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Editor

Transnational Inquiries
and the Protection of
Fundamental Rights
in Criminal Proceedings

A Study in Memory of Vittorio Grevi
and Giovanni Tranchina

 Springer

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In June 2011, in the context of this project, an international conference took place in Syracuse, where distinguished scholars of international and European criminal law and practitioners from eleven countries both from inside and outside Europe met to expose and discuss the provisional results of their investigations. This book brings together the final surveys from a four-level perspective.

Many things have happened since the beginning of the present research, especially the death of two outstanding scholars of Italian criminal procedures, namely Prof. Vittorio Grevi and Prof. Giovanni Tranchina. As a consequence of this, I have chosen to dedicate this project to both of them, in memory of the high human and scientific value of these two Masters. Furthermore, today I would also like to remember Prof. Dr. Günter Heine, who took part actively in this research but unfortunately could not see this book, since he died shortly after our conference in Syracuse.

Many people have contributed to the realization of this project, and I would like to thank firstly all the outstanding colleagues who have taken part in this research for their valuable contributions. A special thank goes to Springer Verlag for its interest and sensitivity towards this project and especially to Miss. Brigitte Reschke for constantly trusting this initiative and patiently awaiting its results. I am very grateful to Mr. Christopher Schuller for his professional editing of the whole manuscript. Moreover, I am very proud of the quality of the work performed by my entire chair team, and I would like to thank especially Simona Arasi, Alessandro Arena, Rossella Bucca, Giusy Laura Candito, Marta Cogode, Federica Crupi, Diego

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Thank you all very much!

Messina, on 11 June 2012

Stefano Ruggeri

Preface

The value of this book is that its complex structure unifies three different subjects, each of which would itself raise considerable interest: criminal inquiries, transnational judicial cooperation, and fundamental rights.

This research has been carried out at a historical moment in which we are witnessing a strengthening of transnational judicial cooperation as essential means to fight against the expansion of criminal organizations that profit from their ability to operate across borders. These are – alongside organizations nurturing political terrorism, sometimes even working closely with them – the criminal groups behind the most serious economic and financial crime, those controlling among other things both production and smuggling of drugs and human trafficking.

The danger of new transnational crime has helped overcome traditional resistance to a strengthened and more efficient international cooperation between domestic states, which have always been jealous of their own sovereignty over everything concerned with the exercise of criminal jurisdiction. These resistances continue to be felt, and those that are still justified must be separated from those which are simply the remnants of obsolete nationalist mentalities. However, this is not the field in which the international community and its individual components are facing the most serious challenge as they try to improve and strengthen their instruments for combating transnational organized crime through international cooperation.

For at least 30 years I have argued that the issue of fundamental rights cannot be dealt with theoretically and handled practically as if the only question at stake were that of elevating the threshold of untouchable individual guarantees entailed by any of them. In particular, one cannot rule out that the increase of terroristic threats should lead to partially rethinking even the extension of some individual freedoms currently considered “fundamental.”

This would not, however, be the same as sharing the logic of “*à la guerre comme à la guerre*,” according to which any mode of fighting against terrorism and other dangerous forms of organized crime should be admissible, even in contempt of most fundamental rights.

Fundamental rights are not a flag one can wave only under a shining sun. They are the main sail which must always be protected without being lowered even when a storm arises. For instance, it is significant that the European Convention on Human Rights distinguishes, within the sphere of the rights it deals with as fundamental, between those that can be suspended or limited in exceptional circumstances (albeit, of course, compensated by some "institutional" guarantees) "in time of war or other public emergency" and other rights which can never be either suspended or limited.

It is not my task to enter into the merits of the approaches to these problems of the various contributions of this book. However, focusing on these problems and involving so many outstanding scholars to provide information and express their opinions thereon are a credit both to the contributors and to the editor of this project.

Torino, Italy

Mario Chiavario

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The Protection of the Right of Freedom on the European Union Level: The European Arrest Warrant and Non-custodial Pre Trial Measures. The Guideline of the Principle of Proportionality: An Interpretive Perspective

Giuseppe Di Chiara

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Abstract "Protection of fundamental rights in particular must be central to the operation of the system:" this formula, found at the heart of the most recent official assessment of the EAW (2011), perfectly summarizes, in terms of political policy, the progressive shift of emphasis from efficiency and security towards the primacy of the protection of individual rights across the entire field of EU measures restricting individual liberty. The experience gained in terms of the principle of proportionality thus becomes a basic paradigm for the interpretation of the system

The chapter contributions from the three first Parts of this book are quoted with the only reference to the Author's surname, either above or below, and the number of the paragraph concerned.

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in terms of applied law. The three levels through which the filter of proportionality has operated in the system of the EAW (multilevel gelling of the legislative choices; margins for evaluative discretion attributed to the judicial authority; official retrospective assessments of practice, which trigger off reinvestments in terms of “returns in circulation”) offer significant tools for a wider interpretation, which extends to the phenomenon of the circulation of non-custodial pre trial measures, to which the relevant framework decision of 2009 refers. In the field of pre trial measures the harmonization of the member states’ national legislations seems today to remain hazy, a mere underlying guideline: a methodological backbone that almost seems—paradoxically—to have lost its sheen but which needs to be brought back to the heart of the debate.

Abbreviations

CCP	Code of Criminal Procedure
EAW	European Arrest Warrant
EU	European Union
FD EAW	Framework Decision on the European Arrest Warrant
TEU	Treaty on the European Union

1 Efficiency, Personal Freedom and Fundamental Rights in the EU: Shifting Priorities and Changing Policies

Dostoevsky said that if you want to measure the degree of civilization of the society in which you live, you should look at its prisons. This idea lends itself perfectly to the relationship between human legal civilization and the modernity of the system for protecting the individual freedoms of a defendant on trial. The aim of these reflections is to illustrate, without in any way claiming to be comprehensive, the development of the EU protection system, looking at its priorities and shifts of emphasis which, although not always clearly visible, have characterized recent years.

It will in this sense be important to graft the experience of the EAW onto the new EU systems for the protection of fundamental rights triggered by the approval of the Lisbon Treaties. We will see that the initial emphasis on efficiency has more recently given way to increasing sensitivity towards the protection of the individual rights involved, by increasing on one hand the scope for judicial assessment, and on the other—as a natural counterpart—the multi-level elasticity of the system. In this regard, it is characteristic that precisely in the scope of the most recent assessment document on the experience of the EAW has it been reaffirmed, on the basis of

recent policy indications, that the “protection of fundamental rights in particular must be central to the operation of the EAW system.”¹

I should immediately clarify the intentions of my paper: to bring to the light the links existing between the experience of the EAW, variations over time of the emphases found in official assessments of the experience, and examples of cooperation concerning the mutual acknowledgement and circulation of non-custodial pre-trial measures. I moreover intend to examine some possible repercussions—at present rather implicit and vague—in terms of harmonizing legislation with regard to the restrictions of personal liberty *ante iudicatum*.

2 The Experience of the EAW and the History of the Principle of Proportionality: the Three Levels

We first need to focus on the experience of the proportionality check with reference to the progress of the EAW in the almost 7 years since it came into force (only Italy, as is known, adapted its own system with a huge and widely criticised delay and by means of legislation that aroused, at every level, no small number of its own problems). In this regard, I will take here into consideration the case of the EAW as a pre-trial measure in the strict sense, excluding from my discussion the European warrants issued following a definitive custodial sentence on conviction.

The principle of proportionality, by now consolidated, as far as regards the exercise of EU competences, by Article 5 TEU, is certainly not a recent acquisition in the field of applied law. According to its classic deconstruction by German legal scholarship, proportionality is to be interpreted in terms of *suitability* (that the measure adopted to pursue an aim is able to achieve this aim or at least to considerably facilitate its achievement), of *necessity* (there is the obligation to choose, among the various possible solutions, the one that implies the achievement of the objective through the minimum sacrifice of conflicting interests) and of *adequacy* (proportionality in the strict sense: the negative side effects caused by the measure must not be disproportionate to its advantages, and this requires a comparative assessment, involving a reflection on the pros and cons).²

Proportionality and adequacy are, moreover, not new concepts in Italian legislation and practice in the field of restrictions of personal freedom during trial. The concrete choice of the measure to be applied to the case at hand is performed by the judge, applying the rules of proportionality and adequacy. By adequacy, Article 275 of the Italian CCP means precisely the principle of the least sacrifice necessary

¹ COM (11 April 2001) Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, 175, para 6.

² On this issue see, by way of example, Sandulli (2006), pp. 4643 ff., and Cognetti (2011), pp. 12 ff.

(one has to choose the measure that, with the minimum sacrifice possible of individual liberty, allows the intended pre trial aim to be achieved).

The judgement of proportionality is, meanwhile, much more elastic, as is clear from the wide-ranging (not to say vague) legislative formula used: the measure must be proportionate "to the seriousness of the fact and to the punishment that has been issued, or that one deems may be issued." This implies a finding of fact³ and a prognosis, as things stand, of the possible future punishment, including the conditional suspension of sentence.

The recent report by the EU commission (quoted above) on the implementation, in the period following 2007, of the framework decision of 2002⁴ dedicates particular attention to the issue of proportionality: this is the severest example of the various criticisms which over recent years have been aimed at the implementation of the EAW and which will be useful to examine briefly.

The Commission report of 2011⁵ criticizes the indiscriminate use of the tool that sometimes emerges in operational practice:

Confidence in the application of the EAW has been undermined by the systematic issue of EAWs for the surrender of persons sought in respect of often very minor offences. In this context, discussions in Council arising from the conclusions of the Member State evaluations show that there is general agreement among Member States that a proportionality check is necessary to prevent EAWs from being issued for offences which, although they fall within the scope of Article 2(1) of the Council Framework Decision on the EAW, are not serious enough to justify the measures and cooperation which the execution of an EAW requires.

It continues by outlining the contents that should be included in the weighing up requested of the issuing authority:

Several aspects should be considered before issuing the EAW, including the seriousness of the offence, the length of the sentence, the existence of an alternative approach that would be less onerous for both the person sought and the executing authority and a cost/benefit analysis of the execution of the EAW. There is a disproportionate effect on the liberty and freedom of requested persons when EAWs are issued concerning cases for which (pre-trial) detention would otherwise be felt inappropriate. In addition, an overload of such requests may be costly for the executing Member States. It might also lead to a situation in which the executing judicial authorities (as opposed to the issuing authorities) feel inclined to apply a proportionality test, thus introducing a ground for refusal that is not in conformity with the Council Framework Decision or with the principle of mutual recognition on which the measure is based

The 2011 report energetically and effectively reviews all the issues emerging in the course of the second phase of the EAW experience. As its central purpose, it considers the weighing of the relative values of the issues at stake—and thus how to manage the evaluative discretion of the judicial authority regarding the decision on

³ Zappalà (2011), p. 430.

⁴ See footnote 1, para 5.

⁵ See footnote 1.

whether to issue the EAW, which can be interpreted in terms of, as the English texts eloquently put it, "appropriateness"⁶ and, thus, of the judgement of proportionality.

An investigation that aims to test its solidity can start with an initial analysis of method. It is useful, in this sense, to distinguish between three levels in applying the principle of proportionality in the experience of the EAW, each corresponding to a different "scale of hardness" in terms of the manoeuvrability and controllability *ex post* of the measure:

- a) The legislative level: this is the basic level of access to choices of proportionality, articulated on the dual plane of EU legislation (the framework decision of 2002) and of its implementation in national legislations;
- b) The judicial level: this involves weighing up the facts of the case and, therefore, the application of common sense⁷ when considering framework-laws and the irreducible "givenness" of the basic facts;
- c) The level of the (official) assessment of practice: this is a procedural level in the strict sense, which returns, circularly, through recommendations and intentions, to the first two levels, bringing to them new experience.

3 The First Level: Legislative Choices and the Principle of Proportionality

The legislative level reveals the anatomy of the principle of proportion: the level of general, abstract rules provides structure for and brings together, above all, choices of proportionality.

The mechanism of the EAW establishes thresholds below which the proceeding judicial authority is forbidden from issuing a measure. These thresholds have at times been unexpectedly raised by the implementing legislation of the Member States. The setting of a threshold implies an assessment of proportionality performed by the European legislator even at the time of the introduction of the mechanism. The legislator has reserved the tool only for serious offences, deeming its extension to less serious offences in terms of type and statutory penalty incongruous and thus prohibited. Once these thresholds have been taken into account, however, there is no automatic mechanism: the judicial authority "may" (and not "must") issue the warrant (Art. 2 FD EAW). The evaluative discretion that is allowed here implies a complex weighing up of costs and benefits, revolving in fact around the principle of proportionality.

The first level is, moreover, internally composite: the framework decision needs to be implemented by the national legislations of the member countries. Italy has,

⁶ See Final Report on the fourth round of mutual evaluation "The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States," 28 May 2009, Council 8302/4/09, para 3.9.

⁷ Regarding the reference to good sense in the analysis of the contents of the principle of proportionality, see the superb study by Bachmaier Winter, above.

for example, made excessively restrictive choices, and was severely criticized by the results of the fourth round of assessments on the experience of the EAW.

The Italian statute of 2005⁸ outlines, for the purposes of the admissibility of the EAW, higher thresholds than those indicated by the framework decision, and the test of proportionality is couched in extremely incisive terms by the *vademecum* of the Ministry of Justice for the issue of the EAW.⁹ This leads, in itself, to the result that the EAW is issued only in particularly serious cases. Having said that, the Report on Italy (2009)¹⁰ clarifies that “the expert team in general commends the application by Italy of a proportionality test and would recommend other Member States to apply such a test.”

It does not however fail to mention that the assessment team “has concerns that some Italian issuing authorities apply this test too restrictively, with the consequence that too little use is made of EAWs.”

4 The Second Level: The Margin for Discretionary Choices in Assessment Falling Within the Competence of the Judicial Authority

We have already seen that the task of the level of legislative choices is to identify thresholds above which the tool “may” (not “must”) operate: the choice is of the judicial authority, and it is here that we have the transition from the first to the second level.

When studying the aspects of judicial practice that characterize the second level, the experiences of Poland and Romania prove valuable.

The reports on Poland¹¹ and Romania¹² regarding the fourth round of assessments had highlighted that the practice in these Member States was to often issue EAWs, even when dealing with cases that, although in theory falling within

⁸The law in question is Law 69/2005, containing “Provisions for bringing domestic law into line with the framework decision 2002/584/JHA of the Council (13 June 2002) regarding the European Arrest Warrant and the procedures of surrender between member states.”

⁹Vademecum per l’emissione del mandato di arresto europeo, issued by the Direzione generale per la Giustizia penale, Ministero della Giustizia, 2010, <http://www.giustizia.bologna.it/Content/Index/683>, para 3.5–3.7.

¹⁰Evaluation Report on the fourth round of mutual evaluation “The practical application of the European Arrest Warrant and corresponding surrender procedures between Members States.” Report on Italy, 23 February 2009, Council 5832/1/09, para 7.2.1.2.

¹¹Council 14240/2/07, Evaluation Report on the fourth round of mutual evaluation “The practical application of the European Arrest Warrant and corresponding surrender procedures between Members States.” Report on Poland (7 February 2008).

¹²Council 8267/2/09, Evaluation Report on the fourth round of mutual evaluation “The practical application of the European Arrest Warrant and corresponding surrender procedures between Members States.” Report on Romania (20 May 2009).

the scope of the framework decision, were found during assessment to be such that they did not merit the difficult path chosen.

The report on Poland, in criticizing the phenomenon, had recommended the member state (No. 8) "*to reflect at national level on the way to ensure that EAWs are issued only when the seriousness of the offence justifies the co-operation which the execution of the EAW will require.*" The Poland report also contained the recommendation (No. 24), aimed at other member states, to implement in their own domestic legislation an explicit *proportionality check*, making it possible to recognize offences that "*are not serious enough to justify the measures and the cooperation which the execution of an EAW requires.*" There followed, with the aim of consistency, the recommendation (No. 34), aimed at the EU, to insert in the framework decision "*a proportionality requirement*" for the purposes of the EAW, clarifying however, at the same time, that this proportionality check would need to be performed "*in the issuing State only.*"

The Romanian report had set itself the task of identifying a further aspect that closes the loop examined here and deserves particular emphasis: the data collected by the group of experts had shown how the authorities of Romania "*somehow almost automatically opt for detention without considering any other options*" (No. 7.3.1.3, listed under the formula "*Non-custodial preventive measures*"). This had led the report, in its proposals section, to recommend Romania (No. 10) to "*take the necessary steps to promote the use of preventive measures alternative to detention in EAW cases where appropriate, including – if necessary – amending Article 90 of the implementing law.*"

In other words, to substitute (to implement a new judicial culture: "*the necessary steps to promote the use*") the "rigid automatism" for good evaluative discretion in the presence of preventive systems which are not mono-modular but structured, in regulatory terms, to include a vast array of pre trial measures.

5 The Third Level: Official Retrospective Assessments of the Practice and Reinvestments of "returns in circulation"

The third and final level comprises the official assessments of the practice. Consider, in this regard, the final report on the fourth round of assessments,¹³ which dedicates a central space to the *proportionality check* (§ 3.9 and recommendation 9), clarifying, its functions and contents:

Basically, this proportionality test is understood as a check additional to the verification of whether or not the required threshold is met, based on the appropriateness of issuing an EAW in the light of the circumstances of the case. The idea of appropriateness in this context encompasses different aspects, mainly the seriousness of the offence in connection

¹³ See footnote 6.

with the consequences of the execution of the EAW for the individual and dependants, the possibility of achieving the objective sought by other less troublesome means for both the person and the executing authority and a cost/benefit analysis of the execution of the EAW.

Having specified that the fourth round of assessments brought to light a significant discontinuity and inconsistency in the management of the proportionality check by national authorities (both legislative and judicial: there are thus included both the first and second level) of member states, the report expresses a wish (including here the “return in cycle” already mentioned) that the point be made the subject of regulatory intervention, based on “a wide consensus” that the proportionality check should not be performed by the issuing authorities. The report makes an explicit recommendation (no. 9) in this sense, specifying—with regard to the tasks of the *conditores*—that “the issue of proportionality should be addressed as a matter of priority.”

We cannot, however, yet consider particularly significant the following data concerning EU legislation in the final report on the fourth round of assessments: the EU Council, in the relevant follow-up report,¹⁴ decided only to update the European EAW manual,¹⁵ clarifying the nature and contents of the proportionality check.

The competent authorities should, before deciding to issue a warrant, consider proportionality by assessing a number of important factors. In particular these will include an assessment of the seriousness of the offence, the possibility of the suspect being detained, and the likely penalty imposed if the person sought is found guilty of the alleged offence. Other factors also include ensuring the effective protection of the public and taking into account the interests of the victims of the offence.

The EAW should not be chosen where the coercive measure that seems proportionate, adequate and applicable to the case in hand is not preventive detention. The warrant should not be issued, for instance, where, although preventive detention is admissible, another non-custodial coercive measure may be chosen – such as providing a statement of identity and place of residence – or one which would imply the immediate release of the person after the first judicial hearing. Furthermore, EAW practitioners may wish to consider and seek advice on the use of alternatives to an EAW. Taking account of the overall efficiency of criminal proceedings these alternatives could include:

- Using less coercive instruments of mutual legal assistance where possible.
- Using videoconferencing for suspects.

By means of a summons

- Using the Schengen Information System to establish the place of residence of a suspect.
- Use of the Framework Decision on the mutual recognition of financial penalties.

Such assessment should be made by the issuing authority.

¹⁴ Council 8436/2/10, Follow-up to the recommendations in the final report on the fourth round of mutual evaluations, concerning the European Arrest Warrant, during the Spanish Presidency of the Council of the European Union. Draft Council Conclusions (28 May 2010).

¹⁵ Council 17195/1/10, European Handbook on how to issue a European Arrest Warrant, Revised version (17 December 2010), para 3.

6 Proportionality in Macro-Area Choices and Circulation of Non-custodial Pre Trial Measures: The Framework Decision of 2009

The scenarios are therefore clear: the EAW is “the first legal instrument based upon mutual recognition of decisions in criminal matters” and “implies a radical change from the old extradition system;”¹⁶ however—as has been authoritatively specified on the institutional level—“in criminal matters, the principle of mutual recognition must apply at all stages of the Procedure” and “must extend to other types of judgment.”¹⁷

The field of pre trial measures is not only an integral part of this prospective development of the system but, moreover, should be involved as a priority.

There are multiple issues at stake: where, in the pre trial framework, the circulation of pre trial measures should be limited to the EAW alone, to the exclusion therefore of less significant measures, this would be translated in terms of the inefficiency of the system or, worse, of a levelling upwards where cross-border cooperation is considered indispensable. There is thus also at stake a pregnant reading of the protection of personal liberty and of the presumption of innocence, which would acquire value where the issue of the EAW could be replaced with a less serious, yet still effective measure, along the lines of the “lowest sacrifice necessary,” for the purposes of satisfying the preventive needs deemed to exist in the case at hand.

We find in these scenarios first the proposal of a Framework Decision on the European pre trial order in the course of preliminary investigations¹⁸ and, subsequently, the effectively more realistic framework decision 2009/829/JHA of the EU Council “on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.”

The *Consideranda* of the Framework Decision of 2009, whose term of implementation is established as 1 December 2012, eloquently establish where to insert the new tool: it “has as its objective the monitoring of a defendant’s movements in the light of the overriding objective of protecting the general public and the risk posed to the public by the existing regime, which provides only two alternatives:

¹⁶ European Handbook on how to issue a European Arrest Warrant, Revised version, wr., Introduction.

¹⁷ COM (10 June 2009) Communication from the Commission to the European Parliament and the Council about “An area of freedom, security and justice serving the citizen” 262 final, para 3.1.

¹⁸ COM (29 August 2006) Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union, 468 final: the proposal of the Commission concluded an itinerary whose precedent was the Green Paper on mutual recognition of non-custodial pre-trial supervision measures [COM (2004) 562 final], accompanied by a precious working document (Annex) of the services of the EU Commission [Commission Staff working paper, SEC (2004) 1046], providing ample material for comparisons.

provisional detention or unsupervised movement” (No. 3). The measures provided for “should also aim at enhancing the right to liberty and the presumption of innocence in the European Union and at ensuring cooperation between Member States when a person is subject to obligations or supervision pending a court decision,” since the objective is “the promotion, where appropriate, of the use of non-custodial measures as an alternative to provisional detention, even where, according to the law of the Member State concerned, a provisional detention could not be imposed *ab initio*” (No. 4).

The Framework Decision on the circulation of non-custodial preventive measures draws clear fruit from the experience of the EAW: the basic device is, *mutatis mutandis*, etched out by the Framework Decision of 2002, as is the list of the 32 offences for which there is no concrete need for the check of double criminality, almost entirely borrowed from the tried-and-tested mechanism of the EAW.

The instrument, moreover, has many resources, especially if compared with the by now superseded project to introduce a European preventive measure: here, in much more manageable terms, pressure has been put on national legislation to encourage the extensive trans-border circulation of preventive measures.

Identifying the common threads that run through the experience of the EAW and the perspective of the reciprocal acknowledgement of non-custodial pre trial measures, it makes sense to find an emphasis above all on the issues of the protection of personal liberty and of the presumption of innocence.¹⁹

It is also worth mentioning the well-known circumstance that all the EU countries are individually members of the Council of Europe and, in this capacity, are subject to the ECHR: Articles 5 and 6 thus represent a common basis on which the instruments in question may be built.

7 Law, Music and “Movements Towards Harmony:” Final Considerations

We should also mention the meaning, in this field, of legislative harmonization, another key tool in strengthening and increasing the mutual trust between member states. The national legal systems of nearly all the 27 EU countries distinguish to a greater or lesser extent between various types of pre trial measures, conferring upon the judge varying margins of evaluative discretion. However, the various

¹⁹ COM (14 June 2011). A further boost in this direction, although supported by a very cautious approach, is to be found, most recently, in the Green Paper on “Strengthening mutual trust in the European judicial area. A Green Paper on the application of EU criminal justice legislation in the field of detention,” 327 final: this contains, moreover, a further emphasis of the viewpoint of the protection of basic rights such as the primary value of reference in the framework of security policies involving the protection of personal liberty during trial (see above, para 1).

mechanisms vary significantly, and suffer internally from the more or less marked rigidity of their systems.

Underlying the framework decision there is an implicit message in which we find perhaps the most disruptive force of the policy direction adopted, and one that heralds much wider developments: it is a strong signal against "rigid automatism," which would transform the judge from a protector of freedom to a mere provider of security, in contradiction with the traditional nature of his role.²⁰ The desire is that the individual states, almost along the lines of a premise "external" to a meaningful implementation of the framework decision of 2009, may increase the flexibility of their systems by entrusting the judge who has already positively decided on whether a pre trial measure should be issued, with a variety of choices regarding the *quomodo*, in respect of the presumption of innocence and of the protection of that highly flexible asset, the personal liberty of the defendant.

The ultimate message of the entire field (EAW and the circulation of non-custodial preventive measures according to the paradigm of mutual recognition) thus converges in the institutional desire for an increase in the multilevel flexibility of the various systems and of the macrosystem which results from it, in order to encourage the possible circulation of preventive measures, mutual recognition, legislative harmonization, and mutual trust, according to the spirit of Tampere.

It is precisely this symbolic message that thus becomes the leading line of the entire field: harmonizing the protection of the accused's personal liberty from the perspective of the protection of fundamental rights rather than of efficiency.

Mireille Delmas-Marty, on the subject of harmonization, perceptively observed that the term evokes musical resonances that take us back to remote times, in which the law was associated with singing and poetry, but that the legal field is not the musical field, and harmonization should not be confused with harmony: the term, she continued, expresses only a movement towards harmony.²¹ In the concrete area of the accused's personal liberty, this movement towards harmony, albeit with difficulty, has begun: the *diapason* has vibrated, more recognizably here than elsewhere; and predicting its implications becomes not only a challenge, but a commitment required of each one of us. Such intentions are imbued with a somewhat idealistic *sapientia iuris*, one might object, but it is precisely such visionary ideas that lie at the heart of Europe.

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²⁰ Natale (2010), p. 114.

²¹ Delmas-Marty (2006), p. 7.

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