



## *Case Flow Management Net-project – The Practical Value for Civil Justice in the Netherlands*

By Thomas de Weers<sup>1</sup>

### Abstract:

The problem of court delays has caused a widespread need for fast and efficient civil procedures that are able to maintain a high standard of quality. The EU-funded research project – ‘CFMnet: Towards European Caseflow Management development network – Identifying, developing and sharing best practices’ – wants to meet this need with a collection of European (CFM) practices in a handbook and an online platform. Does the CFMnet-project have an added value for the judiciary in the Netherlands? The Netherlands is currently reforming the judiciary in a major transformation called Quality and Innovation (*Kwaliteit en Innovatie*). The flexible methodology of this project pre-eminently allows for the inclusion of new ideas. This research shows that the CFMnet-project provides both relevant and irrelevant information for the Netherlands. On the one hand, there are some important practices in the CFMnet handbook that are currently unused in the Netherlands, for instance the centralized management of court experts, real-time case management and certain ICT tools. On the other hand, the Dutch jurisdiction is already familiar with a surprisingly high number of practices that are proposed in the handbook, such as summary proceedings and the division of labor between the court clerk and the judge. The relevance of the CFMnet-project thus differs from issue to issue.

**Keywords:** Caseflow management; CFMnet; Quality and Innovation; Court delays; ICT

### 1. Introduction

The efficiency of the legal framework is considered an important indicator of the competitiveness of a country.<sup>2</sup> A malfunctioning system of civil justice could produce unnecessary costs and cause a burden on the litigants.<sup>3</sup> The problem of court delays has therefore caused a widespread need for fast and efficient civil procedures that are able to maintain a high standard of quality.<sup>4</sup> The demand for process improvement work in court organizations, concentrating on reducing delays, has even created a research field surrounding the concept of ‘Caseflow Management (CFM)’.<sup>5</sup> There are promising CFM-solutions developed and implemented in European Union (EU) countries. Unfortunately, the improvement projects in court organizations are rarely developed or shared across national borders.<sup>6</sup> This is a missed opportunity, as countries could benefit from the possibility of exchanging successful or unsuccessful policies.

The EU supports Member States with improving the effectiveness of their justice systems and stimulates inter-state cooperation in identifying and developing innovative solutions, in particular for cross-border procedures.<sup>7</sup> The EU-funded

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<sup>2</sup> The Global Competitive Report 2015-2016 of the World Economic Forum has (amongst other things) as criteria: judicial independence, the efficiency of the legal framework in settling disputes and the efficiency of the legal framework in challenging regulations, <http://reports.weforum.org/global-competitiveness-report-2015-2016/> (consulted 14/3/2016).

<sup>3</sup> F. Edel, *The length of civil and criminal proceedings in the case-law of the European Court of Human Rights*, Strasbourg 2007, p. 6.

<sup>4</sup> P. Pekkanen, *Delay Reduction in Courts of Justice – Possibilities and Challenges of Process Improvement in Professional Public Organizations* (Doctoral Thesis), Lappeenranta 2011, p. 14.

<sup>5</sup> For more information on caseflow management, see: H.P. Gramckow, V. Nussenblatt, ‘Caseflow Management. Key Principles and the Systems to Support Them’, *The World Bank Justice & Development Working Paper Series 23/2013*; United Nations Office on Drugs and Crime Resource Guide on Strengthening Judicial Integrity and Capacity (2011), [https://www.unodc.org/documents/treaties/UNCAC/Publications/ResourceGuideonStrengtheningJudicialIntegrityandCapacity/11-85709\\_ebook.pdf](https://www.unodc.org/documents/treaties/UNCAC/Publications/ResourceGuideonStrengtheningJudicialIntegrityandCapacity/11-85709_ebook.pdf) (consulted 17/5/2016).

<sup>6</sup> Just/2013/Action Grants – Annex I – Project Description and Implementation – CFMnet: Towards European Caseflow Management development network – Identifying, developing and sharing best practices, p. 3.

<sup>7</sup> The 2015 EU Justice Scoreboard. Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM (2015) 116 final, p. 2.

research project – ‘CFMnet: Towards European Caseflow Management development network - Identifying, developing and sharing best practices’ – attempts to identify practices across countries and professional fields that could be of interest for other jurisdictions. The research group recently published a CFMnet handbook, a systematic collection of CFM tools, methods and practices.<sup>8</sup> The handbook covers the main areas of CFM and provides court organizations with suggestions and guidelines concerning the implementation of practices in courts. The project is furthermore developing a permanent online platform for exchanging good CFM practices at the EU level.<sup>9</sup>

The project results were published in March 2016 after two years of workshops, interviews, visitations and literature reviews. The participating universities, research institutes and ministries of justice have carried out elaborate investigations (from June 2014 to March 2016), resulting in the documentation of numerous interesting court practices in the handbook and the accompanying inventory of best practices.<sup>10</sup> Nevertheless, the added value of the CFMnet-project is not self-evident. The CFMnet-project is not the first attempt to collect the best practices at an international level. The European Commission for Efficiency of Justice published the ‘Compendium of “best practices” on time management of judicial proceedings’ and the ‘Saturn Guidelines for Judicial Time Management,’ which also included an extensive list of implementation examples in different European countries.<sup>11</sup> As the project approaches completion, I want to assess the results of this two-year effort. Does the CFMnet-project provide the judiciary with new information?

This question is of particular interest for the Dutch judiciary. The Netherlands is currently modernizing the civil and administrative procedure in a reform named ‘Quality and Innovation (QAI)’. The reform is a very concrete example of a project that could benefit from the CFMnet’s work. To evaluate the added value of the CFMnet-project, it would be interesting to know if the handbook proposes solutions that are currently unknown or unused in the Netherlands. Therefore, in this report, the following research question is answered: does the CFMnet-project have an added value for the judiciary in the Netherlands?

The objective and the methodology of CFMnet are discussed first to provide a brief outline of the project (part 2). Then, the QAI-project of the Netherlands is described concisely in the next section (part 3). The additional value of the CFMnet-project for the QAI-reform is discussed in the following part by drawing out some issues the Dutch courts are (potentially) facing and the solutions that could be found in the handbook (part 4). Finally, the findings of the different chapters are evaluated in the analysis (part 5).

## 2. CFMnet – Objective and Methodology

The CFMnet-project is at the heart of this paper. The definition of the objective and the methodology is therefore an essential step in answering the research question. The CFMnet research proposal shows that courts in all European countries are dealing with comparable problems concerning delays and backlogs.<sup>12</sup> Still, the reforms in courts remain nation-specific and unshared. There have been few systematic efforts to increase networking in CFM, and process improvement efforts have not been studied in-depth from a comparative perspective.<sup>13</sup> In the light of the common problem of court delays, the project proposes a more systematic evaluation of court practices to assess the potential problems and to find solutions.<sup>14</sup>

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<sup>8</sup> See for the handbook and the inventory of best practices: <http://www.lut.fi/web/en/european-caseflow-management-development-network> (consulted 12/5/2016).

<sup>9</sup> The idea behind the website is to facilitate a continuous exchange of information between countries and interested legal practitioners or scholars. See: Just/2013/Action Grants – Annex I – Project Description and Implementation – CFMnet: Towards European Caseflow Management development network – Identifying, developing and sharing best practices, p. 2.

<sup>10</sup> The coordinating university of the project is Lappeenranta University of Technology (Finland). The research partners are the Research Institute on Judicial Systems (Italy), Utrecht University (the Netherlands), University of Brescia (Italy), Ministry of Justice (Estonia) and the Ministry of Justice (Finland). Bern University (Switzerland) is an associate partner.

<sup>11</sup> European Commission for the Efficiency of Justice (CEPEJ) – Compendium of “best practices” on time management of judicial proceedings, CM(2007) 8 Addendum; M. Fabri, N. Carboni, ‘European Commission for the Efficiency of Justice (CEPEJ) - Saturn Guidelines for Judicial Time Management. Comments and Implementation Examples’, *CEPEJ-SATURN(2015)2*.

<sup>12</sup> Just/2013/Action Grants – Annex I – Project Description and Implementation – CFMnet: Towards European Caseflow Management development network – Identifying, developing and sharing best practices, p. 4.

<sup>13</sup> Just/2013/Action Grants – Annex I – Project Description and Implementation – CFMnet: Towards European Caseflow Management development network – Identifying, developing and sharing best practices, p. 3.

<sup>14</sup> Just/2013/Action Grants – Annex I – Project Description and Implementation – CFMnet: Towards European Caseflow Management development network – Identifying, developing and sharing best practices, p. 2.

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The main objective of the CFMnet-project is to start creating a procedure for European cooperation in developing and sharing good practices for civil law.<sup>15</sup> The products of the project are (i) a Caseflow Management Handbook and (ii) a Caseflow Management Improvement Platform focusing on civil law. The CFM Handbook is a practical guide containing functional CFM procedures (for example, e-tools for case monitoring or e-filing) developed in different EU countries.<sup>16</sup> The Caseflow Management Improvement Platform will provide tools and opportunities for interaction between court stakeholders in Europe. The following focus areas were chosen:

- Legislative Measures for Timeliness in Civil Proceedings
- Judicial Case Management
- Performance Management
- Use of ICT in court proceedings
- EU Cross-border Disputes

The handbook and the website are a collective effort of all the participating researchers in the project. The required information was collected in a variety of European countries through workshops, interviews, literature reviews and country visits.<sup>17</sup> The country visits took place in the civil law countries of Austria, Belgium, Czech Republic, Estonia, Finland, Germany, Italy, the Netherlands, Portugal, Slovenia, Spain and Sweden. The common law countries have been excluded.

### 3. Quality and Innovation in the Netherlands

A concise description of the QAI-project is indispensable to see where the CFMnet-project could have an added value. In this section, the legislative changes, the digitalization, organization and recent developments are discussed.

#### 3.1. Introduction

The courts in the Netherlands are still using paper files and fax machines for communication on a daily basis. Compared to other countries, the Dutch judiciary lags behind in terms of digitalization.<sup>18</sup> To keep up with times, the judiciary realized that the courts have to be reformed profoundly.<sup>19</sup> Therefore, the QAI-project (2012) was announced to make complex, official, expensive and time-consuming legal proceedings a thing of the past.<sup>20</sup> The paper-based system is supposed to be replaced by standardized and user-friendly online proceedings.<sup>21</sup> To this end, the project is designing a new digital procedure and is reforming the national procedural law and regulations.<sup>22</sup> The planned measures are expected to result in a new basic procedure in which the judge takes responsibility for his/her cases, delivers custom-made judgements and rules definitely on the substance of cases (i.e. solves the underlying conflict).<sup>23</sup> The project is carried out in close cooperation between the Ministry of Security and Justice (formerly the Ministry of Justice) and the Council for the Judiciary. The Ministry of Security and Justice is responsible for redrafting the procedural laws, while the Council for the Judiciary takes on the process innovation, the digitalization of procedures and the implementation of the ideas.

#### 3.2. Legislation

The new legislation comprises the framework in which the digitalization and the process innovation of the reform take place. Provided that the reform is successful, there will be substantial changes in five areas:<sup>24</sup>

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<sup>15</sup> Just/2013/Action Grants – Annex I – Project Description and Implementation – CFMnet: Towards European Caseflow Management development network – Identifying, developing and sharing best practices, p. 2.

<sup>16</sup> Just/2013/Action Grants – Annex I – Project Description and Implementation – CFMnet: Towards European Caseflow Management development network – Identifying, developing and sharing best practices, p. 5.

<sup>17</sup> To be more precise: 60 court stakeholder interviews, 7 on-site visits to European countries and 4 workshops. Just/2013/Action Grants – Annex I – Project Description and Implementation – CFMnet: Towards European Caseflow Management development network – Identifying, developing and sharing best practices, p. 7.

<sup>18</sup> Frits Bakker, chairman of the Council for the Judiciary in an interview with the *Advocatenblad*, <https://www.rechtspraak.nl/SiteCollectionDocuments/Interview-Deken-OrdevAdv-en-voorzitter-Rvdr-Advocatenblad-25092014.pdf> (consulted 12/5/2016).

<sup>19</sup> Kamerstukken II, 2012-13, 29 279, no. 164.

<sup>20</sup> See the webpage on innovation on the website of the Council for the Judiciary, <https://www.rechtspraak.nl/English/The-Council-for-the-Judiciary/Pages/Innovation.aspx> (consulted 12/5/2016).

<sup>21</sup> See the webpage on innovation on the website of the Council for the Judiciary, <https://www.rechtspraak.nl/English/The-Council-for-the-Judiciary/Pages/Innovation.aspx> (consulted 12/5/2016).

<sup>22</sup> F. van Dijk, R. Kouwenhoven, 'Judicial Reforms in the Netherlands', in: S. Verberk (ed.), *Judicial reform in the Netherlands. Change in broad outline* (Rechtstreeks 2014, special edition), The Hague 2014, p. 9.

<sup>23</sup> Kamerstukken II, 2012-13, 29 279, no. 164, p. 3.

<sup>24</sup> Kamerstukken II, 2014-15, 34 059, no. 3.

1. A new basic procedure: the law of civil procedure is simplified. The following format will be the starting point: the filing of a claim, the filing of a response by the opposing party, the hearing of the case, and, finally, the judge's decision (if the parties were not able to reach an agreement). The setup described above should be the standard procedure for all cases, but the judge will be allowed to modify this format if he/she considers it necessary.
2. New substantiation of the hearing: the hearing of the parties will be central in the new basic procedure. The judge will have more opportunities to decide how to use the hearing (for example to try to reconcile the parties or to request information), but he/she could also decide to not have a hearing at all (for example, if the opponent does not put up a defense).
3. Digital start of the proceedings: legal barriers will be removed to make it possible to initiate proceedings digitally. The idea is to make this obligatory for professional parties.
4. Simplification of the existing procedures: there will be one uniform initiation of proceedings in which the procedure is started by filing the claim. This will entail eliminating the difference between the application proceedings (*verzoekschriftprocedure*) and the summons proceedings (*dagvaardingsprocedure*).<sup>25</sup>
5. Appeal and appeal in cassation: the basic procedure described above will be applied in appeal cases too.

### 3.3. Digitalization

The legislative change is only one part of the reform. The other half is about process innovation and digitalization. This part cannot be implemented by law reform only, but requires the development of specific software for a brand new digital procedure. The project has started with the development of a basic interface called 'MyCase (*MijnZaak*)' to allow the applicant to start the proceedings with a digital form. The form is the originating document (*inleidend document*) in civil proceedings to which other files (such as evidence) can be attached. The system works the same way for the defendant, because he will be required to upload his defense on MyCase too. To process the digitalized information, the project is also developing a digital work space for court staff. The 'MyWorkspace (*MijnWerkomgeving*)' program will give access to the digital files, the registration system and the planning system for court hearings.

### 3.4. Organization

The QAI-project decided to link the digitalization efforts with the legislative reform. To make the changes less burdensome for the end-users, preference was given to one overarching reorganization. The Council of State, however, identified an important risk in this approach. By merging both reforms, the success of the legislative reform became dependent on the realization of the digitalization.<sup>26</sup> As the digitalization efforts of the judiciary have not always been successful, the Council of State advised to disconnect digitalization efforts from the legislative changes.<sup>27</sup> The advice was not followed.<sup>28</sup> The QAI project is trying to make the reform a success by actively involving stakeholders, such as judges, court staff and lawyers in the development and the implementation of the transformations.<sup>29</sup>

A lack of support is often a reason behind the failure of a digitalization project.<sup>30</sup> The software for 'MyCase' and 'MyWorkspace' is therefore being developed in close cooperation with its future users. The software tools are developed step-by-step, based on thousands of user stories that were collected in the beginning of the project. The users are regularly consulted to adapt the program to their wishes. The methodology of the project furthermore provides for the possibility of adding new features after the completion of the program. This is important, because the QAI project is only focusing on the bare essentials of an innovative and digitalized judiciary. The best practices of the CFMnet-project could therefore be interesting for the future.

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<sup>25</sup> Summons proceedings are used for conflicts in which the parties have conflicting interests (the enforcement of a contract, for example). The applications proceedings are used for changing an already existing legal relationship that is usually of a non-commercial interest (for example the institution of administration by a guardian). The formal procedural rules for the application proceedings and the summons proceedings are different.

<sup>26</sup> Kamerstukken II, 2014-15, 34 059, no. 3.

<sup>27</sup> Kamerstukken II, 2014-15, 34 059, no. 3.

<sup>28</sup> The Senate passed the law on the QAI-project on 12 July 2016. The legislative proposal combined the digitalisation and legislative reform. See: [https://www.eerstekamer.nl/wetsvoorstel/34059 Vereenvoudiging\\_en](https://www.eerstekamer.nl/wetsvoorstel/34059 Vereenvoudiging_en) (consulted 4/8/2016).

<sup>29</sup> Kamerstukken II, 2014-15, 34 059, no. 3, p. 12 (Memorie van Toelichting - Voorstel tot wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Algemene wet bestuursrecht in verband met vereenvoudiging en digitalisering van het procesrecht).

<sup>30</sup> R.E. Messick, 'Judicial Reform and Economic Development: A Survey of the Issues', *The World Bank Research Observer*, Vol. 14, No. 1, p. 124.

### 3.5. State of Affairs

The project has not been spared of criticism. Already at the start of the program, the question has been raised whether the reform is actually necessary.<sup>31</sup> The quality of the Dutch judiciary is reasonably high and the necessity of a reform is therefore not obvious.<sup>32</sup> The feasibility of the project has also received substantial criticism from various sides. By reducing the through-put times by 40%, the QAI-project is supposed to create a yearly cost-reduction of 270 million.<sup>33</sup> According to Ahsmann and Hofhuis, this reduction is unfeasible, especially since the legislative reform does not propose many new measures compared to earlier reforms.<sup>34</sup> The Netherlands Bar Association even wondered whether the new basic procedure will require more time from judges.<sup>35</sup>

The current state of affairs does not inspire much confidence. The program is not proceeding according to plan. The legislative approval of the proposal came more than a year after it was due, and the implementation phase was postponed on several occasions.<sup>36</sup> The project furthermore encountered a large financial setback (the total costs rose from 60 to 200 million euro<sup>37</sup>) and the external relations with the legal profession appear to be problematic. The Netherlands Bar Association has laid down specific conditions for their support and is actively trying to influence the political decision-making process.<sup>38</sup> A good outcome of the project is therefore not assured. Could CFMnet provide the Dutch judiciary with fertile ideas?

## 4. The Additional Value of the CFMnet-project

The practical value of the CFMnet-project does not only need to show itself in, for example, a solution for financial troubles or legislative delay. Examination of the handbook has brought certain issues to light that could be of interest for the QAI-project. The methodology of the QAI-project makes the inclusion of new ideas very well possible. The 'best practices' that could have an added value for the Dutch judiciary are discussed in accordance with the chapters of the handbook.<sup>39</sup>

### 4.1. Legislative Measures for Timeliness in Civil Proceedings

The first chapter of the handbook is about legislative measures that could improve timeliness in civil proceedings. The proposed ideas include simplifying the small claim and the uncontested claim procedure, reducing the number of appeals, improving the ordinary civil proceedings and promoting mediation and conciliation tools. Quite a few of these measures have already been implemented in the Netherlands. This does not mean that the chapter is of no interest. The Dutch government recently announced a new legislative proposal concerning mediation, and the QAI-project is putting a specific emphasis on final dispute resolution.<sup>40</sup> The paragraphs on mediation, conciliation and settlements (par. 2.4.) are therefore of particular interest for the Netherlands.

<sup>31</sup> M. Ahsmann, H. Hofhuis, 'Versnelling van doorlooptijden van rechtszaken met 40%', *NJB* 2014/1273.

<sup>32</sup> The Global Competitive Report 2015-2016 of the World Economic Forum shows that the Netherlands performs well in judicial independence (6<sup>th</sup> of 140), efficiency of the legal framework in settling disputes (10<sup>th</sup> of 140) and the efficiency of the legal framework in challenging regulations (6<sup>th</sup> of 140), <http://reports.weforum.org/global-competitiveness-report-2015-2016/> (consulted 14/3/2016). The World Justice Project 2015 shows similar results. The Netherlands scores 1<sup>st</sup> out of 102 in 'Civil Justice' and 14<sup>th</sup> out of 102 in 'Criminal Justice', [http://worldjusticeproject.org/sites/default/files/roli\\_2015\\_0.pdf](http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf) (consulted 14/3/2016).

<sup>33</sup> Time will not be saved by granting the judges less time for a case. The amount of time the file is on the table will be reduced by making court calendars responsive to change. The system will react immediately to certain events (for example, the filing of a rejoinder) and will not wait until the expiration of a deadline. The moment a specific action has been carried out by one of the parties, a new deadline for the parties or the court will start to run immediately. The question remains if these responsive calendars will be able to reach a time-reduction of 40%.

<sup>34</sup> M. Ahsmann, H. Hofhuis, 'Versnelling van doorlooptijden van rechtszaken met 40%', *NJB* 2014/1273.

<sup>35</sup> Nederlandse Orde van Advocaten. Consultatie Wetsvoorstel wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Algemene wet bestuursrecht in verband met vereenvoudiging en digitalisering van het procesrecht (2014), [http://www.mr-online.nl/images/stories/files/Consultatie\\_NOvA\\_wetsvoorstel\\_KEI.pdf](http://www.mr-online.nl/images/stories/files/Consultatie_NOvA_wetsvoorstel_KEI.pdf) (consulted 26/4/2016).

<sup>36</sup> The Senate passed the law on the QAI-project on 12 July 2016. See: [https://www.eerstekamer.nl/wetsvoorstel/34059\\_vereenvoudiging\\_en](https://www.eerstekamer.nl/wetsvoorstel/34059_vereenvoudiging_en) (consulted 4/8/2016).

<sup>37</sup> See for example an article in het *Algemeen Dagblad*, <http://www.ad.nl/ad/nl/1012/Nederland/article/detail/3932083/2015/03/28/Ict-project-justitie-blijkt-140-miljoen-euro-meer-te-kosten.dhtml> (consulted 12/5/2016).

<sup>38</sup> See for overview of the letters the Bar Association sent to the Dutch parliament, the Senate or the Council for the Judiciary: <https://www.advocatenorde.nl/10463/advocaten/digitalisering-rechtspraak-en-modernisering-procesrecht.html?thema=digitalisering-rechtspraak-project-kei&themaID=10468> (consulted 16/5/2016).

<sup>39</sup> The last chapter of the handbook (6. EU Cross-border disputes) is left out, because of the limited relevance for the reform in the Netherlands.

<sup>40</sup> Kamerstukken II, 2014-15, 33723, no. 14.

#### 4.1.1. Mediation, Conciliation, Settlements

The QAI-reform wants to motivate judges to focus more on final dispute resolution.<sup>41</sup> This means that the judge should not only focus on the legal dispute, but also on the underlying conflict between the parties. The reform is supposed to stimulate judges to refer cases to a mediator or to guide the parties towards a settlement. The QAI-project, however, does not propose any concrete legal measures to encourage ADR in the civil law field.<sup>42</sup> The reform does provide for measures to stimulate final dispute resolution in administrative law, but the proposal remains silent with regard to civil law.

The handbook provides some interesting practices concerning financial incentives resulting from settlements or mediation, which could possibly be applied in the Dutch jurisdiction. The Czech Republic returns 50% of the court fee if a settlement is reached, and tax benefits can be obtained in Estonia, Slovenia and Italy.<sup>43</sup> The Netherlands does not utilize these kinds of encouragements (apart from subsidies for lower income groups). The parties need to bear the costs of mediation themselves. The financial incentives could be of interest for the Netherlands, especially since the court fee system is being modified anyway.

The handbook describes another interesting practice from the Finnish jurisdiction involving mediation assistance in the courtroom. Finnish judges often act as mediators in cases concerning family matters while being assisted by a psychologist or social worker with specialized expertise in parenting and child development matters. The judge remains responsible for the legal procedure, while the expert ensures that the essential questions regarding the best interests of the child are covered. According to the Finnish judiciary, the collaboration between the judge and expert has enhanced the capacity of the court to solve social issues. The practice furthermore saves the court's resources and social security expenditures.<sup>44</sup> The Finnish idea shows that mediation does not necessarily need to take place outside the courtroom. Apart from the clear qualitative benefits of this practice, the idea could also save public money.

#### 4.2. Judicial Case Management

The third chapter of the handbook concerns judicial case management and the possible role of a judge as a case manager in a civil procedure.<sup>45</sup> The chapter touches shortly upon active judicial case management, but most emphasis is put on the division of labor between judges and court clerks, and managing expert witnesses. The Netherlands does not have an official monitoring system for experts in civil cases and therefore the paragraph about this topic (par. 3.2) could be of interest.

##### 4.2.1. Managing Judicial Experts

The management of judicial experts and the monitoring of their performance is an important field in civil justice. There are many cases in which an evaluation of the facts is difficult without the application of the specialized knowledge of an expert.<sup>46</sup> The poor quality of expert opinions or a heavy workload could cause unreasonable delays for the parties.<sup>47</sup> The proper organization of the experts could therefore greatly benefit a court organization. The Dutch judiciary drew up detailed guidelines for expert opinions concerning (amongst other things) the communication with the parties, the right to hear and be heard and impartiality.<sup>48</sup> There are furthermore a couple of organizations concerned with the registration of experts.<sup>49</sup> In civil law, however, there is no official system to monitor the quality of experts.<sup>50</sup> The handbook could

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<sup>41</sup> See: <https://www.innovatierechtsbestel.nl/gerechtelijke-procedures/kwaliteit-en-innovatie-rechtspraak-kei/aanpassingen-wetgeving> (consulted 4/8/2016).

<sup>42</sup> Kamerstukken II, 2014-15, 34 059, no. 3, p. 12 (Memorie van Toelichting - Voorstel tot wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Algemene wet bestuursrecht in verband met vereenvoudiging en digitalisering van het procesrecht).

<sup>43</sup> Inventory of Caseflow Management Practices in European Civil Proceedings. Appendix 1 for the Caseflow Management Handbook – Guide for Enhanced Court Administration in Civil Proceedings (2016), <http://www.lut.fi/web/en/european-caseflow-management-development-network> (consulted 18/4/2016), p. 9 (Estonia), p. 12 (Slovenia) and p. 11 (Italy).

<sup>44</sup> Inventory of Caseflow Management Practices in European Civil Proceedings. Appendix 1 for the Caseflow Management Handbook – Guide for Enhanced Court Administration in Civil Proceedings (2016), <http://www.lut.fi/web/en/european-caseflow-management-development-network> (consulted 18/4/2016), p. 9.

<sup>45</sup> Caseflow Management Handbook. Guide for Enhanced Court Administration in Civil Proceedings (2016), <http://www.lut.fi/web/en/european-caseflow-management-development-network> (consulted 18/4/2016), p. 13.

<sup>46</sup> Caseflow Management Handbook. Guide for Enhanced Court Administration in Civil Proceedings (2016), <http://www.lut.fi/web/en/european-caseflow-management-development-network> (consulted 18/4/2016), p. 17.

<sup>47</sup> Caseflow Management Handbook. Guide for Enhanced Court Administration in Civil Proceedings (2016), <http://www.lut.fi/web/en/european-caseflow-management-development-network> (consulted 18/4/2016), p. 17.

<sup>48</sup> Leidraad deskundigen in civiele zaken (date unknown), <https://www.rechtspraak.nl/SiteCollectionDocuments/Leidraad-deskundigen-WT.pdf> (consulted 18/4/2016).

<sup>49</sup> There is, for example, the National Expert Broker (*Landelijke Deskundigheidsmakelaar*) and the Dutch Association for Specialised Medical Reporting (*Nederlandse Vereniging voor Medisch Specialistische Rapportage*).

therefore offer some interesting ideas about centralized monitoring. According to the handbook, the experts should be monitored in four different ways:

1. ex ante evaluation mechanism (before the enrolment of the experts on the official register);
2. control of their performance while they are working;
3. ex post control of the performance;
4. periodic reassessment.<sup>51</sup>

There are some good practices in the inventory concerning this topic, notably in Belgium. The Belgian judiciary adopted a system for monitoring expert witnesses that won the Crystal Scales of Justice prize three years ago (organised by the Council of Europe). To increase the quality of judicial expert opinions, the court of first instance of Antwerp established a mechanism of constant cooperation and communication with judicial experts.<sup>52</sup> The court created a special department composed of a judge, a clerk and two members of civil registry staff.<sup>53</sup> The team is concerned with:

- offering a personalized service to experts and different parties;
- checking compliance with the prescribed deadline for the report and reminding the expert of this deadline, if necessary;
- registering information concerning the experts in a special information system developed for this purpose.<sup>54</sup>

The project resulted in an increased quality of expert opinions, a reduction of the time they needed and quicker payment of the experts. As the project did not require much human resources and material investments in Belgium, it could be easily transposed in the Dutch legal system or another jurisdiction.<sup>55</sup>

### 4.3. Performance Management

The chapter about performance management describes issues related to target-setting and making sure that activities, resources and efforts contribute to the achievement of these targets.<sup>56</sup> This so-called performance management covers a wide range of topics such as court user satisfaction and case clearance rates/case backlogs. In the Netherlands, the quality of the judicial system is measured by RechtspraakQ, the common and overarching quality system of the judiciary.<sup>57</sup> The RechtspraakQ quality system was introduced in the beginning of this millennium. The forthcoming digitalization could offer opportunities for the field of performance management, as there will be more data available.

#### 4.3.1. Real Time Monitoring

The paragraph on monitoring systems and procedures (par. 4.1.4) could be particularly interesting in this respect, as it proposes real-time performance information to facilitate process control, improve decision-making and quick reactions towards problems.<sup>58</sup> The Dutch judiciary does not have this yet. The Finnish 'Timeframe Alarm System' is a well-functioning example of such a real-time performance management system. The system was established to advance personal planning of court staff, reduce backlogs and eliminate delays in courts.<sup>59</sup> The program draws attention to delays that are about to happen to enable an effective intervention. The moment a case is exceeding a time-limit, there is an

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<sup>50</sup> There is a centralised monitoring register for criminal cases: The Netherlands Register of Courts Experts (NRCE). It is the first nationwide register with a legal basis, independent position and structural funding. In the coming years, the NRCE wants to expand its focus to other fields of law.

<sup>51</sup> Caseflow Management Handbook. Guide for Enhanced Court Administration in Civil Proceedings (2016), <http://www.lut.fi/web/en/european-caseflow-management-development-network> (consulted 18/4/2016), p. 19.

<sup>52</sup> Crystal Scales of Justice Prize. Explanations by jury member Lidija Masanovic, Legal Advisor for European Integrations, Ministry of Justice of Montenegro (2012), [http://www.coe.int/t/dghl/cooperation/cepej/events/edcj/cristal/Cristal2012projetsgagants\\_en.asp](http://www.coe.int/t/dghl/cooperation/cepej/events/edcj/cristal/Cristal2012projetsgagants_en.asp) (consulted 18/4/2016).

<sup>53</sup> Rechtbank Eerste aanleg Antwerpen internationaal in de prijzen (2012), [http://justitie.belgium.be/nl/nieuws/persberichten/news\\_pers\\_2012-10-30\\_2](http://justitie.belgium.be/nl/nieuws/persberichten/news_pers_2012-10-30_2) (consulted 18/4/2016).

<sup>54</sup> Rechtbank Eerste aanleg Antwerpen internationaal in de prijzen (2012), [http://justitie.belgium.be/nl/nieuws/persberichten/news\\_pers\\_2012-10-30\\_2](http://justitie.belgium.be/nl/nieuws/persberichten/news_pers_2012-10-30_2) (consulted 18/4/2016).

<sup>55</sup> Crystal Scales of Justice Prize. Explanations by jury member Lidija Masanovic, Legal Advisor for European Integrations, Ministry of Justice of Montenegro (2012), [http://www.coe.int/t/dghl/cooperation/cepej/events/edcj/cristal/Cristal2012projetsgagants\\_en.asp](http://www.coe.int/t/dghl/cooperation/cepej/events/edcj/cristal/Cristal2012projetsgagants_en.asp) (consulted 18/4/2016).

<sup>56</sup> Caseflow Management Handbook. Guide for Enhanced Court Administration in Civil Proceedings (2016), <http://www.lut.fi/web/en/european-caseflow-management-development-network> (consulted 18/4/2016), p. 21.

<sup>57</sup> Quality of the judicial system in the Netherlands (date unknown), <https://www.rechtspraak.nl/SiteCollectionDocuments/Quality-of-the-judicial-system-in-the-Netherlands.pdf> (consulted 18/4/2016).

<sup>58</sup> Caseflow Management Handbook. Guide for Enhanced Court Administration in Civil Proceedings (2016), <http://www.lut.fi/web/en/european-caseflow-management-development-network> (consulted 18/4/2016), p. 24.

<sup>59</sup> Caseflow Management Handbook. Guide for Enhanced Court Administration in Civil Proceedings (2016), <http://www.lut.fi/web/en/european-caseflow-management-development-network> (consulted 18/4/2016), p. 24.

alarm symbol appearing on the list of the cases for which a person is responsible. The list is updated daily, and the cases are presented according to their urgency.<sup>60</sup> There is a similar system in Slovenia (the President's Dashboard) that shows court performance in real-time in the following areas: human resources, backlogs, efficiency and quality of decisions.<sup>61</sup> The RechtspraakQ system only provides periodical reports and therefore does not have real-time performance information. The full digitalization of the QAI-project could offer the opportunity to create a similar application. The immense amount of data that are collected when the digital procedure is implemented could be very well used for real-time monitoring. The existence of an electronic infrastructure is not a prerequisite for tracing backlogs, but the use of a digital system will make it easier.

The use of the data is another interesting element of performance management. The accessibility of the collected information does not necessarily need to be restricted to the president of the court or the Council for the Judiciary. The German judiciary uses a practice that could be easily implemented in another jurisdiction. In order to stimulate competitiveness amongst judges and different court sections, the German regional court of North Rhine-Westphalia publishes court statistics every three months internally. The publication of these data enables judges to compare themselves with each other, which apparently has a very stimulating effect on their productivity.<sup>62</sup> The costs necessary for the publication of data are very limited and the QAI-project should be able to build such a tool without much difficulty. The cost-benefit ratio of this practice could therefore be of good proportions.

#### **4.4. Use of ICT in Court Proceedings**

The last chapter of the handbook discusses the use of ICT to increase the efficiency and effectiveness of the judiciary, focusing on case management systems, electronic delivery and submission of documents, as well as other electronic solutions for improved use of ICT.<sup>63</sup> The Netherlands is not the first country to try to digitalize the justice system. There have been many (un)successful attempts that could provide interesting experiences.<sup>64</sup> The legislative proposal for QAI briefly mentions Estonia, Germany, Finland and Ireland as countries in which the judiciary is digitalizing and innovating the administration of justice.<sup>65</sup> However, the handbook shows that there are many other countries working with highly-developed IT-solutions.<sup>66</sup> What could we learn from them?

##### **4.4.1. Electronic Communication**

The secure involvement of the defending party in online proceedings is a complex issue. The online service of a document requires a certain level of security to make sure that the message has indeed reached the recipient. The legislative proposal of QAI explicitly mentions Germany as an instructive example with regard to the digital signature.<sup>67</sup> The proposal states that the German experiences with the digital signature could teach us that the guarantees and technical expectations made on it need to be proportionate to the user-friendliness and the costs of the project.<sup>68</sup> The German example could indeed be instructive, but it is not the first to raise this consideration. There are many other

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<sup>60</sup> Caseflow Management Handbook. Guide for Enhanced Court Administration in Civil Proceedings (2016), <http://www.lut.fi/web/en/european-caseflow-management-development-network> (consulted 18/4/2016), p. 24. See for more information the Inventory of Caseflow Management Practices in European Civil Proceedings. Appendix 1 for the Caseflow Management Handbook – Guide for Enhanced Court Administration in Civil Proceedings (2016), <http://www.lut.fi/web/en/european-caseflow-management-development-network> (consulted 18/4/2016), p. 31.

<sup>61</sup> Caseflow Management Handbook. Guide for Enhanced Court Administration in Civil Proceedings (2016), <http://www.lut.fi/web/en/european-caseflow-management-development-network> (consulted 18/4/2016), p. 24; Inventory of Caseflow Management Practices in European Civil Proceedings. Appendix 1 for the Caseflow Management Handbook – Guide for Enhanced Court Administration in Civil Proceedings (2016), <http://www.lut.fi/web/en/european-caseflow-management-development-network> (consulted 18/4/2016), p. 35.

<sup>62</sup> Inventory of Caseflow Management Practices in European Civil Proceedings. Appendix 1 for the Caseflow Management Handbook – Guide for Enhanced Court Administration in Civil Proceedings (2016), <http://www.lut.fi/web/en/european-caseflow-management-development-network> (consulted 18/4/2016), p. 32.

<sup>63</sup> Caseflow Management Handbook. Guide for Enhanced Court Administration in Civil Proceedings (2016), <http://www.lut.fi/web/en/european-caseflow-management-development-network> (consulted 18/4/2016), p. 28.

<sup>64</sup> Caseflow Management Handbook. Guide for Enhanced Court Administration in Civil Proceedings (2016), <http://www.lut.fi/web/en/european-caseflow-management-development-network> (consulted 18/4/2016), p. 28-34; Inventory of Caseflow Management Practices in European Civil Proceedings. Appendix 1 for the Caseflow Management Handbook – Guide for Enhanced Court Administration in Civil Proceedings (2016), <http://www.lut.fi/web/en/european-caseflow-management-development-network> (consulted 18/4/2016), p. 39-55.

<sup>65</sup> Kamerstukken II, 2012-13, 29 279, no. 164, p. 14.

<sup>66</sup> Kamerstukken II, 2012-13, 29 279, no. 164, p. 14.

<sup>67</sup> Kamerstukken II, 2012-13, 29 279, no. 164, p. 14.

<sup>68</sup> Kamerstukken II, 2012-13, 29 279, no. 164, p. 14

countries that have dealt with difficulties concerning electronic communication.<sup>69</sup> The Electronic Legal Communication System (*Elektronischer Rechtsverkehr*) from Austria, for example, is a functioning paperless electronic communication tool used for communication between parties and the court.<sup>70</sup> The Czech Republic, Estonia, Italy, Portugal and Sweden have other operational systems.<sup>71</sup> The Dutch judiciary is far from the first organization to consider the balance between user-friendliness and the costs of the digital signature. There are even countries with a considerably lower budget that had to deal with similar problems. Acquiring knowledge of these experiences could help the judiciary in its considerations concerning innovation and digitalization in the Netherlands.

#### 4.4.2. Innovation within the Courtroom

The chapter on ICT could also be interesting for innovations within the courtroom. The QAI-reform does not give much attention to this, although the use of certain technologies has proven itself to be useful.<sup>72</sup> Audio-visual recordings of court hearings could save a lot of time and make it possible for the court and the parties to review the court hearing in either audio or video format.<sup>73</sup> It is furthermore possible to transcribe the audio documents into written text without the intervention of a court clerk.<sup>74</sup> In addition, by granting the audio file the status of a court document, needless paperwork could disappear. After all, transcription will not be necessary anymore. The handbook provides plenty of examples of countries working this way. Spanish courts are making a video recording of all the hearings (both in civil and criminal cases) which is later added to the file on CD.<sup>75</sup> The Portuguese judiciary adopted a similar system for audio records years ago and no longer requires a written transcript.<sup>76</sup> There is even a privately developed solution for recording court hearings (the Liberty Court Recorder), which is used by Estonia.<sup>77</sup> The Netherlands could easily make use of this technology, considering the existing use of video-conferencing.

### 5. Analysis: The Additional Value for the QAI-project

Does the CFMnet-project have an added value for the judiciary in the Netherlands? The previous paragraphs show that there are numerous practices in the handbook that are currently unused in the Netherlands. To stimulate ADR, for example, the ideas concerning incentivizing mediation, conciliation and settlements could be interesting. The section on judicial case management provides good ideas for a better way of managing judicial experts. The chapters on performance management and ICT show that there are many countries working with highly-developed IT-solutions, for example concerning case management, electronic communication or real time monitoring. The flexible methodology of the QAI-project pre-eminently allows for the inclusion of the ideas that can be found in these sections.

This being said, the Dutch jurisdiction is familiar with a surprisingly high number of practices that are proposed in the handbook (for example: the practices concerning the structure of ordinary civil proceedings, summary proceedings and the division of labor between the judge and the court clerk). The reason for this could be found in the extensive reform of

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<sup>69</sup> See, for example: F. Contini, G. F. Lanzara (eds.), *The Circulation of Agency in E-Justice. Interoperability and Infrastructures for European Transborder Judicial Proceedings*, Dordrecht 2014; F. Contini, G.F. Lanzara, *ICT and Innovation in the Public Sector. European Studies in the Making of E-Government*, London 2009.

<sup>70</sup> Inventory of Caseflow Management Practices in European Civil Proceedings. Appendix 1 for the Caseflow Management Handbook – Guide for Enhanced Court Administration in Civil Proceedings (2016), <http://www.lut.fi/web/en/european-caseflow-management-development-network> (consulted 18/4/2016), p. 40.

<sup>71</sup> Inventory of Caseflow Management Practices in European Civil Proceedings. Appendix 1 for the Caseflow Management Handbook – Guide for Enhanced Court Administration in Civil Proceedings (2016), <http://www.lut.fi/web/en/european-caseflow-management-development-network> (consulted 18/4/2016), p. 42 (Czech Republic), p. 44 (Estonia), p. 47/48 (Italy), p. 51 (Portugal), p. 53 (Spain) and p. 55 (Sweden).

<sup>72</sup> Boston Consultancy Group Business Case. Programma Kwaliteit en Innovatie. Eindrapportage Validatie en Advies (2013), [https://www.eerstekamer.nl/overig/20150324/programma\\_kwaliteit\\_en\\_innovatie/document3/f=vjsjkapdenzn.pdf](https://www.eerstekamer.nl/overig/20150324/programma_kwaliteit_en_innovatie/document3/f=vjsjkapdenzn.pdf) (consulted 17/5/2016), p. 22.

<sup>73</sup> Boston Consultancy Group Business Case. Programma Kwaliteit en Innovatie. Eindrapportage Validatie en Advies (2013), [https://www.eerstekamer.nl/overig/20150324/programma\\_kwaliteit\\_en\\_innovatie/document3/f=vjsjkapdenzn.pdf](https://www.eerstekamer.nl/overig/20150324/programma_kwaliteit_en_innovatie/document3/f=vjsjkapdenzn.pdf), (consulted 17/5/2016), p. 23.

<sup>74</sup> There is even free transcription software available on the internet.

<sup>75</sup> Inventory of Caseflow Management Practices in European Civil Proceedings. Appendix 1 for the Caseflow Management Handbook – Guide for Enhanced Court Administration in Civil Proceedings (2016), <http://www.lut.fi/web/en/european-caseflow-management-development-network> (consulted 18/4/2016), p. 54.

<sup>76</sup> Inventory of Caseflow Management Practices in European Civil Proceedings. Appendix 1 for the Caseflow Management Handbook – Guide for Enhanced Court Administration in Civil Proceedings (2016), <http://www.lut.fi/web/en/european-caseflow-management-development-network> (consulted 18/4/2016), p. 49.

<sup>77</sup> Inventory of Caseflow Management Practices in European Civil Proceedings. Appendix 1 for the Caseflow Management Handbook – Guide for Enhanced Court Administration in Civil Proceedings (2016), <http://www.lut.fi/web/en/european-caseflow-management-development-network> (consulted 18/4/2016), p. 45.

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the Dutch law of civil procedure that took place in the beginning of this millennium.<sup>78</sup> The legislative changes updated the law of civil procedure and introduced many ideas that are proposed in the handbook now (such as the focus on the hearing and active judicial case management). A large part of the handbook is therefore of lesser interest.

What is surprising is that the handbook hardly addresses one of the biggest problems of legal reforms: how to implement a new practice? It is not always easy to transpose a practice from one country to another. There could be a whole range of obstacles making a successful implementation impossible. Judges and lawyers could, for example, resist a change of the justice system. There is a general section about reforms (par. 4.3 of the handbook), but this part is remarkably short. The handbook only includes examples of successful reforms, although sometimes the difficulties and failures of a reform could be more interesting than the success stories. Of course Member States will be reluctant to share information about unsuccessful reforms. Still, it would have been interesting to see how other countries have dealt with problems such as lengthy legislative procedures and problematic external relations (with for example the bar association or the bailiffs).

The CFMnet-project therefore provides both relevant and irrelevant information for the Netherlands. The practices could be categorized into four different categories. To start with, there are practices that could be implemented swiftly, such as the German practice of the internal publication of the performance of judges. Secondly, there are practices that are interesting, but require more time to be implemented. A good example of such a practice is the Belgian system for the monitoring of expert witnesses. Thirdly, there are practices that do not offer much for the Netherlands, because they have already been (partly) implemented, such as the legislative measures concerning active judicial case management and the introduction of summary proceedings. The fourth category comprises ideas that are of a very limited relevance for the Netherlands. The restriction of appeal rights (par. 2.6. of the handbook), for example, is a very blunt method for fighting backlogs. The Netherlands is not in need of such a drastic measure and therefore this practice is of no relevance for now. What should be mentioned is that the (partial) irrelevance of a practice for the Netherlands does not make it a bad practice. A practice could be working in one country, but not in another. The relevance of a certain idea very much depends on the circumstances in a certain jurisdiction. It would therefore be interesting to see what the relevance of the CFMnet-project is for other countries.

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<sup>78</sup> See: R. Eshuis, 'Justice in better times – on the effectiveness of measures to accelerate civil proceedings', The Hague 2007, p. 90 and Kamerstukken II 1999-2000, 26855, 3, p. 3-10. The reform was to make **the civil justice system more accessible and efficient, and less formal. There were five central principles: simplifying the law of civil procedure, do away with unnecessary formalities, modernising the relationship between the court and parties, more efficiency and harmonisation of the law of civil procedure**

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