schools should be covered by statutory accident insurance. Such accident insurance should cover not only medical expenses but also damages for missed career advancement. Professor Dr. Christian Huber from the Technical University of Aachen (RWTH Aachen) was a member of the Scientific Advisory Board of the ADAC's child protection project. Mr Kuhn pointed out that Prof. Dr. Huber had dealt with detailed questions relating to the protection of children in road traffic from the perspective of liability and insurance law. He emphasised that the objective was not to harmonise the relevant law in this field but to establish EU-wide minimum standards with regard to the level of protection afforded to children as victims or perpetrators of road accidents. The speaker attached particular importance to the fact that the rules should be as precise as possible because most cases were settled out of court. He pointed out that it was more likely that legal disputes would be settled through judicial proceedings if the rules contained a large number of legal concepts that needed explanation.

The speaker summarised the key issues as follows: The compulsory wearing of seatbelts must not be a second-class obligation, as in Austrian law, where the only effect of a violation of this obligation is a reduction of the damages for pain and suffering. Whether the child is a victim or a perpetrator often depends on coincidences, which is why the same yardstick should be applied in either case, which is true in the German legal system but not in the French one.

Mr Kuhn pointed out that, according to the findings of developmental psychology, children below the age of 10 were not sufficiently capable of understanding. As far as children between the ages 10 and 14 years were concerned, it all depended on the specific circumstances prevailing in a given case. while no particular privileged treatment was necessary for children who were older than 14 years. Mr Kuhn pointed out that this subdivision into age groups applied to all Member States of the EU. The speaker emphasised that the advantage of applying defined age limits was that a child's liability would then not depend on the judge's assessment of his/her specific case.

The speaker explained that the liability of parents for the acts of their children depended on their *ex ante* perspective. In accordance with the principle of partnership in education, he said, it was necessary for parents to gradually let go, which of course involved the risk that in hindsight it might turn out that they let go too early.

Mr Kuhn pointed out that the following proposals had been made with regard to liability on grounds of equity for children who were not capable of unlawful acts: The speaker emphasised that the financial circumstances of a child that had caused an accident should not play any role because it would be very difficult to find out what assets of the child that could be reasonably utilised. However, this did not apply to existing insurance, which would of course have to be taken into account, irrespective of whether such insurance existed for the injuring party or for the injured party. The speaker suggested that if this meant a departure from the principle of separation, this would have to be accepted for pragmatic reasons. These principles, he proposed, should apply not only to accidents involving motor vehicles but also to those involving cyclists.

As far as damages for a child's lost earning capacity was concerned, the standard of proof played a key role. The speaker felt that the reduction of the standard of proof, as observed in the German established court practice, was worth applying elsewhere as well, especially since it was the injuring party that had brought the child into the difficult situation in terms of furnishing proof.

When a child was killed, the speaker suggested, its parents and siblings should be entitled to between 10,000 and 15,000 euros of damages for grief, irrespective of any evidence of mental illness. The purpose of this money should be to take the survivors' minds off the child's death, e.g. by enabling them to go on a longer journey. However, there should not be any fixed amounts as in the UK; instead, the amount of the damages should be fixed by the courts.

Robert Mulac of the European Commission's Directorate-General Internal Market & Services reported on problems associated with the implementation of the Fifth Motor Insurance Directive. He informed the participants about an implementation body meeting with the Member States that had been held on 28 September 2006. The following delicate points were addressed at this meeting:

- The effects of false number plates on the use of the guarantee fund: If a number plate cannot be identified, coverage must be provided by the guarantee fund of the country in which the accident occurred.
- The insurance cover of imported cars, considering the possibility of coverage by a foreign motor insurer.
- Circumstances in which the Central Authority complies with the obligation of promptly delivering the necessary data and the question of to whom the Central Authority is obliged to deliver such data.
- The various effects in terms of liability and insurance law if a passenger knew, for instance, that the driver was under the influence of alcohol.
- The minimum cover should be adjusted in such a way that the amount available in the event of a personal injury should be 1 million euros per victim or 5 million euros per accident, irrespective of the number of victims. The speaker added that Member States were allowed to fix higher amounts, in particular for the owners of certain vehicles such as vehicles used in local public transport services. He explained that the sums mentioned were only minimum amounts. Five years after their implementation, they would have to be adjusted. Due to the fact that the various Member States would implement the Directive at different points in time, the gap between the minimum sums insured would tend to widen over time. The speaker suggested that this would have to be discussed once again at European and that it could not be left to the Member States.

In an admirably clear presentation, Professor Dr. Michael Brenner of the University of Jena dealt with "The Framework Decision on the enforcement of fines in the light of national constitutional laws and the European Convention on Human Rights (ECHR)". The speaker began by drawing attention to the fact that the EU had no competence in the field of law governing criminal and non-criminal offences.

He added that, nevertheless, laws were being approximated in this field by means of so-called "framework decisions". Prof. Brenner explained that in these framework decisions Member States committed themselves to implementing what had been agreed between the Member States in their respective legal systems. The speaker pointed out that framework decisions were legal instruments of the European Union that were binding in terms of the objective pursued, but not in terms of the form of implementation or the means used to achieve the objective. Prof. Brenner stressed that there was a consensus to the effect that, as a general rule, fines should also be enforceable in another Member State. He added that it could not be tolerated that German drivers did not comply with the lower speed limits in Austria simply because they relied on the fact that after their return to Germany they could not be called to account.

Prof. Brenner suggested that the only debatable issue with regard to the Framework Decision on the enforcement of fines (which had been adopted on 24 May 2005) was the way in which the Framework Decision would be transposed into national law. The speaker pointed out that the Framework Decision stipulated that fines should be recognised and enforced 'without any ifs or buts'. However, the speaker reminded participants that it was necessary, in Germany, to observe the procedural safeguards enshrined in the German Constitution and – in each Member State – to observe the procedural safeguards of the European Convention on Human Rights. He stressed that, since the post-implementation rules were part of national law, their constitutionality had to be guaranteed. He added that, more than other legal instruments, a framework decision left the national legislator room for manoeuvre in complying with these requirements.

However, what were these requirements, the speaker asked. While the foreign procedures did not have to stand up to the standards of the German Constitution, he said, they did have to be roughly equivalent or commensurate. The speaker drew attention to the fact that, while the requirements stipulated in the European Convention on Human Rights were somewhat vaguer, at the end of the day they were not significantly different from the safeguards laid down in the German Constitution. Should the fines imposed in a given Member State not be in keeping with these procedural safeguards, the speaker suggested, the German legislator would have to ensure – through a public policy rule – that such fines would not be recognised or enforced in Germany.

Prof. Brenner approached the subject not only from an abstractive perspective but also illustrated the major principles by means of concrete examples:

The material facts had to be established by means of a flawless procedure under the rule of law. This was not the case if speeding was determined through "visual inspection" by a police officer, or if the blood alcohol level was measured by checking the breath of a driver.

Alleged offenders must not be forced to disclose to the police the names of other persons – in particular family members – or to incriminate themselves. For this reason, the Austrian "*Anonymverfügung*" – an order which imposed an administrative fine on a car owner who refused to disclose the name of the driver – would be contrary to public policy from a German perspective, and hence the fines imposed through such an order would not be enforceable in Germany.

Of course, there were also limits to the application of the public policy rule, conceded Prof. Brenner. German drivers, for instance, would have to accept the fact that much higher fines were imposed on traffic offences in other countries. Only if such fines infringed upon the principle of proportionality – i.e. if a steamroller was used to crack a nut – could such limits be transgressed. However, this would not apply, the speaker said, if a fine of 470.00 euros was imposed for going through a red light in Norway, even if a much lower fine would be imposed in Germany for the same offence.

Prof. Brenner pointed out that the right to a fair trial played a key role within the framework of the European Convention on Human Rights. This principle, he added, also meant that the defendant had to be given an opportunity to participate in the procedure, including the possibility of appealing a decision. This requirement was not met, the speaker explained, if an administrative order imposing a fine became legally effective and non-appealable by posting it on a bulletin board, or if the administrative order was served to the alleged offender in a language he did not understand, e.g. if German tourists who had spent their holidays on Mallorca were served such a notice in Spanish, which they usually do not speak.

The speaker added that another consequence of this principle was that it had to be possible for a court to review all the facts pertaining to decision that had to be examined, i.e. to review the decision not only in law but also in fact. Prof. Brenner once again cited Austria as an example of a country where the local practice did not meet this requirement. The quintessence of the statement presented by Prof. Brenner can be summarised as follows: He pointed out that the recognition and enforcement of fines as such was indisputable. However, he added that it was necessary when implementing the Framework Decision to observe the procedural safeguards; an examination based on the safeguards in the European Convention on Human Rights (compared with an examination based on the safeguards in the German Constitution) had the advantage that the former applied in all the Member States and also in the EU, so that the Framework Decision itself would already have to satisfy these provisos.

Mr Jörg Elsner, Chairman of the German Bar Association's Traffic Law Working Party, opened the second conference day by presenting "the viewpoint of the lawyer" on "the role of lawyers in the settlement of claims". In his presentation, he focused on out-of-court settlements. The speaker pointed out that in this particular field, lawyers primarily intervened on the side of victims of road accidents; sometimes, however, lawyers also represented motor insurers when the latter outsourced such activities. In the context of the motor insurers' claims management, the speaker explained, the injured party was occasionally referred to as the "customer", which was misleading because in actual fact the injured party was "the other driver" involved in the accident.

Mr Elsner went on to say that if a lawyer represented the motor insurer, there was a risk under German law that he might betray his client as specified in Section 356 of the German Penal Code. Under this provision, the speaker explained, a lawyer was not allowed to represent both of the contending parties. The purpose of this provision was to safeguard the public's confidence in the reliability and integrity of lawyers. The speaker added that while it was not a punishable offence under criminal law for an employee of an insurance company to refer to an injured party as "the customer", there was still a conflict of interests here, as well.

Mr Elsner pointed out that the settlement of claims was not an objective quantity. Instead, there was scope for assessing claims, both from personal injuries and property damage. As far as property damage

was concerned, the speaker explained, there were not only different repair options but also diverging repair levels. The advice given by the representative of the insurance company, he added, was necessarily aimed at keeping the financial burden for the motor insurer to a minimum; this was occasionally also achieved by not giving the injured party full information about what he or she was entitled to.

Mr Elsner suggested that entrusting an employee of the motor insurer with giving legal advice to the injured party was as if the trade unions asked the employers' association to fix a new "negotiated" wage rate. If the legal advice was given by a lawyer, he added, the advantage was that the latter would only have the interests of the injured party in mind. The lawyer would also refer his or her client to an independent motor vehicle expert, who also had scope for judgment in his conclusions of fact. This prevented unjustified claims, the speaker explained, from being enforced at the expense of the insurance community because motor insurers had qualified staff at their disposal.

Mr Elsner added that, in some areas, lawyers also welcomed the claims management practised by motor insurers, in particular their rehabilitation management in cases of serious personal injuries. In this particular field, the speaker explained, the motor insurers spent much more money than the statutory health funds in order to reintegrate the injured party as quickly as possible and as a result to avoid higher damages for lost earning capacity.

Mr Elsner expressed scepticism with regard to the legal advice provided by garages and offices of consulting motor vehicle experts because they pursued their own financial interests and – unlike a lawyer – they were not independent. The interest of garages, the speaker explained, was to repair vehicles or sell replacement vehicles; that of car-hire operators was to rent out cars; and that of motor vehicle experts and breakdown service operators was to earn commissions by supplying customers. Furthermore, he added, all of these operators did not have the competence to provide comprehensive legal advice.

Mr Elsner suggested that since victims of road accidents depended on independent competent advice for the settlement of their claims, the lawyers' fees incurred in the context of out-of-court claims settlement should be recoverable in all legal systems because they were necessary expenses. Mr Elsner contended that this would not put an undue burden on either the community of the insured or the motor insurers. He pointed out that, on the one hand, these costs accounted for just about 2 per cent of the total volume of losses and that, on the other hand, the motor insurers would also be able to cut personnel expenses if the claims letters they received were drawn up by qualified legal experts.

However, if motor insurers invested considerable amounts of money in claims management by their own employees, the primary reason – the speaker suggested – was probably that the damages they awarded to injured parties were probably lower than what they were legally entitled to. Mr Elsner concluded that injured parties therefore depended on lawyers as indispensable pilots guiding them through the treacherous fairway of the settlement of claims caused by accidents.

Mr Elsner's presentation of the viewpoint of the lawyer was complemented by Mr Jan Moerland from the DAS Netherlands legal expenses insurance, who presented "the viewpoint of the insurer". It should be pointed out that the purpose of Mr Moerland's presentation was not to focus on the motor insurers' opposing views but to describe the role played by legal expenses insurance in the Netherlands within the framework of the settlement of claims. The speaker pointed out that the – out-of-court – settlement of claims from road accidents was the reason why many Dutch citizens took out legal expenses insurance.

He added that litigious claims were then settled by the legal advisers who were employed by legal expenses insurers. The speaker pointed out that, in the Netherlands, lawyers were hardly ever involved in the settlement of motor vehicle claims because the amounts involved were too low. He mentioned that 85 per cent of motor vehicle property damage claims were settled without any legal assistance. However, this was different, he said, for personal injuries, where 90 per cent of the injured parties sought legal advice – 44 per cent from their legal expenses insurer and 33 per cent from a lawyer. In 4 per cent of the cases, the speaker added, the legal advisers employed by legal expenses insurers referred cases to a lawyer.

Mr Moerland explained that cases in which lawyers were involved took 18 per cent more time than cases in which lawyers were not involved. The advantages associated with using the services of a legal expenses

insurer, the speaker said, were that their costs were more predictable; in addition, legal expenses insurers – unlike lawyers – offered their clients the opportunity to get a second opinion.

Mr Moerland's presentation gave rise to a lively discussion. Mr Kaessmann (ADAC) pointed out that the expertise of legal expenses insurers tended to be more restrained as it became costly. Mr Riedmeier (ADAC-appointed defence lawyer) added that in Germany there were doubts about the independence of legal expenses insurers. Mr Wittkowski (ADAC-appointed defence lawyer) drew attention to the fact that the legal situation in Germany was different from that in the Netherlands because lawyers' fees in Germany were subject to a scale of charges which ensured that these expenses were predictable. Mr Jung (ADAC) pointed out that what mattered was not only the level of the expenses but also – and even most importantly – consumer protection. Mr Chateau, a lawyer from Nantes in France, reported that a recovery of out-of-court legal expenses was absolutely unheard of in France.

The presentations which, on the second day of the conference, dealt with problems encountered on the way "Towards a Sixth Motor Insurance Directive" will be summarised by Professor Huber Groutel from Bordeaux.

On the third day of the conference, Mr John Pickering, President of PEOPIL, gave a highly instructive overview of "English liability and insurance law". He pointed out that the principle that applied in English law was that of "no strict liability"; in other words, insurers were only obliged to pay damages if the injured party could prove culpability. If there was contributory fault on the part of the injured party, Mr Pickering explained, the claim would be reduced, e.g. by 25 per cent if the driver had not worn a seat belt. He added that, as far as personal injuries were concerned, there was a three-year limitation period, which could only be prevented by instituting legal proceedings. For injured parties who were minors or disabled persons, the speaker said, the limitation period began to run later: for minors, upon completion of the 18th year of age; for persons with brain damage, never.

Mr Pickering pointed out that one principle that applied in English law was "*restitutio in integrum*", i.e. full compensation of the damage suffered. However, the amounts awarded were not based on any tariff or *barème*; instead, he explained, each case was assessed on its own merits. He added that the maximum award for general damages (= non-economic losses) – which corresponded to the German *Schmerzensgeld* (damages for pain and suffering) – amounted to £ 250,000. Since there were no guidelines, the speaker explained, decisions were consistent with precedents. The highest amount ever awarded for an economic loss – the equivalent of the German *Vermögensschaden* – was £ 12 million. Mr Pickering explained that economic loss included damages for lost earning capacity as well as additional requirements. He added that the public benefits available in this field were so modest that claims for damages played a very important role. Mr Pickering emphasised that coverage was unlimited in English law.

In response to a question asked by Mr Rothley during the subsequent discussion, Mr Pickering admitted that, while this might be a problem for reinsurers, there was no political will in England to abandon unlimited coverage. It was interesting to hear from Mr Pickering that there were expedited procedures for cases involving amounts of less than £ 1,000 and for cases involving amounts of between £ 1,000 and £ 15,000. Mr Pickering explained that "individual case management" was limited to cases involving amounts of more than £ 15,000. He added that the "loser pays" principle applied to the reimbursement of legal fees, which included both lawyers' and court fees. He pointed out that there was no tariff. Instead, it was left to the judge's discretion to assess fees that were "fair and reasonable". Mr Pickering emphasised that one advantage of the English system was that it made it possible to consider the specific circumstances of a case. One disadvantage, he said, was that cases involving high amounts took a long time to be settled and were associated with considerable litigation expenses.

Robert Bray from the European Commission reported on "New developments in the harmonisation of European civil law". In his overview, he presented a large number of civil law projects at European level that currently were – more or less – close to being adopted. In his presentation, the speaker did not limit himself to discussing projects in the field of traffic law. He also addressed: the Rome I and Rome II conventions; the enforcement of uncontested claims within the EU; particularities with regard to the settlement of cross-border small claims (i.e. claims involving amounts not in excess of € 2,000); amendments to consumer contracts in connection with e-commerce transactions; the law applicable to

last wills and testaments; questions relating to the European certificate of inheritance; as well as the limitation periods discussed by the Parliament; the speaker said that it should be noted that the European Parliament would discuss this matter again on 31 January 2007.

As the last speaker of the conference, Diana Wallis (English Liberal Democrat MP in the European Parliament and ALDE spokesperson on the Legal Affairs Committee) addressed the topic of the current state of play with regard to the Rome II Regulation. Following the adoption of a Council decision, Mrs Wallis explained, there would now be a second reading in the European Parliament. Since the planned Rome II Regulation, she pointed out, was not preceded by any previous regulation, its purpose was to unify law in the field of conflict rules. However, the aim was not only, Mrs. Wallis pointed out, to prevent "forum shopping" (i.e. influencing the applicable law by choosing a specific place of jurisdiction) which was always frowned upon; instead, the objective was to achieve justice.

Mrs. Wallis described a case that had been brought to her knowledge in which a British citizen who had had an accident in Spain which had been caused by a Spaniard had been awarded € 12,000 by a Spanish court, while he would have received £ 50,000 under English law. It was only fair, she said, to take the victim of a road accident as is. That was the key "political issue". Mrs. Wallis stressed that if traditionalists and private international law professors drew attention to the technical problems associated with the split connecting factor – i.e. for personal injuries and property damage, and in the case of personal injuries, the split between the merits of a claim and the amount of damages – this could be countered by pointing out that the Parliament had to make a political value judgment.

Mrs. Wallis reminded participants that this was the first time that the Council had to co-operate with the European Parliament in a co-decision procedure; for the first time, the Parliament was a "co-legislator". She added that the only concession that the Council had made in response to the Parliament's proposal was that of a review of the regulation four years after its entry into force. That was too little, she said; quite apart from the fact that the decision to allow the Hague Convention, which applied in some Member States, to continue in effect had to be seen as a step backwards. During the second reading, Mrs. Wallis pointed out, the Parliament would try to find a more judicious solution.

It would be conceivable, she said, to stipulate that the legal system of the country in which the accident occurred should apply as a general rule, but that the judge should "consider" what damages the victim would be awarded in that system, if there was a "wide gap" relative to the damages awarded to the victim in the legal system of his or her home country. Mrs. Wallis pointed out that there were no reservations with regard to such a solution from the perspective of common law. However, she emphasised that it was important to solve the problem now. Excluding road accidents from the Rome II Regulation was not an option, she said. The speaker added that another concern was to facilitate out-of-court settlements; victims should not be obliged to litigate in order to enforce their claims.

During the discussion, the author of this reported pointed out that, to his mind, this would be a "lame" compromise that would by no means help to achieve the envisaged objectives. Instead, the "consideration" of a "wide gap" was hardly justiciable. The author of this report argued that a judge who was familiar with the domestic legal system would tend to rate the differences as negligible; and even if he were to perceive them as significant, he would only be obliged to consider them, which would possibly only have effects in homoeopathic doses. He added that such vague legal concepts were not at all conducive to promoting out-of-court settlements because victims and injuring parties naturally differed in their assessment of what "wide gap" or "consideration of this circumstance" meant.

At the end of the conference, the participants unanimously adopted recommendations for the "Framework Decision on the enforcement of fines in the light of national constitutional laws and the European Convention on Human Rights (ECHR)". The content of the recommendations was in keeping with the points postulated by Prof. Brenner in his presentation, i.e. the observation of the procedural safeguards enshrined in the ECHR, in particular in Article 6. It was pointed out that, with the introduction of the Framework Decision, other European countries ceased to be "unlegislated areas" for car drivers; at the same time, however, it was necessary to ensure that legal remedies were available for car drivers to appeal unjustified fines. However, the medium-term objective was not only to ensure that sanctions imposed by Member States would be recognised and enforced in any other Member State of the EU, but to harmonise substantive criminal law and the law governing non-criminal offences.