Editorial

All 'bout the Money? On the Division of Costs in the Context of EU Criminal Justice Cooperation and the Potential Impact on the Safeguarding of EU Defence Rights

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Introduction

Last year, in her Editorial for Volume 24, Issue 2–3 of this Journal, Estella Baker demanded attention for the financial impact of the European Union’s criminal justice activities. She provided several examples to illustrate the (potential) financial costs involved in the application of EU legislation in the criminal justice sphere (such as mutual recognition instruments and directives on procedural rights). In order to enhance our understanding of the impact of the EU’s activities in criminal matters, Baker suggests an increased (academic) focus on the issue of financial costs such activities may have.¹

Baker is right in that the seemingly trivial issue of money has so far been neglected in (EU) criminal law scholarship and I fully agree with her that the issue deserves more attention.² This editorial answers Baker’s call in that it

² The relevance of this issue already emerged from my comparative legal research on criminal justice cooperation systems in federations (Switzerland and the USA) versus the European Union, see J. Ouwerkerk, Quid Pro Quo? A comparative law perspective on the mutual
provides a critical reflection on the division of costs under the mutual recognition regime. While Baker indicates financial issues by category of EU activity, this piece takes it one step further. It attempts to demonstrate that the financial impact of EU legislation in one category—i.e. cross-border cooperation on the basis of mutual recognition—may have negative consequences for the implementation of EU legislation in another category—i.e. the safeguarding of procedural rights for suspects and accused persons.


In order to enhance the level of protection of procedural rights for suspects and accused persons, the European Union has been working, for more than a decade now, towards achieving common minimum standards in this field. This has not always been successful. To recall, the 2004 proposal for a Framework Decision on fair trial rights was discussed for years but eventually did not reach unanimous agreement in the Council. But then, shortly before the entry into force of the Lisbon Treaty, the Council adopted a Resolution on a step-by-step realisation of common minimum standards regarding criminal defence rights. This piecemeal approach turned out to be much more successful, maybe also because Article 82(2) TFEU requires qualified majority voting rather than unanimity.

So far, four directives have been adopted with regard to the following specific defence rights: the rights to interpretation and translation; the right to information (about rights, about the accusation and about the essential materials of the case); the right of access to a lawyer, and the right to communicate with third persons and consular authorities; the presumption of innocence (including inter alia the right not to incriminate oneself and the right to remain silent) and the right to be present at trial. A fifth directive provides recognition of judicial decisions in criminal matters (Antwerp: Intersentia, 2011), in particular Chapters 4.4, 5.4 and 6.4.6.

3 Baker, supra note 1, in particular 97–100.