

THE PLUMBER AND HIS TOOLS

Scrutinizing judicial budgets, length of divorce proceedings and workload of courts in the Netherlands

Presentation at the plenary meeting of the Commission on the Efficiency of Justice (CEPEJ),
9 December 2010

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1. Introduction

Last year I had the experience that the water in my bathroom kept running. I phoned a plumber. A young man with a new van loaded with a lot of sophisticated, brandnew toolbox arrived. He didn't succeed and left without fixing the problem. Afterwards I phoned an other plumber. A older men with dito van arrived, with less but heavily used tools. He fixed the job in an hour.

After this presentation I hope to have convinced you that this anecdote is at the heart of the matter concerning the work of CEPEJ. In my view we did an outstanding work on improving the budgetary figures in our reports during the years. The figures become more and more reliable and comparable. We also made good progress in measuring the output of the system, by introducing new ratio's like the disposition time of a case and clearance rate. But despite our progress we still have a long way to go. CEPEJ at this moment is still the young man with the brand new tools and with little experience in handling them. Sure, it is hard to get a grip on the data and comparing countries. And sure, it is tempting to develop and buy new tools, hoping that these new tools will indeed help to fix the job better. But that would be the wrong reflex. In the next years we should according to me focus on building up experience in handling and sharpening the existing tools.

Everybody who has presented the results of CEPEJ to a professional, national audience knows the weakest spot: the reliability of the data. The national correspondents have a hard, pioneering task. I was facing this problem in the Netherlands too. So two years ago I arranged it with the Dutch scientific journal *Justitiële Verkenningen* to organise a special on a review of by Dutch scientists. Professors in the field of administration of justice, lawyers, bailiffs, etc. were asked them to write an article with the leading question: *'How do you value and explain the ranking of the Netherlands in het CEPEJ report 2008?'*. In this presentation I will heavily lean on the work of a couple of the scientists involved. The website of CEPEJ will include the introduction to this special, the contribution of dr. Marijke ter Voert on divorce cases and the contribution of dr. Roland Eshuis on litigious and non-litigious cases.

In this presentation I will evaluate the ranking of the Netherlands in European perspective concerning:

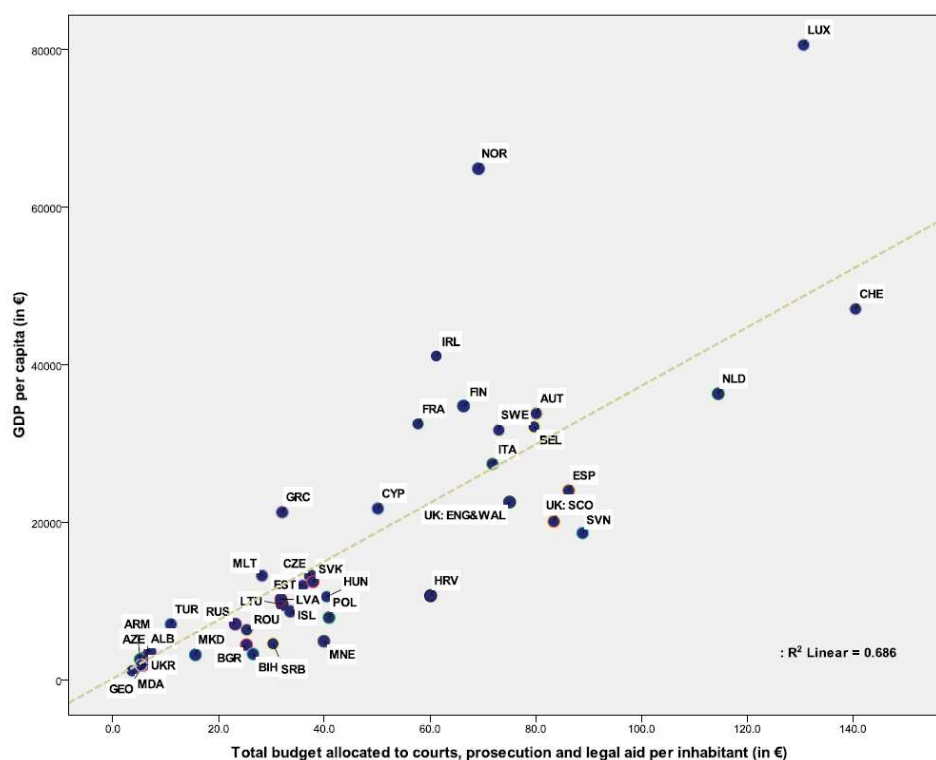
1. the budgets for the judiciary, prosecution and legal aid;
2. the length of litigious divorce proceedings:.
3. the workloads of courts, division of litigious and non litigious civil cases.

I will finish my presentation with some lessons for dealing with the CEPEJ-tools in the next future.

2. The total budget for judiciary, prosecution and legal aid

The report of CEPEJ contains a graph which is political dynamite whenever a financial department lays eyes on it. I mean the figure where the total budget per inhabitant for the judiciary, prosecution and legal aid is confronted with the Gross Domestic Production per capita.

Figure 1: Correlation between the DDJP per capita and the total budget (judiciary, prosecution and legal aid) per inhabitant in 2008



Source: CEPEJ, 2010, p 46

On the horizontal axis: expenditures for justice (legal aid, law and order) per capita. Dutch expenditures around 115 euros per inhabitant

On the vertical axis: gross national product per capita. For the Netherlands this is about 4000 euro per capita.

The diagonal line: there is a strong correlation between wealth and total per capita spending on justice. The Netherlands is positioned slightly right of the line. With almost 4000 euros of national income per capita, we spend about 115 euro a person on the judiciary, prosecution and legal aid. Measured by the European benchmark – that is the diagonal in the figure – one would expect 100 euro. The benchmark implies spending 15 euro per person less. With a population of 17 million and 15 euro per person, we come up with about 255 million euros more budget than expected, with this European benchmark as reference.

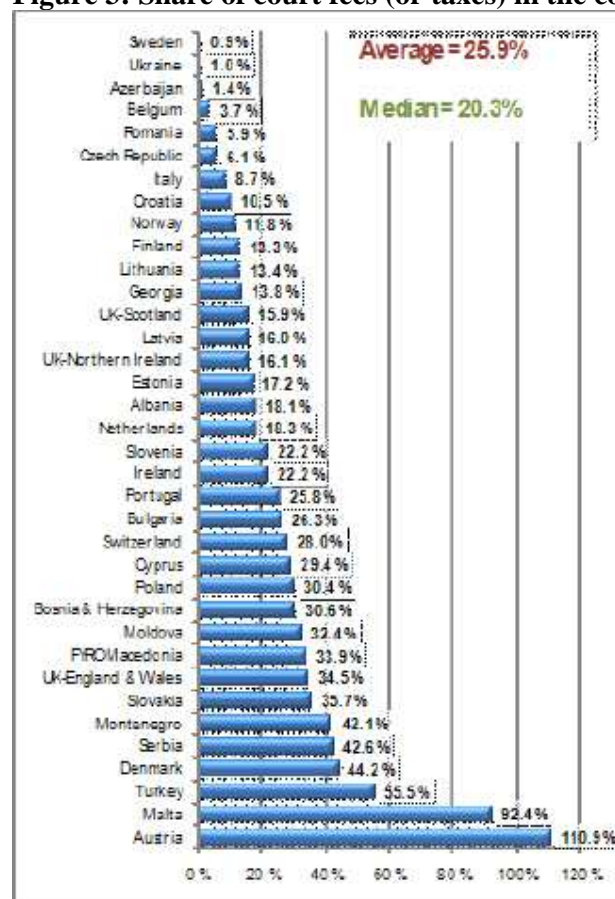
As was explained in the recent CEPEJ-newsletter of 3 December 2010 the Dutch government plans provides a cut of 240 million by introducing costcovering court fees and 50 euro mln euro extra on legal aid. Total this is about 300 million euros, which is *grosso modo* in line with the European benchmark. This is of course a quick and dirty analysis. To make responsible policy conclusions, one should look deeper and take into account the specific

tasks judges, prosecutors and lawyers fulfil in a country. Also the amount of the budget doesn't say anything about the performance of the judicial system: what does the judicial system deliver the citizens with a certain budget? That's the key question. That is why I would like to focus in the following presentation on more output oriented chapters in the report of CEPEJ 2010. More specific: the length of proceedings of divorce cases and the disposition time and clearance rate of civil cases.

Cost covering court fees

Except in five states (France, Iceland, Luxembourg, Monaco and Spain) a part of the judicial system in all states comes from court fees and taxes, in varying proportions. The CEPEJ-report gives a good overview of the situation in 2008. In 2008 the cost covering rate of the Netherlands in 2008 is 18%, which is less than the median value in Europe of 20%. Striking is of course the position of Austria with a share of court fees related to the court budget of 110%. Which is possible because of the fact that Austrian courts earn this position by handling the land registers in Austria.

Figure 3: Share of court fees (or taxes) in the court budget (as receipts) in 2008, in %



Source: CEPEJ, 2010, p. 63

The revenues of courts of course depends on the incoming cases, which is strongly related to developments in economy and society. It appears that there is no clearcut trend between 2006 and 2008: some countries show less revenues, others more. But also policy initiatives may play a more prominent factor. As was explained in the CEPEJ-newsbrief of December 2010 Dutch government has decided that in civil and administrative cases from 2013 the citizens

have to pay the costs of the judiciary. The newsletter also showed that in the Czech republic will raise court fees with about 50 %.

If one divides the total revenues of fees by the budget of the courts, the Dutch proposal for introducing cost covering court fees would raise the ratio from 18% now till nearly 50% in the near future. The ratio is not 100% because of the fact that in some cases (penal, asylum, children) are excluded from the policy. CEPEJ-data are not detailed enough to compute this on this more detailed level. Anyhow, with this policy the Netherlands would raise in the ranking to the top five. Again, this is also a quick and dirty analyses. To make a reliable comparison, one should take into account the specific tasks a court has in a country (for example concerning land and business registers).

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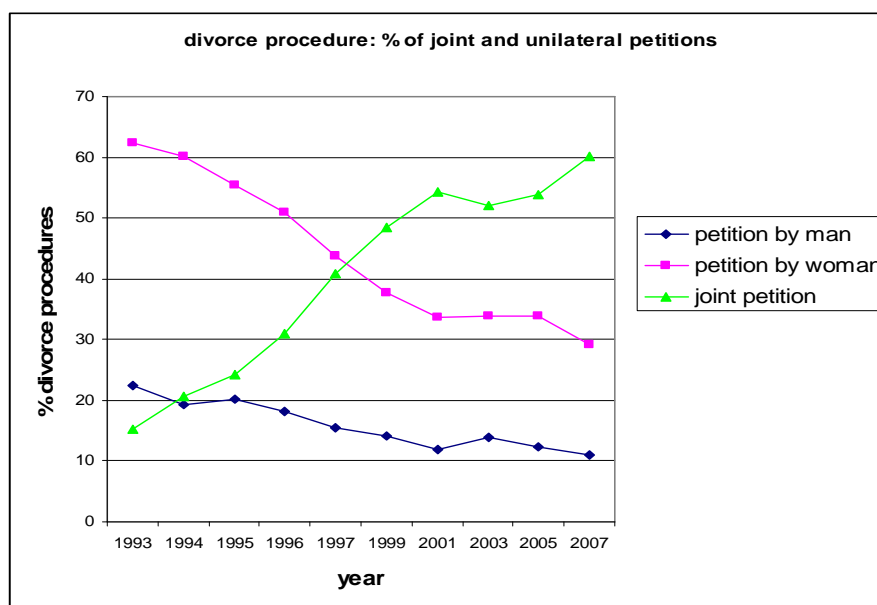
3. The length of divorce proceedings

The figures on divorce proceedings by CEPEJ were analysed in an article by dr Ter Voert called "*How fast can you divorce in Europe?*" This article is published in the country profile of the Netherlands on the site of CEPEJ.

Litigious and non-litigious divorce proceedings

Divorce proceedings may be instituted by both spouses jointly (a joint petition) or by just one of them (a unilateral petition). A joint petition means that both partners already reached an agreement on (the consequences of) the divorce. In that case they mostly share a lawyer and the court procedure is mainly administrative. In case of a unilateral petition one of the partners takes the initiative for the divorce procedure. A litigious unilateral divorce procedure means that the other partner makes an objection and disputes (certain aspects of) the divorce proceedings. In this situation there will be a hearing at the court. In a non-litigious unilateral divorce procedure the other partner does not object. Figure 2 shows that the percentage of joint petitions has increased from 15% in 1993 to 60% in 2007. Furthermore, unilateral petitions are initiated more often by women than by men.

Figure 4: % of joint and unilateral divorce proceedings in the Netherlands

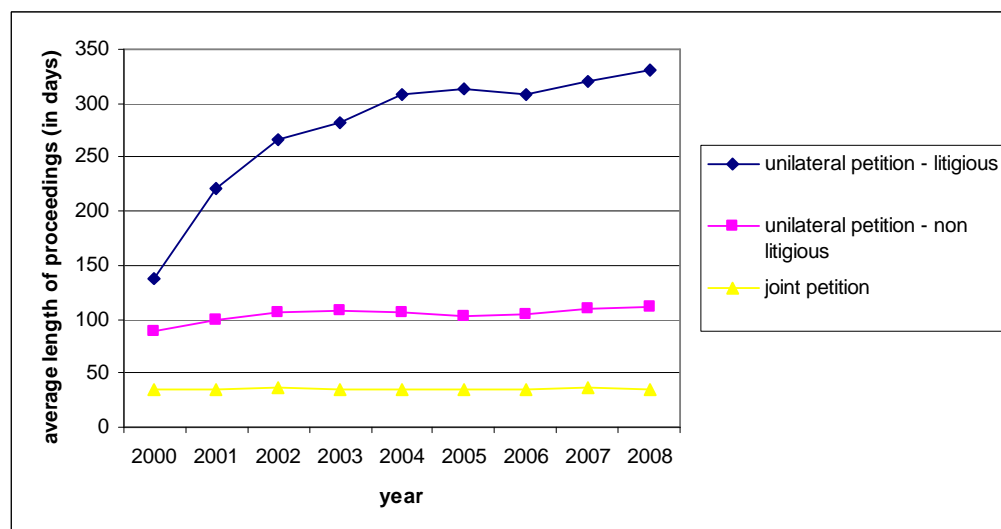


Source: Statistics Netherlands, Den Haag/Heerlen 16-1-2009

Length of court proceedings

Non-litigious divorce proceedings take less court time than litigious divorce proceedings. Figure 5 shows that joint petitions – i.e. administrative cases - take on average 35 days, whereas litigious unilateral petitions take about 330 days in 2008. Furthermore, it is striking that the length of these litigious divorce proceedings increased considerably from 2001 on.

Figure 5 Length of litigious and non-litigious divorce proceedings, 2000-2008



Source: Database of the Council for the Judiciary

This is probably caused by the policy of the courts to refer litigious divorce cases to mediation and to combine ancillary divorce proceedings in one hearing. Separate proceedings that are related to the same divorce case are taken together and the judge decides in the same session on all ancillary matters. This latter increases the complexity of a litigious divorce case.

Conclusion

The review of ms Ter Voert showed that we had included the wrong number in the CEPEJ. Her intervention led to a correction of the Dutch figures in the CEPEJ report.

Moreover her article gave better insight and interpretation of the presented figures. It led to the notion in the CEPEJ report 2010 (p170) that one should not too easily conclude that a high disposition time in litigious divorce cases implies that the judiciary doesn't function well. To be able to draw conclusions like that, you have to take into account the distribution between litigious and non-litigious divorce cases and especially the complexity of the litigious cases that are left over.

4. The workload of courts, disposition time and clearance rates

From an international perspective, the civil justice in the Netherlands has a reputation to maintain. When Zuckerman in 1999 proclaimed the crisis in civil justice - based on his comparative study of justice in 13 countries - he made one exception:

'Of all the countries reviewed in this volume, only Holland presents a truly positive picture. Overall, the Netherlands experience a lower volume of litigation and fewer problems with court congestion than its neighbours do. The enviable situation is due to the fact that the legal profession and the social institutions have found sound solutions to the problems by developing alternatives to the court process that work better and faster at less cost to the people involved in legal disputes.' (Zuckerman, 1999).

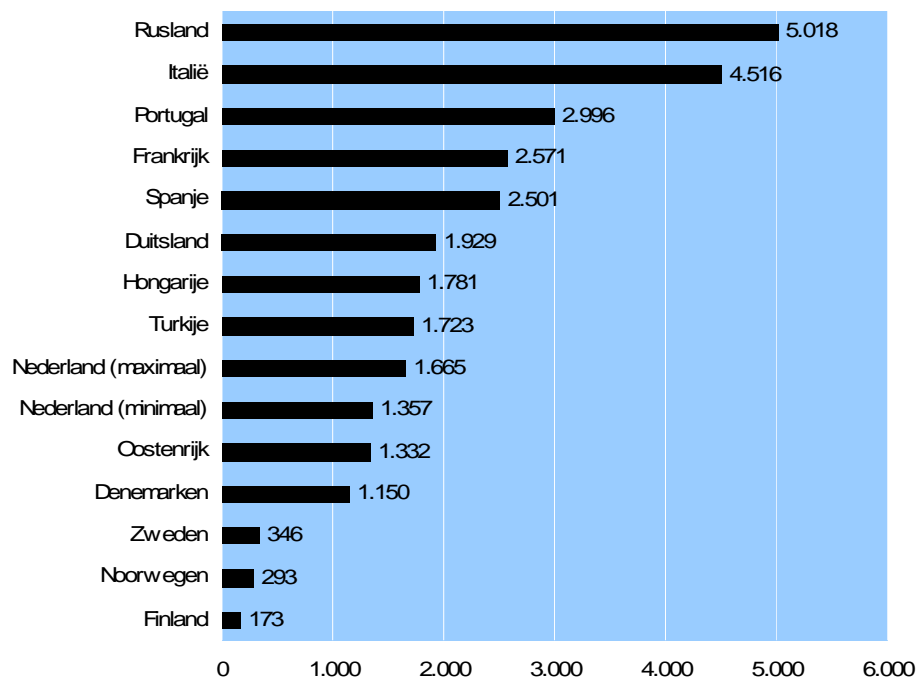
The third report by the Council of Europe established the Commission for the Efficiency of Justice (CEPEJ) compared the amount of 'litigious civil cases' in 34 countries in 2006. The Netherlands reported to have the highest number litigious civil cases per capita in 2006. Nowhere the number of civil litigation that is fought in court is as large as in the Netherlands. What did change in ten years after publication of Zimmermans book. Do Dutch polder in civil disputes their tolerant tradition exchanged for a hard fighting? Does the current policy in the late nineties to alternative forms of dispute resolution, including mediation and arbitration, encourage, failed miserably, or even counterproductive sorted? This was so striking that several Dutch scientist dealt with the report on this matter.

Recalculating the Dutch data

Ronald Eshuis (2010) noted that the number of procedures that were counted for the Netherlands is much too high. A mistake was made. Instead of an exhaustive census of proceedings in which defence is actually conducted, for the Netherlands all civil cases were counted. And compared with the exhaustive count for the other countries. And although during the period 2000-2008 the number of civil proceedings before the Dutch courts has increased significantly, the number of litigious proceedings in the Netherlands in international perspective, is actually still quite low. Eshuis calculated that the right amount would be some 230.000 litigious cases.

Figure 3 shows that the recalculation results in a well known international ranking of the Netherlands concerning the number of litigious cases: some what higher than the Scandinavian countries and Austria, but lower than Germany, France, Italy and Spain.

Figure 6 Civil litigious cases per 100.000 inhabitants



Bron: European judicial systems. Edition 2008 (data 2006)

Dimensions of workload

The result of this methodological and technical discussion is that the Netherlands is mostly missing in chapter 9 concerning court activity, the chapter where the workload of courts is compared, and where new tools like clearance rate and disposition time are elaborated. The problem of not delivering the wanted data is partly caused by CEPEJ itself. I would like to quote on a correspondence I had with the before mentioned WODC-researcher Ronald Eshuis, when we were gathering the data for the CEPEJ report in May 2010. He wrote a review on the CEPEJ-report on this matter and send on my request – in an email on the 11th of May 2010 – his thoughts regarding the ‘litigious cases’ in the Cepej report:

“There is no clear-cut definition of ‘litigious’ cases in the Cepej report. It is clarified by a few examples of non-litigious cases, consistent with what I remember from the discussions regarding the first Cepej report. The general idea was to count only real, contested cases, as ‘litigious’. The examples of non-litigious cases, as given in the Cepej report, include uncontested cases, one-sided requests and divorce cases with mutual consent.

In my educated guess of 230.000 litigious cases I did include contested cases terminated by a friendly settlement. The examples in the Cepej report are not clear on whether they should or should not be included. I did include these cases, because they seem consistent with the general idea regarding ‘litigious cases’: there are conflicting parties, they start a court procedure to resolve the conflict, in which the conflict is resolved. In contemporary court procedures, judges (often) are actively involved in bringing about these friendly settlements; they are viewed as the ‘preferable way’ to terminate a court case. Dutch civil process law since 2002 prescribes judges to first try if parties are willing to settle friendly (before deciding the case with a judgment). I wonder if the reports of the various countries are consistent in the way friendly settlements (and / or other terminations without a judicial decision) are counted.

I am surprised to see a question (and answers to the question!) regarding ‘incoming litigious cases’. It seems to me that the concept of ‘litigious’ / ‘non-litigious’ cases can only relate to terminated cases: only after termination of the case we know if it was defended and in which way it settled. We can not tell whether a new incoming case will be defended or how it will settle; and it may take years (see: case disposition time) before we can. For this reason, the Netherlands did not provide an answer to this question. I wonder how countries that answer this question, handle it. Do they give a theoretical answer instead of an empirical, assuming that the distribution of ‘litigious / non-litigious’ in incoming cases will match the distribution of terminated ‘litigious / non-litigious’ cases?”

My conclusion is that CEPEJ has to define it clearer in the questionnaire next years and ask how incoming non litigious should be estimated. The Netherlands is not alone in this matter. In the report it is explicitly noticed that only half of the countries supply the wanted data (p 167). And that is regrettable. If we don't improve these kind of figures, the comparison of financial input - as I illustrated at the beginning of my presentation – will be remaining dominant. And so will be the focus on financial controlling the judicial system, instead of improving the efficient functioning of the judicial system. Promising tools like clearance rate and disposition time can not be used in comparing the European countries.

From workload to clearance rate and disposition time.

I think this Dutch discussion is helpful for CEPEJ. But I also think CEPEJ can be helpful for the Netherlands. In contacts of the Dutch national correspondent Sandra Kalidien with the Council of the Judiciary it is become clear that the Council of the Judiciary is not sure about the reliability of the data. The bottom line is that (certain) know that the stock figures can not be correct. And therefore the Dutch Council of the Judiciary does not want the backlog figures to be published. These are essential data for calculating disposition time and clearance rate, which are ratio's of inflow, outflow and backlogs.

Here some calculations that are made within the CEPEJ may be of great help in this rather technical discussion, with big policy relevance. I refer especially to an exercise of Austria mentioned on a plenary meeting, as I has roughly calculated the case disposition time as instructed by CEPEJ and compared with the actually measured times there on case level. Austria came to the conclusion that the outcomes for 95 percent was similar. If this also accounts for the Dutch judiciary it means that the Dutch Council can measure disposition time much more easier than they think is possible at the moment. To show that to the Dutch Judiciary would be of great help to them for the Netherlands. And that's the reason why candidate the Netherlands for a peer review visit of CEPEJ in the second part of 2011.

6. Conclusion: experienced handling of tools without the constant need of a manual!

In the introduction I mentioned the anecdote of the experienced plumber who fixed the job by building up experience how to handle his tools. I hope to have illustrated that only using the tools a lot, will help us forward in our mission to assist states in improving the judicial system. Leading in this kind of exercises should be the central mission of CEPEJ: comparing and benchmarking to learn from each other by exchanging best practices and improving the judicial system. This is not possible if certain crucial concepts are interpreted in very different ways.

An active use of tools is the best way to get them reliable. More specific conclusions by using the tools in this presentation are the following:

- *the budgets concerning judiciary, prosecution and legal aid*: the report 2010 contains an interesting benchmarks against the background of the recent budget cuts in the Netherlands and the aim of introducing cost covering court fees;
- *the length of litigious divorce proceedings*: the length of litigious divorce proceedings in the Netherlands is very high. This high and increasing score is directed related to the strong growth of non-litigious divorce cases, which are handled very fast by the Dutch courts.
- *workloads of courts, clearance rates and disposition times*: CEPEJ has to enlighten the definition and calculation instruction on litigious cases in order to improve the response on this matter compare the performing of judicial systems in terms of clearance rate and disposition time.

The first issue deals with the financial input towards the judicial system, the two other issues deal with the output of the judicial system. The name of our committee is Commission on the **efficiency** of Justice, which implies that we confront the financial input with the output in terms of production. For the next years we especially have to enhance and use the data concerning the output. Than we can deal with our mission in a comprehensive way. The quality of CEPEJ-data and the way they are used nationally is of course a responsibility of countries themselves. National experts are important in this process, but cannot do it on their own, as is stated by our running new president John Stacey and vice president Georg Stawa in the e-mail we got from them on the 27th of November. And I am also glad to announce that the Netherlands would like to be a candidate for participating in the *peer review exercise in 2011*. In my view the Netherlands can use the help of CEPEJ on the discussion of cost covering court fees and the measurement of clearance rate and disposition time in civil matters.