
What Do the European Judges Strive for - An Empirical Assessment

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Abstract:

Caseload backlogs and the quality of judicial decision-making have attracted worldwide scholarly attention for quite some time. The puzzle lies in explaining the observed persistence of backlogs alongside the quest for improvement in judicial decision-making. This is especially true since many countries, while trying to cope with this challenging issue, continue to enact regulatory provisions to seemingly improve the judiciary.

The principal and agent theory suggests that the incentives of the agent (courts) and the principal (citizens) are going to be aligned under certain circumstances. This article analyzes the incentive mechanisms of continental judicial administration in view of traditional principal-agent theory and provides additional insights into the current legal, behavioral and economic discussion. Specifically, the article analyzes whether the current incentives for judges are in line with theoretical predictions. If one takes for granted that the European-continental judicial systems can be treated as bureaucratic systems, then discussion should, apart from judicial salary increases, focus upon interpretation of the observed differences in evaluation of judges in different countries, and upon the main incentives for judges' good performance and promotion. This article offers a multidisciplinary analysis of current European and most recent Finnish guidelines on effectiveness and quality of judicial administration, and provides a law and economics assessment of proposed guidelines. Moreover, the identified multiplication effect of sticks in judiciary setting offer an additional argument for cautious application or even complete abolishment of such an inducement mechanism.

1. Introduction

Caseload backlogs and the quality of judicial decision-making have attracted worldwide scholarly attention for quite some time.² The triggering issue is the observed persistence of backlogs alongside the quest for improvement in judicial decision-making. This is especially true since many countries, while trying to cope with this challenging issue, continue to enact regulatory provisions that seemingly improve the judiciary. This article offers an economic analysis of the incentive stream of the continental judiciary, suggests several alternative inducement mechanisms to improve continental judicial performance and effectiveness, and provides an economic assessment of the proposed Finnish Quality Benchmarks and related provisions in several other continental countries.

However, two *caveats* related to the scope of this article should be made. First, since it is not possible to cover all aspects of judicial performance, effectiveness and the quality of rulings, this article merely focuses on the judicial incentive stream and omits economic comment on the types of salary, quality standards, the exact time of promotions, the question of judicial independence and so on – issues which go well beyond the scope of this article.

The second *caveat* is related to the scientific authority that should be attributed to our findings. Law and economics is strictly speaking not theory, but a *method* for facilitating discussions on the law. Hence, what we do is summarize the most striking results that have been produced with the law and economics method. The principles we draw from the literature only express a personal opinion on what *should* be concluded, rather than on what *is* generally concluded.

Scholarly literature and related economic models of judicial behavior and court organization identify several inducement mechanisms concerning the motivation of judges to work efficiently. This motivation presents the central challenge to the economic analysis of courts. However, it should be stressed that the law and economics literature has focused primarily

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² For an overview see Buscaglia Jr., Dakolias, M. and W.Ratliff, 1995, "Judicial reform in Latin America, A Framework for National Development," Hoover Institution, Stanford University and J.C. Botero, R. La Port, F. Lopez-de-Silanes, A Shleifer and A. Volokh, 2003, *Judicial Reform*, The World bank Research Observer, vol. 18, No. 1, pp.61-88.

on judicial performance in common law countries, whereas little attention has been devoted to the continental, civil law countries. This article attempts, while primarily focusing on continental judiciaries, to fill in this gap

Section 2 of this article outlines the general findings of law and economics scholarship regarding the effectiveness of judicial performance, identifies several additional principles on judicial performance, and then compresses these findings and principles into a unified set of recommendations and evaluation criteria. In Section 3 some attention will be paid to the proposed Finnish quality benchmarks, with related economic assessment. Section 3 continues with a survey, an economic assessment of several other continental judiciary systems, and offers additional insights into employed incentive mechanisms. Section 4 concludes and offers final thoughts and remarks.

2. Synthesis of law and economics scholarship on judicial performance

This section identifies several law and economics principles on judicial performance and tries to compress them into a unified set of recommendations and evaluation criteria.³ Law and economics is regarded as one of the most successful research programs of the last fifty years⁴ and its purpose is to find out what “good law” is by analyzing the incentive, risk and transaction cost effects of legal rules, jurisprudence/decisions, regulations, and performance with the related behavior of all legal stakeholders (judges, attorneys, legislators, public prosecutors *etc.*). As already advanced, law and economics literature and related economic models of judicial behavior and court organization offer several different explanations for what influences the behavior and motivation structure of judges. As commentators note, this motivation and behavior puzzle also presents the central challenge to the economic analysis of courts.⁵

In this respect, law and economics literature has identified three main explanations to the questions of judicial incentive structure. First, judges follow the law – they simply meet their obligations as articulated in the jurisprudential theory of adjudication.⁶ Second, there is the political motivation - judges seek to implement their own policy preferences (also political) subject to constraints such as review by other judges or by legislatures.⁷ Third, there is the self-interested judge – where judicial motivation derives from the structure of incentives within which the judge works.⁸ This third approach, which has been developed from Judge Posner’s seminal article on judicial behavior and performance,⁹ is in the law and economics’ scholarship regarded as the one upon which consensus has been reached. Therefore, our discussion summarizes the most striking results of this third approach and, while providing additional insights, assesses the proposed CEPEJ and Finnish Quality Benchmarks for enhancement of judicial performance.¹⁰

³ For a synthesis see Kornhauser, A. Lewis, “Judicial Organization and Administration,” in De Geest, Gerrit, Buckaert, Budewijn (eds.), *Encyclopedia of Law and Economics*, Edward Elgar, 1999.

⁴ See Katz, W. Avery, “Foundations of the Economic Approach to Law,” Oxford University Press, 1998; De Geest, Gerrit, Buckaert, Budewijn, “Encyclopedia of Law and Economics,” Edward Elgar Publishing, 2000; Friedman, D. David, “Law’s Order: What Economics has to Do with Law and why it Matters,” Princeton University Press, 2001; Shavell, Steven, “Foundations of Economic Analysis of Law,” Harvard University Press, 2004; Goldberg, Victor, “Framing Contract Law – An Economic Perspective,” Harvard University Press, 2006; Polinsky, A. Mitchell, Shavell, Steven, “Handbook of Law and Economics,” Nort-Holland, 2007; Posner, A. Richard, “Economic Analysis of Law,” 7th ed. Aspen Publishers, 2007.

⁵ See Kornhauser, *supra* note 2.

⁶ For a synthesis see Kornhauser, A. Lewis, “Appeal and Supreme Courts,” in De Geest, Gerrit, Buckaert, Budewijn (eds.), *Encyclopedia of Law and Economics*, Edward Elgar, 1999.

⁶ *Id.*

⁷ In this political model each court usually has preferences over policy space and hence decides a case to announce a policy – to announce a new legal rule according to their political preferences. See e.g. Cameron, M. Charles, “New Avenues for Modeling Judicial Politics,” University of Rochester Wallis Institute of Political Economy Working Paper, 1993; McNollgast, “Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law,” 68 *Southern California Law Review* 1631, 1995.

⁸ See also Aranson’s competing views on rule-governed, rent distribution and wealth maximization types of judicial motivation which actually describe systemic tendencies rather than motivation of a particular judge. Yet those three “competing” views may be understood as consistent with the presented one. See Aranson, H. Peter, “Models of Judicial Choices as Allocation and Distribution in Constitutional Law,” *Brigham Young University Law Review* 794, 1994.

⁹ Posner, A. Richard, “An Economic Approach to Legal Procedure and Judicial Administration,” 2 *Journal of Legal Studies* 399, 1973. See also Posner, A. Richard, “What Do Judges Maximize?” 3 *Sup. Ct. Econ. Rev.* 1, 1994; Posner, A. Richard, “The Federal Courts: Crisis and Reform,” Harvard University Press, 1985.

¹⁰ CEPEJ stands for The European Commission for the Efficiency of Judges, see: http://www.coe.int/T/dghl/cooperation/cepej/default_en.asp

Posner's article shifted conventional thinking regarding judges away from the *mélange* of glorification, celebration, and adoration that pervaded the majority of academic thinking about the judiciary, towards a more economically-inspired analysis of judicial incentives and judicial behavior.¹¹ Posner assumes that judges are self-interested, rational, utility-maximizing individuals and that their behavior is hence best understood as a function of the incentives and constraints that particular legal systems place on their judges.¹² Hence, the criteria of judicial performance are relative to the incentives and constraints that determine judicial behavior¹³ and it would be a mistake to suppose that one performance criterion or set of criteria should be applicable to all judges.¹⁴ The crucial starting point of Posner's analysis is thus the observation that judges are maximizers of their utility,¹⁵ where every judge has, as also pointed out by Higgins and Rubin, a utility function and tries to maximize the weighted utility of the arguments in the function.¹⁶ As Posner states, the judge's utility function is likely to be quite similar (different weights) to the utility function of the average person.¹⁷ Judges would thus prefer higher salaries, less crowded dockets, recognition within their legal and judicial circles, and freedom to make decisions without outside interference.¹⁸

One of the valuable insights, which follow from this argument, is the observation that lawyers who seek or accept a judgeship derive more utility from leisure and public recognition relative to income than the average practicing lawyer does.¹⁹ Moreover, according to Posner, judges are also likely to be more risk-averse, since judicial incomes are lower but also more stable than those of practicing lawyers.²⁰ In other words, a set of given incentives (e.g. income, appointment and promotion) and constraints creates in legal systems, including continental, a self-selection mechanism where a certain, risk-averse type of lawyer self-selects into the career judiciary. This self-selection mechanism results in the adverse situation where the majority of the best, most productive, inventive fresh young law school graduates are often driven away from the judiciary towards other, more appealing legal professions. Consequently, since no one is forced to become a judge, the incentives and constraints imposed by the structure and rules of a judicial career²¹ influence the judges' productivity and motivation structure.

2.1 The economics of continental career judiciaries: the principal-agent perspective

A typical continental career judiciary is a part of the civil service, where appointment and promotion are part of an elaborate system of rules and acknowledged characteristics²² In this system a fresh law school graduate applies for a clerk's position (for a certain period of time – several years) and occupies the lowest rung of the judicial ladder. During his

¹¹ See Schauer, Frederick, "Incentives, Reputation, and Inglorious Determinants of Judicial Behaviour," 68 U. Cin. L. Rev. 615, 1999.

¹² An important implication of this finding is that judicial behavior is likely to differ across national legal systems to the extent that components of the system differ in the incentives and constraints that they impose on judges; Posner, *supra* note 7.

¹³ E.g. in some judicial systems a judge's reversal rate might be a critical performance criterion, while in others more weight should be placed upon the citation rate.

¹⁴ Posner, *supra* note 8.

¹⁵ *Id.*

¹⁶ Judges maximize a utility function that includes as arguments "judicial discretion" and wealth; it is also presumed that judges like to impose their values on society, which is accomplished by precedent-setting opinions. Yet he is also constrained by the prospect of being overruled and by the effect of a reversal on his future wealth; Higgins, S. Richard, Rubin, H. Paul, "Judicial Discretion," 9 J. Legal Stud. 129, 1980. See also Cass, A. Ronald, "Judging: Norms and Incentives of Retrospective Decision-Making," 75 B.U.L. Rev. 941, 1995; Heise, Michael, "The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making And the New Empiricism," 2 U. Ill. L. Rev. 819, 2002; Macey, R. Jonathan, "Judicial Preferences, Public Choice, and the Rules of Procedure," 23 J. Legal Stud. 627, 1994.

¹⁷ This function is dominated by income, leisure, family relationships, work satisfaction, and a concern for personal integrity, reputation and felt achievement; Posner, A. Richard, "Judicial Behavior and Performance: An Economic Approach," 32 Florida State University Law Review 1259, 2005.

¹⁸ Cohen, A. Mark, "Explaining Judicial Behavior of What's "Unconstitutional" about the Sentencing Commission?" 7 Journal of Law, Economics and Organization 1, 1997.

¹⁹ Posner, *supra* note 8.

²⁰ Posner, *supra* note 8. See also Higgins, Rubin, *supra* note 13; Schauer, *supra* note 10.

²¹ E.g. by inducing a greater pursuit of leisure or intellectual satisfaction relative to income; *Id.*

²² In fact, Judge Posner argues that there is no substantial difference between career judiciary and any other professional civil service; Posner, *supra* note 8.

career he expects to rise through the judicial system as he gains experience, years of service, positive opinions of his superiors and so on. Obviously, the assessment of civil-continental law judiciary should be essentially the same as the assessment of a typical bureaucratic system.²³ Moreover, it may be argued that the problem of effectiveness of the continental judiciary (persistent backlogs *etc.*) is essentially, in law and economics theory, known to be a sort of principal-agent problem,²⁴ where courts with judges represent agents and where citizens (society at large) act as principals.²⁵ Principal-agent theory suggests that the incentives of the agent (courts) and the principal (citizens) are going to be aligned under certain circumstances. Hence, if one takes for granted the fact that continental judicial systems are bureaucratic systems, then our discussion should focus on non-salary incentive mechanisms for effective judicial performance.

In this principal-agent setting, one party (the agent, *i.e.* the court) takes an action on behalf of “citizens” (the principal), where the authority relation is a type of contractual arrangement and where the principal assigns limited powers to an agent in order to increase efficiency.²⁶ Due to the problem of asymmetric information and prohibitive monitoring costs (transaction costs) the principal cannot control perfectly the behavior and the performance (valuation of the quality of decisions) of judges.²⁷ This informational asymmetry and high monitoring costs, coupled with the rational self-interested utility-maximizing agent (judge), creates opportunities (incentives) for courts (agents) to shirk, extract rents or even to sabotage principals’ goals.²⁸ In other words, due to this principal-agent problem, judges might engage in shirking effort and in behavior designed to mislead or disguise their real output.²⁹ As stated, a rational wealth-maximizing, self-interested judge will behave in an opportunistic manner (pure waste of resources) to achieve his self-interested objectives.

In addition, the theory describes this as a problem of agency costs where the judge (court) is induced to shirk if the cost to the principal (citizens) of detecting some amount of shirking, Cd, is greater than the benefit of preventing that shirking, Bp.³⁰ Since the costs of detecting, Cd, generally exceed the benefits of prevention, Bp, judges will be induced to behave opportunistically and will seek to maximize their utility function. In order to mitigate adverse selection, opportunism, and informational asymmetries, certain monitoring devices and incentive structures must be developed. A set of such efficient mitigation mechanisms will be offered in the following section, but we should first mention some further striking law and economics insights into the related features of the continental judiciary. As Posner has stressed, the detailed rules which are laid down for the continental judges to follow could be one of the most important devices for minimizing agency costs.³¹ Posner develops this idea further by arguing that this mitigation device can also explain the fact that career judiciaries are found in legal systems that rely heavily on detailed codes and not on the looser common law standards.³² Moreover, it is argued that a career judiciary is methodologically conservative, since a judge’s promotion depends on the

²³ Moreover, it could also be similar to the behavior of employees in a large business firm; Posner, *supra* note 8.

²⁴ Here, we are referring to a particular paradigm developed in economics and political science that examines the relationship of individuals with related authority but conflicting interest. See e.g. Moe, M. Terry, “The New Economics of Organization,” 28 Am. J. Pol. Sci. 739, 1984.

²⁵ Of course, one should regard the agent (the citizens or society at large) as the governmental body which regulates and is responsible for the effective and quality function of the judiciary.

²⁶ Tracey, E. George, Yoon, H. Albert, “The Federal Court System: A Principal-Agent Perspective,” 47 St. Louis U. L. J. 819, 2003. See generally Coase, H. Ronald, “The Nature of the Firm,” 4 *Economica* 386, 1937.

²⁷ See generally Alchian, A. Armen, Demsetz, Harold, “Production, Information Costs, and Economic Organization,” 62 Am. Econ. Rev. 777, 1972.

²⁸ Additionally, in line with this argument Schneider considers the continental judiciary employment system as an internal labor market system, where career opportunities are the only economic incentive and where tenured judges with fixed pay compete for promotions to the next rank; Schneider, R. Martin, “Judicial Career Incentives and Court Performance: An Empirical Study of the German Labour Courts of Appeal,” 20 *European Journal of Law and Economics* 127, 2005.

²⁹ Smyth, Russell, “Do Judges Behave as *Homo Economicus*, and if so, can we Measure their Performance? An Antipodean Perspective on a Tournament of Judges,” 32 Fla. St. U. L. Rev. 1299, 2004.

³⁰ If Cd > Bp then judges start to shirk. See Posner, A. Richard, “Judicial Behavior and Performance: An Economic Approach,” 32 Flo. St. U. L. Rev. 1259, 2005.

³¹ Conformity to such detailed rules is much easier to determine than whether a judge is creative, innovative, imaginative and so forth: Posner, *supra* note 29.

³² Posner continues by arguing that when a code sets forth a legal rule with great specificity, it is relatively easy to determine whether the judge is applying the code correctly – minimization of judicial agency costs; Posner, *supra* note 29.

ability to perform to the satisfaction of superiors who want benefit from having such experimentally-minded subordinates.³³ Hence, law and economics literature predicts that the output of a career judiciary will display low variance, will be of uniformly professional quality, and will also be uncreative.³⁴

2.2 Incentive stream and the behavior of judges

Law and economics literature has identified several efficient incentive mechanisms to mitigate the observed principal-agent problem, to reduce the agency costs of the career judiciary, and to solve the adverse selection problem. Since judges are self-interested, wealth-maximizing, rational individuals, financial incentives (salary) might be the first appropriate mitigation mechanism. Yet, if judges (as is the case in the continental judiciary) of the same rank get paid the same amount and given that there are often sizeable differences in output across judges, then the wages do not have a positive causative effect on their marginal product.³⁵ Hence, the compensation of continental judges does not depend on the quality of their rulings (or *vice versa*) and thus potential quality does not result in any direct benefit, and there is also little economic payoff for judges from their quality judging.³⁶ Obviously, low financial compensation will also result in the *ex ante* adverse selection problem (where the best fresh graduates are driven away) and will influence retirement decisions.³⁷ Thus, an increase in financial rewards for judges might be an intuitive and straightforward remedy.

However, the literature questions whether there is much scope to improve judicial performance of already employed judges through improved financial rewards.³⁸ The intuitive idea would be to increase the financial awards (salaries), and consequently judges would increase and improve (quality) their output. Yet, due to the asymmetric information problem, high costs of monitoring (human capital issue) and related agency costs, such an incentive mechanism might not work. As stated, judges will be induced to shirk since the cost to the principal (citizens) of detecting some amount of shirking, C_d , is greater than the benefit of preventing that shirking, B_p .³⁹ The costs of detecting, C_d , may, due to asymmetries of information, exceed the benefits of prevention, $C_d > B_p$, and judges may consequently be induced to behave opportunistically and will seek to maximize their utility function. Judges may hence reap increased financial awards but might, due to the fact that $C_d > B_p$, not improve their productivity, since the identified agency problem might prevent efficient monitoring. This cost of detecting, C_d , actually reflects two problems: 1) it might be costly to evaluate exactly the real value and quality of judicial performance (decisions); and 2) judicial activity is not a labor-intensive profession where costs of monitoring will actually be low (as it would be, for example, in the case of farmers), but is classified under so-called *human capital* intensive professions where the work is almost entirely done by mental activity, which is hard to measure. Hence, the increase in financial reward and related incentives for enhancing productivity and quality of judgments would be wasted and might not result in an increase of judicial productivity.⁴⁰ Furthermore, as literature advances, monetary compensation represents only a small portion of the returns to judging and it is of diminishing proportion once we move up the judicial hierarchy,⁴¹ since in higher courts the non-monetary returns are higher.⁴² Many judges in continental legal systems would have been earning considerably more in private practice, and, as such, give up substantial monetary incomes to join the judiciary (high opportunity costs).⁴³ Hence, as literature suggests, most judges

³³ Posner, *supra* note 29.

³⁴ See Merryman, J. Henry, "The French deviation," 44 Am. J. Comp. L. 109, 1996; Posner, *supra* note 24.

³⁵ Smyth, *supra* note 28.

³⁶ Higgins, Rubin, *supra* note 13. See also Miceli, J. Thomas, Cosgel, M. Metin, "Reputation and Judicial Decision Making," 23 J. Econ. Behav. & Org. 31, 1994.

³⁷ Squire, Peverill, "Politics and Personal Factors in Retirement from the United States Supreme Court," 10 Pol. Behav. 180, 1988.

³⁸ See e.g. Baker, A. Scott, "Should we Pay Federal Circuit Judges more?," 87 B.U.L.Rev. 63, 2008. To stress it again, those are the judges who already occupy one of the ladders in the judicial hierarchy.

³⁹ If $C_d > B_p$ then judges start to shirk. See Posner, A. Richard, "Judicial Behavior and Performance: An Economic Approach," 32 Flo. St. U. L. Rev. 1259, 2005.

⁴⁰ Baker in his recent article on the payment of circuit judges actually found no empirical evidence for the notion that the increase in payment induces higher judicial productivity and hence provides an empirical confirmation for our argument. See Baker, *supra* note 37.

⁴¹ Smyth, *supra* note 28.

⁴² Greenberg, E. Paul, "The Role of the Compensation Structure in Enhancing Judicial Activity," 15 J. Legal. Stud. 417, 1986.

⁴³ Smyth, *supra* note 28.

could earn more by resigning from the bench and returning to private practice or even acting as consultants to law firms.⁴⁴ The examples of such judges having to linger in office because of inadequate financial rewards or having to return to private practice occurred long ago and it is not common nowadays.⁴⁵ Yet, if such lingering of judges does become a daily pattern, then this is a straightforward and inexpensive signaling mechanism that the financial rewards in continental legal systems are too low and that such incentives have to be increased in order to avoid declining productivity and quality of judicial outputs.

However, increased financial remuneration might be an effective mechanism to mitigate the identified adverse selection problem, where the majority of the best, most productive, inventive fresh young law school graduates are, due the comparatively low financial rewards, often driven away from the judiciary towards other, more appealing legal professions. Increased initial financial compensation - one comparatively closer to the starting rewards in other legal professions - in the probation period might then attract better, more productive and inventive, fresh young law school graduates. An understanding of the way that fresh young law school graduates sort themselves across legal professions is essential for constructing effective hiring policies, which will then help to mitigate the adverse selection problem. Besides increased initial financial compensation and screening,⁴⁶ Lazear suggests contingent contracts as one of the most effective ways to induce the appropriate fresh law graduates to apply for a job. Obviously, contingent contracts could be seen as an extended version of increased financial compensation, where piece-rate pay is the most basic form of such contingent contracts.⁴⁷ Under such a contract, a fresh young law graduate will be compensated on the basis of output during his probation period. However, since the evaluation of such output is, as noted, very costly, the sporadic, qualitatively-based evaluation is recommended.⁴⁸

Yet, as soon as these graduates are employed, the incentive effect of increased financial rewards is lost. Namely, as previously discussed, the asymmetric information problem and high monitoring costs (coupled with the rational, self-interested utility-maximizing judges) create, in instances of increased financial rewards, incentives for judges to shirk and extract rents. Hence, the increased financial reward incentive mechanism should be applied *ex ante* to attract better young law graduates and thus solve the adverse selection problem, but it loses its merit once young lawyers become judges. Here, as already stated, the incentive effect for increasing productivity and effectiveness is lost and alternative incentive mechanisms (carrots and sticks) should be developed and applied.

The promotion prospect could be offered as a first such carrot and is a very powerful alternative to the incentive mechanism, although judges would rarely admit that a desire for promotion is a motivating factor.⁴⁹ Literature offers, however, significant empirical evidence that judges in the USA and Japan are motivated by prospects of promotion.⁵⁰ Ramseyer and Rasmusen in their series of articles convincingly show that promotion prospects influence the behavior of lower courts judges in Japan – they induce them to work effectively and increase their productivity and effectiveness.⁵¹ The desire to be promoted is also a motivating factor in the United Kingdom, New Zealand⁵² and even in Germany. Schneider, in a recent study on judicial career incentives, has shown that career opportunities (promotion) are the only

⁴⁴ Macey, R. Jonathan, "Judicial Preferences, Public Choice, and the Rules of Procedure," 23 J. Legal. Stud. 627, 1994.

⁴⁵ See Smyth, *supra* note 28.

⁴⁶ Where credentials are used to weed out the undesired law school graduates; O'Flaherty, Brendan and Aloysius Siow, "Up-or-Out Rules in the Market for Lawyers, 13 Journal of Labor Economics 709, 1996.

⁴⁷ See Lazear, P. Edward, "Personnel Economics for Managers," Wiley, 1998.

⁴⁸ If the fresh law school graduate's output exceeds some fixed standard, then he should be given a particular reward; *Id.*

⁴⁹ See Schauer, *supra* note 10. However, the tournament theory was introduced in Lazear, P. Edward, Rosen, Sherwin, "Rank-Order Tournaments as Optimum Labor Contracts," 89 Journal of Political Economy 841, 1981.

⁵⁰ Cohen for example presents empirical data that desire for promotion influences the behavior of district judges in the United States; Cohen, A. Mark, "The Motives of Judges: Empirical Evidence from Antitrust Sentencing," 12 Int'l Rev. L. & Econ. 13, 1992. Taha further shows that judges with higher prospects of promotion are more likely to publish their opinions; Taha, E. Ahmed, "Publish or Paris? Evidence of How Judges Allocate their Time," 6 Am. L. & Econ. Rev. 1, 2004.

⁵¹ See Ramseyer, J. Mark, Rasmusen, B. Eric, "Judicial Independence in a Civil Law Regime: The Evidence from Japan," 13 Journal of Law, Economics and Organization 2, 1997.

⁵² Smyth, *supra* note 28.

economic incentive which might influence the observed performance of the German courts.⁵³ Fabel, Choi and Gulati support these findings and suggest tournament-competition among judges as an effective mechanism to improve judicial performance.⁵⁴ In such a tournament system, judges compete against each other to achieve the highest score in the hopes of either winning promotion or enhancing their reputation *vis-à-vis* their colleagues.⁵⁵ Among the criteria that could be used, Choi and Gulati propose opinion publication rates, citations by academics, dissent rates, citations of opinions by other courts, citations by the Supreme court and speed of disposition of cases.⁵⁶ Hence the promotion prospect, coupled with a sort of competition-tournament among judges, is a powerful incentive mechanism and can be used in order to improve judicial performance. Different versions of the promotion prospect (e.g. irregular promotion, not depending on the passing of a certain number of years but on the judge's performance) should thus be designed and applied as inducement mechanisms.

Moreover, the respect (reputation effect) of other colleagues can be seen as another incentive mechanism. Law and economics literature suggest that reputation among one's peers is a powerful non-pecuniary inducement factor for many market actors.⁵⁷ Since judges are the same as all other rational, wealth-maximizing persons,⁵⁸ Miceli and Cosgel suggest that "how a judge is viewed by his or her colleagues, by law professors, law students and the general public" is an incentive mechanism to perform effectively.⁵⁹ Moreover, as Cooter points out, judges generally seek prestige among the lawyers and litigants who bring cases before them.⁶⁰

Furthermore, there could be a special yearly prize for "the best judge of the year," a list of top 10% judges, or a black-list of the worst 5% judges as additional reputation-respect tools. Such awards and lists could then be made public and paid attention to by society at large (or awarded by the bar, president or prime minister, for example).

Last but not least, one of the factors which induce judges to behave productively is the power to influence outcomes through voting and the evolution of the law (creation of precedents).⁶¹ In other words, they might be motivated by the prospect of leaving a legacy. Landes and Posner suggest that judges derive utility from imposing their policy preferences on the community at large,⁶² whereas Schauer stresses that "judges could plausibly select outcomes, or select substantive or methodological trademarks, for the purpose of maximizing their own influence."⁶³

2.3. Carrots, sticks and the multiplication effect

The prospect of leaving a legacy, gaining respect among colleagues (society) and promotion prospects have been discussed as additional mechanisms for inducing judicial productivity and effectiveness. In contrast, the traditional increase in financial rewards might, as noted, not be the most appropriate incentive mechanism due to the identified asymmetries of information/high monitoring costs/agency problem. All of the presented mechanisms could be regarded as carrots which are offered to judges in order to induce their productivity and effectiveness. However, theory suggests that judicial behavior can be induced either by means of carrots (rewards, e.g. reward, prize, respect, promotion) or sticks (threats to punish, e.g. a decrease in salary or position, lay-offs, unilateral termination of employment, black-lists, criminal

⁵³ Schneider, R. Martin, "Judicial Career Incentives and Court Performance: An Empirical Study of the German Labor Courts of Appeal," 20 *European Journal of Law and Economics* 177, 2005.

⁵⁴ See Choi, Stephen, Gulati, Mitu, "A Tournament of Judges?" 92 *California Law Review* 1, 2004; Fabel, Otmar, "Richterhierarchien und die Verbreitung der ökonomischen Analyse des Rechts," 116 *Zeitschrift für Wirtschafts- und Sozialwissenschaften* 1, 1996.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See e.g. McAdams, H. Richard, "Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination," 108 *Harv. L. Rev.* 1003, 1995.

⁵⁸ Implying that their wealth-maximization behaviour encompasses also their desire to perform public service and to achieve a »higher calling«. In economic terms this desire and motivation to perform public service represents part of their utility curve (different weight) and is included in the wealth-maximizing definition.

⁵⁹ See Miceli and Cosgel, *supra* note 35.

⁶⁰ Cooter, D. Robert, "The Objectives of Private and Public Judges," 41 *Pub. Choice* 107, 1983. Also Posner argues that judges care about how they are viewed among other lawyers, but not litigants, who appear before them; Posner, *supra* note 29.

⁶¹ Smyth, *supra* note 28.

⁶² Landes, M. William, Posner, A. Richard, "Legal Precedent: A Theoretical and Empirical Analysis," 19 *J. L. & Econ.* 249, 1976.

⁶³ Schauer, *supra* note 10.

prosecution). Yet, until now the use of sticks has been exempted from our discussion of alternative inducement mechanisms. But as we all know, sticks can be an extremely powerful method to induce behavior in a certain desired way, and they have been the object of some scholarly attention (together with carrots they were considered as two sides of the same coin). Coase and Whitman, for example, even show that at the individual level a carrot and a stick have an equivalent marginal effect on the incentives.⁶⁴ Hence, if they are such a powerful inducement mechanism and if they have an equivalent marginal effect, why are they not also employed as an alternative mechanism to induce judicial performance? Why do we not employ them as inducement mechanisms more regularly? Would not the application of sticks then be a novelty, an inventive contribution, a super-incentive mechanism which could finally effectively improve judicial quality and performance?

We argue that the sole use of sticks, regardless of how appealing it might be, is an inefficient, socially undesirable option and may also endanger judicial independence. In this respect we offer several significant arguments against the employment of sticks as sole judicial inducement mechanisms. First, Lazear considers the effect of drafting difficulties, arguing that carrots are superior when it is not clear what the maximum level of performance is, and sticks are superior when the minimum is unclear.⁶⁵

Second, as we have already pointed out, the quality and the effectiveness of judicial performance is, due to the asymmetric information problem and related high monitoring costs, extremely costly to measure effectively (non-verifiable performance).⁶⁶ Thus, we argue that the application of sticks would be, if not completely impossible, at least highly costly and thus inefficient (transaction costs). To illustrate, suppose the principal, A (a certain governmental office), were to monitor and assess the performance of all judges, B, in a certain country and punish them in the case of shirking. The costs of monitoring, C_m , may actually - due to the fact that judicial performance is extremely hard to measure (identify) and that A would have, hypothetically speaking, to "look into the state of mind of every single judge" - exceed the benefits, B_p , of achieved improvement of performance, $C_m > B_p$. In other words, the costs of monitoring, C_m , might be prohibitive due to the asymmetric information problem, and may prevent the application of the sticks remedy (otherwise creating uncertainty, arbitrariness and abusive/moral hazard problems on the principal's side). If we also introduce Lazear's point on the unclear maximum level of performance, then the employment of carrots as an inducement mechanism becomes straightforward.

Third, the extension of Dari-Mattiacci and De Geest's multiplication effect may be offered as a significant additional argument against the use of sticks as judicial inducement mechanisms.⁶⁷ In this respect one should firstly note that although punishments and rewards are symmetrical ways to induce compliance with a single command, they differ fundamentally when it comes to multiple commands. Dari-Mattiacci and De Geest suggest that the threat to punish (a stick) is more powerful than the promise to reward (a carrot) because, when parties comply, the former is not carried out and thus can be reiterated all over again (the *multiplication effect*), whereas rewards will have to be paid and thus are consumed with use.⁶⁸ In other words, sticks are used up in the case of violation, whereas carrots are used up in the case of compliance. One should also note that sticks are only multipliable if agents behave non-cooperatively, which is not, as we argue, the case in judiciary settings where judges cooperate, coordinate and communicate among each other.⁶⁹

⁶⁴ Coase, H. Ronald, "The Problem of Social Cost," 3 Journal of Law and Economics 1, 1960; Wittman, A. Donald, "Liability for Harm or Restitution of Benefit?," 13 Journal of Legal Studies 57, 1984.

⁶⁵ Lazear, P. Edward, "Personnel Economics," MA:MIT Press, 1995.

⁶⁶ We define non-verifiable performance as one where the third party *ex-post* has extreme difficulties establishing whether they performed effectively since there is generally no accepted exact definition of what effective performance means or entails.

⁶⁷ Dari-Mattiacci, Giuseppe, De Geest, Gerrit, "Carrots, Sticks and the Multiplication Effect," 26 Journal of Law, Economics and Organization 365, 2010.

⁶⁸ This also implies that the use of carrots (i.e. salaries) requires an enormous amount of resources (since carrots are consumed with use) allocated to judiciary rewards (payment) which might be, due to the high monitoring costs, in this instance of judicial performance entirely wasted (pure waste of resources); *Id.*

⁶⁹ The multiplication effect is based on the exploitation of non-cooperative behavior in the population and is a tool that makes sticks more powerful and enforcement based on sticks cheaper; *id.*

However, the use of sticks might be a source of possible abuses and may endanger the judicial independence which is a fundamental aspect of the rule of law (and consequent social welfare).⁷⁰ In this respect, the application of Dari-Mattiacci and De Geest's argument may explain the "dark" period of German judiciary during WWII and the related collapse of the rule of law. In a judicial setting where judges have made substantial relation-specific investments and where their performance is non-verifiable, sticks might carry an implicit danger of exploitation. The principal (the state/society at large) might threaten to stop cooperating (uncertainty) by using, for example, termination of employment, sanctions, or imprisonment, unless the judge (agent) behaves and performs as requested.⁷¹ Since the judge is a rational, wealth-maximizing person he simply starts to act in accordance with the principal's wishes. The threat of the principal to stop cooperation actually represents the costs of not behaving in accordance with the principal's goals, C_c , and where they obviously exceed the possible expected benefits, $p B_s$, of not doing so, $C_c > p B_s$. In this setting C_c consists of the lost relation-specific investment, R_i , lost income, I , costs of imprisonment, opportunity costs and so forth which the judge must bear with certainty, whereas the possible benefits of disobeying the principal's wishes should be discounted by the future prospect of such benefits (expected benefits). As also advanced by Dari-Mattiacci and De Geest, the multiplication effect makes it easier not only for a benevolent enforcer (principal) to make society better but also for a selfish tyrant to make society worse off.⁷² Since the multiplication effect makes exploitation through sticks easier, there is thus in a judiciary setting a greater need for strict regulation, cautious application or even complete abolishment of such an inducement mechanism.

This consideration may also help to explain why the use of sticks in a judiciary setting is generally absent, undesirable, unnecessary and dangerous or, if applied, subject to extremely strict procedural requirements and safeguards, which should prevent possible abuses and retain judicial independence as a fundamental aspect of the rule of law. Hence, the use of carrots,⁷³ combined with highly regulated application of sticks, appears as the only possible inducement mechanism to improve judicial performance, quality and effectiveness.

2.4 Empirical findings

There is a wealth of empirical evidence for Posner's predictions. For example, Tabarrok and Helland investigate why trial awards differ across the US.⁷⁴ They examined the states in which judges are elected (23) and another ten states in which judges are elected via partisan elections. They found that since most plaintiffs are in-state voters and many defendants are out-of-state voters, elected judges have an incentive to service their constituencies by aiding plaintiffs. A particular low-cost method of aiding plaintiffs is to transfer wealth from out-of-state business defendants to in-state plaintiffs. They also have strong evidence that in the cases with out-of-state defendants, awards were much higher in partisan-elected states than in other types of judicial systems.⁷⁵ They showed that the expected total award in partisan-elected states with out-of-state defendants is approximately 240.000,00 USD higher than in other states.

Looking at judges' behavior from another point of view and at the federal courts, Cohen researched whether the judges acted as utility maximizers⁷⁶ and therefore examined how the 200 district court judges during a six-month period between January and July 1988 decided about the constitutionality of the U.S. Sentencing Commission. He found that the judges who have crowded dockets tend to rule the Sentencing Commission unconstitutional, as do judges who face the prospect

⁷⁰ The detailed discussion on the judicial independence and its role as a fundamental aspect of the rule of law (with related implications on the functioning of economic system and social-welfare) is beyond the scope of this article. However, the substantive negative impacts which the multiplication effect may have on such a role are briefly addressed and will be accurately assessed elsewhere. For law and economics analysis of the judicial independence see e.g. Cabrillo, F., Fitzpartick, F., "The Economics of Courts and Litigation," Edward Elgar Publishing, 2008.

⁷¹ This is exactly what happened to the judiciary in Nazi Germany and in the ex-communist states.

⁷² Dari-Mattiacci, De Geest, *supra* note 66.

⁷³ Yet carrots should not be seen only as an increase in financial rewards (their major drawback is the needed amount of financial resources) but should encompass the whole system of previously identified carrots (prizes, top 10% lists of judges, legacy, reputation *etc.*).

⁷⁴ Tabarrok, A., Helland, E., 1999, "Court Politics: The Political Economy of Tort Awards," *Journal of Law and Economics*, vol. XLII, 1999.

⁷⁵ *Id.*

⁷⁶ Cohen, *supra* note 17.

of being appointed to a vacant appeals court position.⁷⁷ In addition, Choi and Gulati, while examining the behavior of the federal judges, (whose wages are set for the duration of their judgeship, but could be promoted either to Supreme Court or to Appellate court), deciding whether U.S. Sentencing Commission is constitutional or not, offer further evidence that judges are utility maximizers.⁷⁸ The article concludes that judges were more likely to use written opinions to communicate their rulings in Sentencing Guidelines cases where the potential for promotion to the circuit court of appeal was greater.⁷⁹

3. Quality benchmarks – The Finnish model

As already noted, the main goal of the principal-agent theory is to align the goals of the principal and the agent in order to maximize the utility of the principal, of course subject to certain constraints. Even though the current CEPEJ European guidelines on the quality of judicial administration were the initial focus of our investigation, the most recent Finnish model of Quality Benchmarks⁸⁰ soon appeared as a focal point of our attention.⁸¹ This was due to the novelty of the Quality Benchmarks and their advanced elaborated stage (as advanced as the U.S. one). Once we know what the utility function of the principal looks like, we can assess the incentives needed to align the utilities of the agents with the principals.

The Finnish model was developed in the 1990s to improve the quality of Finnish adjudication.⁸² It was first launched in the courts of the jurisdiction of the appeal court of Rovaniemi (hereinafter called Quality project). The purpose was to achieve fair trials, well-reasoned and correct decisions, and accessible court services (including financial services). In 2003, a working group was established which was to come up with the quality benchmarks based on the pilot project. The impetus for the Quality project came from the realization that the public (principals) want the courts (agents) to be efficient, cost-effective and produce quality decisions. The Quality project goals were to produce information about the development needs of the courts; act as a tool for training and development of judges; act as a means to “opening” the courts to outsiders; and serve as a means of evaluation of the courts from time to time. It should be mentioned that the Quality project was not meant to be an evaluating tool for individual judges (see page 11 of the Quality Benchmarks), but do so for the courts in general. The goals were set by the courts themselves and have been evaluated just once in a few years (3-5 years). The evaluations of the courts were intended to disclose their weaknesses and open the path to improvement.

As of now, each court in Finland has its own evaluation system. Depending on the budget, courts negotiate each year with the Ministry of Justice and predict the number of incoming cases and the necessary money and personnel. The success of the previous year is discussed during the negotiations for the following year. The goals for the next year are set, as is the average number of input, number of decided cases, productivity and efficiency. Also, each court might have its own statistics. More traditional means of overview are inspectional visits that Courts of Appeals pay to the individual courts from time to time.

Quality Benchmarks

The Quality Benchmarks consist of six aspects, which contain forty quality criteria:

1. *the process*

⁷⁷ Judges on average said that they expected that the sentencing rules would increase their workload. Also, it seems that the promotions were biased towards judges that did not proclaim certain rules unconstitutional; Cohen *supra* note 17.

⁷⁸ Choi, J. Stephen, Gulati, G. Mitu, “Choosing the Next Supreme Court Justice: An Empirical Ranking of Judges Performance,” 78 S. Cal. L. Rev. 23, 2004.

⁷⁹ *Id.*

⁸⁰ For detailed explanation see: “Evaluation of the Quality of Adjudication in the Court of Law, Principles and Proposed Quality Benchmarks, A Quality Project of the Courts of Jurisdiction of the Court of Appeal of Rovaniemi,” Finland, March, 2006 (herein: Quality Benchmarks).

⁸¹ We should point out that we are not going to compare the USA model and the Finnish (a.k.a. European model) since the literature distinguished between the Anglo-Saxon and the continental judiciary system with regards to the promotion and election/appointment of the judges. For an excellent overview see Posner, A. Richard, “Overcoming Law,” Harvard University Press, 1995. We should also mention the Dutch and the Swedish models, see *ibid.*

⁸² See *supra* note 69.

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- a. *the proceedings have been open and transparent vis-à-vis the parties*
 - b. *the judge has acted independently and impartially*
 - c. *proceedings have been organized in an expedient manner*
 - d. *active measures have been taken to encourage the parties to settle*
 - e. *process must be managed effectively and actively (both procedurally and substantively)*
 - f. *the proceedings have to be arranged and carried out so that minimum expenses are incurred by the parties and others involved in the proceedings*
 - g. *the proceedings have been organized in a flexible manner*
 - h. *the proceedings are as open to the public as possible*
2. *the decision*
 - a. *the decision is just and lawful*
 - b. *the reasons for the decisions should convince the parties, legal professionals and legal scholars of the justness and lawfulness of the decision*
 - c. *the reasons are transparent*
 - d. *the reasons are detailed and systematic*
 - e. *the reasons for the decision must be comprehensible*
 - f. *the decision should have a clear structure and be linguistically and typographically correct*
 - g. *the decision should first and foremost be pronounced so that it can be, and is, understood*
3. *treatment of the parties and the public*
 - a. *the participants in the proceedings and the public must at all times be treated with respect to their human dignity*
 - b. *appropriate advice is provided to the participants in the proceedings, while still maintaining the impartiality and equitability of the court*
 - c. *the advising and other services of those coming to courts begins as soon as they arrive at the venue*
 - d. *the participants in the proceedings are provided with all necessary information about the proceedings*
 - e. *the communications and public relations of the court are in order, where necessary*
 - f. *the lobby arrangements at the court are in accordance with the particular needs of various customer groups*
4. *promptness of the proceedings*
 - a. *cases should be dealt with within the optimum processing times established for the organization of judicial work*
 - b. *the importance of the case to the parties and the duration of the proceedings at earlier stages have been taken into account when setting the case schedule*
 - c. *also the parties feel that the proceedings have been prompt*
 - d. *time limits that have been set or agreed are also adhered to*
5. *competence and professional skills of the judge*
 - a. *judges should take care of the maintenance of their skills and competence*
 - b. *judges should attend continued training sessions*
 - c. *judges' participation in training is subject to agreement in the annual personal development talks*
 - d. *court has specialized judges*
 - e. *the parties and the attorneys should get the impression that the judge has prepared for the case with care and understands it well*
 - f. *judges participate regularly and actively in judges' meetings, in quality improvement conferences and also in other work of the Quality Working Group*
6. *organization and management of the adjudication*
 - a. *the organization and management of adjudication are taken care of with professionalism and support the discharge of the judicial duties of the court*
 - b. *the assignment of new cases to the judges is methodical and carried out in a credible manner*
 - c. *the specialized competence of the judges is also utilized in the processing of cases*
 - d. *adjudication has been organized so that the use of reinforced compositions is de facto possible*
 - e. *personal development talks are held with every judge every year*

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- f. *the courts should have a methodical system for the active monitoring of case progress and for taking measures to speed up delayed cases*
 - g. *it is the responsibility of the management and the court that the judges and other staff are not being overloaded with work.*⁸³

3.1 Economic assessment of Finnish quality benchmarks

As can be seen from the above benchmark criteria, they set the elements of the utility function of the users and stakeholders of the courts – the principals. In other words, this set of elements presents the principal's goals or features of what the effective, productive and quality-based performance of judges should look like. Yet the incentive structure for the judges (agents) to perform the requested tasks and to fulfill the presented criteria is completely missing. As the law and economics literature suggests, in order to achieve such benchmark performance criteria the judges should be induced to do so through the employment of incentive mechanisms. As noted, several different mechanisms are applicable (carrots), whereas certain (sticks) should be avoided or applied with extreme caution.

First, to solve the adverse selection problem and the problem of judges leaving their offices, the financial rewards should be increased. Also, if it is observed that the intensity of judges is low or falling then this is, as noted, a straightforward and inexpensive signaling mechanism that the financial rewards are too low and that they have to be increased in order to avoid declining productivity and quality of judicial outputs.

Second, promotion prospects, coupled with a sort of competition-tournament among judges, are the next powerful incentive mechanism to improve judicial performance. Different versions of promotion prospects (e.g. irregular promotion, not depending on the passing of a certain number of years but on the judge's performance) should be thus designed and applied as inducement mechanisms.

Third, respect among peers and the related reputation effect may be employed as another inducement mechanism to achieve the proposed quality benchmarks. For example, special yearly prizes for "the best judge of the year," a list of top 10% judges, or a black list of worst 5% judges might be used as such inducements. These instruments would be made public and paid attention to by society at large, especially if they were awarded by the bar, president or prime minister.

Fourth, the quest for legacy is one the carrots, which induce judges to behave productively - the power to influence outcomes through voting and the evolution of the law (creation of precedents). Namely, the judges derive utility from imposing their policy preferences on the community at large, from the prospect of leaving legacy and from selecting outcomes, or selecting substantive or methodological trademarks, for the purpose of maximizing their own influence.

Of course, one can think of several other versions of carrot incentive mechanisms, which could be applicable to improving judicial performance. However, they should only be used as long as they do not cross the border and become inefficient and abusive stick mechanisms.

Unless the assessed quality benchmarks are supported by a corresponding system of incentive mechanisms, the achievement of targeted goals and performance remains uncertain and doubtful. The surveyed law and economics literature offer several alternative mechanisms to mitigate the identified asymmetries of information, high monitoring costs, and agency problems where the employment of such mechanisms is needed for the fulfillment of the presented policy goals.

⁸³ Just to compare, National Center for State Courts in USA promulgated Trial Court Performance Standards promulgated by the National Center for State Courts. They set five performance standards: (1) Access to Justice, (2) Expedition and Timeliness, (3) Equality, Fairness, and Integrity, (4) Independence and Accountability, and (5) Public Trust and Confidence. Each comprises more standards and all in all there are 22 standards. As can be seen, the standards are very much like quality benchmarks in the Quality project. For more information see www.ncsconline.org.

3.2 Economic assessment of reported incentive mechanisms in continental countries

As we have seen above, the principals and agents have different utility functions. Therefore, there should be an incentive structure put in place, which would align the utility of the agent with the principal. There are many incentives that could be put in place; however, existing continental judicial systems cut out some of them. Examples include incentive bonuses for judges who solve more cases, fast-track promotion, and extra judicial training. Further research is needed to analyze the structure of incentives in particular EU countries, but much is already known about several judicial systems.

In Finland, an incentive for judges to work harder could be that the courts each year negotiate with the Ministry of Justice for their budgets, and a higher budget usually brings more personnel, additional education, maybe plusher offices, better-stocked libraries, and so on. It could be that courts compete among each other in order to get the biggest budget. However, it needs to be found out how particular courts deal with potential shirkers – free-riders that weigh down the efficiency and effectiveness of their courts, since all of the performance criteria are aimed at the court, and not at the judge level. As for sticks, there are some disciplinary measures in place in Finland; however, in 2006 only two disciplinary proceedings were instigated, which ended with reprimands.⁸⁴

In Germany, wages do not depend on the productivity of particular judges and they do not get any bonuses for handling additional cases. However, the presidents of the courts, who promote judges, look at the number of cases handled and some other aspects of the judges' work, even though there are no set performance indicators for individual judges, only for the courts. As for sticks, judges can be reprimanded and even recalled for professional inadequacy, criminal offences, and for breach of professional ethics. As of 2006, there were 20 proceedings for professional inadequacy, 22 for criminal offenses and approximately 10 for breach of professional ethics (out of 20138 judges).⁸⁵

Sweden has a similar system to Finland, with performance indicators at the court and not judge level, and targets for courts are set each year after a discussion between the courts and the National Courts' administration. The main target is the processing-time length of cases. There are no bonuses for hard-working judges. There were two disciplinary procedures instituted in 2006 and both ended up with a reprimand.^{86 87}

In the Netherlands performance indicators are set at the court level. There are no bonuses for hard work and disciplinary procedures rarely occur (though exact disciplinary data do not exist). The authority to dismiss judges lies with the Supreme Court and it usually handles one to two cases per year.⁸⁸

In Slovenia, on the other hand, promotion depends on many different criteria:

- professional knowledge, whereby consideration shall be taken of:

- (i) the judge's professional activities,
- (ii) the judge's specialist and postgraduate studies and the reputation achieved by the judge in the legal profession,
- (iii) working capabilities, whereby consideration shall be taken of the ratio of the volume of judicial work,
- (iv) the ability to resolve legal questions, whereby consideration shall be taken of the level of correctness and legality achieved in the judge's decision-making as determined primarily by the reversal rate,
- (v) the safeguarding of the reputation of the judge and the court as determined from the way in which procedures are conducted, communication with parties and other bodies, the upholding of independence, impartiality, reliability and uprightness, and behavior inside and outside the service,
- (vi) the verbal and written skills,

⁸⁴ There were 901 judges in Finland in 2006 (see: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2008/finland_en.pdf, 2.4.2010).

⁸⁵ See http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2008/germany_en.pdf (2.4.2010).

⁸⁶ CEPEJ: Scheme for evaluating judicial systems 2007, country: Sweden, URL: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2008/sweden_en.pdf (2.4.2010).

⁸⁷ There were 1039 professional judges in Sweden in 2008 (22.03.2011).

⁸⁸ CEPEJ: Scheme for evaluating judicial systems 2007, country: Netherlands, URL: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2008/netherlands_en.pdf (2.4.2010).

- (vii) additional work undertaken in holding judicial office especially within the framework of mentorship, and involvement in legislative procedures and in education and professional training,
- (viii) the attitude towards colleagues in performing judicial work and
- (ix) the ability to perform the functions of a managerial position, if the judge is appointed to such a position, as shown by the work results in the area entrusted to the judge.

When judges are promoted, they also get a higher wage. One of the interesting things in Slovenia was that the Ministry of Justice offered additional payment to judges in 2009/10 who were ready to deal with more cases. However, a lot of judges, did not participate in the scheme, claiming that it encroached on their independence.^{89,90}

4. Conclusion

Increasing backlogs and the quality of judicial decision making is making headlines and attracts scholarly attention for quite some time. The aim of this article was to shed light on the problem from a law & economics perspective. The article focuses on the incentive stream of the continental judiciary, suggests several alternative inducement mechanisms to improve continental judicial performance and effectiveness, and provides an economic assessment of the proposed Finnish Quality Benchmarks and related provisions in several other continental countries. Therefore, beside salary, the prospect of leaving a legacy, gaining respect among colleagues (society), and promotion prospects have been discussed, as additional mechanisms for inducing judicial productivity and effectiveness since traditional increases in financial rewards might not be an appropriate incentive mechanism due to the identified asymmetries of information (high monitoring costs-agency problem). The eventual employment of sticks (unilateral termination of employment contracts, lay-offs, sanctions, prosecutions *ect.*) is discussed as such an additional inducement mechanism. The introduction of such a mechanism becomes even more appealing if one notes that they are much more powerful inducement mechanism than a promise to reward (carrots). However, the application of the multiplication effect provides a significant argument against the sole use of sticks, regardless of how appealing they might be. Employment of sticks in a judiciary setting is, as we argue, an inefficient, socially undesirable option, endangering judicial independence and diminishing social welfare. This consideration may also help to explain why the use of sticks in a judiciary setting is generally absent, undesirable, unnecessary and dangerous or, if applied, subject to extremely strict procedural requirements and safeguards, which should prevent possible abuses and retain judicial independence as a fundamental aspect of the rule of law.

The governments in continental systems do not have a lot of maneuvering space to align the utility functions of judges and the public. This is true since the salary is strictly set and judges have an increase in salary only when they are promoted, which occurs infrequently. Since there are not many degrees of freedom, it seems that judges behave as in rank-tournaments and their careers are the outcome of a succession of rank-ordered tournaments for promotion. Judges therefore compete in the decision-making performance for the fixed price of promotion to the next level. The prospects of leaving a legacy, and gaining respect and reputation among colleagues (society) appear as additional inducement mechanisms, beside the fear of being reprimanded or impeached. However, our survey shows that continental countries rarely resort to such additional incentive mechanisms. Therefore, there is room for improvement, not so much in the sticks but in reward mechanisms, which result in the enhancement of judicial performance, effectiveness and quality of judicial decisions. Further research is required in order to examine what precisely are the salient driving forces behind judicial decision-making.

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⁸⁹ Just on the side, in the 1980s, Slovenian courts also had a lot of backlogs. They instituted a similar incentive scheme and cleared the backlogs. It was interesting that none of the judges claimed that the scheme encroached on their independence (interview with a Minister of Justice of the Republic of Slovenia). See: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2008/slovenia_en.pdf (2.4.2010)

⁹⁰ Unfortunately, the exact numbers are not at our disposal. Also, since the article in general does not discuss the independence of judges, we will not delve in the further explanation of the matter.

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