

Article

# Pressure on Judges: How the Budgeting System Can Impact on Judge's Autonomy

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**Abstract:** Performance-based budgeting is a label that groups different budgeting models, developed in the New Public Management era, that link the funding to the performance of agencies. If European justice systems have been unresponsive to apply managerial techniques to courts, this is particularly true for modern budgeting techniques. Courts' budgets have been, and still are in many cases, drafted only on historical costs, and, although important for the court functioning, it has been one of the most neglected subjects in court administration studies. In recent years, some countries have been developing new approaches to justice systems and court budgeting, using a "performance-based" budget perspective, which relates the courts' budget to the efficiency results, setting specific performance targets. Although fundamental to ensure transparency, accountability, and proper resource allocation among courts, these approaches have an impact on judicial independence and autonomy, because they may put pressure on judges' productivity and efficiency, to the detriment of quality. Building on two case studies, Finland and The Netherlands, this paper aims to analyze how, and to what extent, the "performance-based" budgeting system is influencing the functioning of courts and the autonomy of judges.

**Keywords:** court administration; judicial independence and accountability; judges' behavior; efficiency; performance-based budget

## 1. Introduction

How, and how much, justice systems and courts gain from the State budget, and in which way they are accountable for what they spend, is of paramount importance for judicial independence and the well-functioning of courts.

"Judicial independence is a central pillar of any constitutional system. It is fundamental in any democracy that individual judges and the judiciary as a whole are independent of all external pressures and improper influence from the other branches of government, including funding bodies. The minimum conditions for judicial independence include financial security<sup>1</sup>". ([European Network of Council for the Judiciary \(ENCJ\) 2016](#))

An adequate budget, based upon objective and transparent criteria, makes the judiciary less vulnerable to undue influence, and, at the same time, it can ensure integrity and competence of the judges through the proper allocation of resources on judicial salaries and training ([European Network of Council for the Judiciary \(ENCJ\) 2016](#)).

<sup>1</sup> ([European Network of Council for the Judiciary \(ENCJ\) 2016](#), p. 5).

However, public resources are limited, and the prioritization of their allocation creates competition among the different public departments (Osborne and Gaebler 1992). The challenge for governments is to ensure a good level of public services reducing expenses, or to improve public performance containing public expenditure growth: In other words, to be efficient. Efficiency has been an increasing target for public administration over the years. Starting from the 80s, under the slogan “do more with less” (Osborne and Gaebler 1992), a new phase of business-like approach to public management, called New Public Management (NPM), took place.

Since the New Public Management wave started, budgeting has played a major role as a powerful managerial tool to improve planning, policies’ development, services delivery, and accountability mechanisms. Budget is used as a key management tool for achieving better organizational planning and performance, which are the main goals of NPM. To reach these goals, the budgeting process has been revised, progressively moving from a historical line-item budget, focused on the expenditures necessary to ensure public services (inputs), to a budget more focused on the results obtained from those expenditures (outputs and outcomes). In this new NPM budgeting approach, the central question is no longer “how much money I can get?” but “what can I achieve with this money?” (Organisation for Economic Co-operation and Development (OECD) 2007).

Due to its unique features, and an embedded refractoriness to change, judiciaries in many countries were only marginally, and anyway late, affected by NPM. Only in the late 90s the general pressure for increasing efficiency and the need to improve judicial services, somehow forced European judiciaries to deal with the NPM perspective (Maier 1999; Fabri and Langbroek 2000; Fabri et al. 2003).

However, there was, and there is still, an underlying difficulty in applying innovative managerial and budgeting techniques to the judiciary, which is also due to a rooted concern about judicial independence and, generally speaking, a non-managerial attitude of the legal profession.

If European justice systems have been unresponsive to apply managerial techniques, this is particularly true for budget planning and expenditures. Courts’ budgets have been, and still are in many cases, drafted only on historical costs, and although important for the court functioning, they have been one of the most neglected subjects in court administration studies.

In recent years, some countries have been developing new approaches to justice systems and court budgeting, using a “performance-based” budget perspective, which relates the courts budget to the efficiency results, setting specific performance targets to improve allocative and technical efficiency.

Building on two case studies, Finland and The Netherlands, this paper aims to analyze how, and to what extent, the “performance-based” budgeting system is influencing the functioning of courts and the autonomy of judges.

This paper represents a preliminary work, and it is part of a broader ongoing research project aimed at providing a significant contribution to judicial administration studies analyzing an important and quite unexplored issue: The budget in the judiciary and its impact on the functioning of the courts, with particular reference to organization development, efficiency and quality, judges’ behavior and judicial values.

This first paper is based on literature analysis and preliminary interviews in the two countries. In Finland I conducted six semi-structured interviews at the Ministry of Finance, Ministry of Justice, Parliament, Helsinki District Court, Market Court, Supreme Court. In The Netherlands, I interviewed three people at the Council for the Judiciary. Interviews were performed in April and August 2018<sup>2</sup>. More in-depth interviews will be carried on in the further stages of research.

After discussing the role of judges from multiple perspectives, this paper will describe the approaches of Finland and The Netherlands to performance-based budgeting for the judiciary and then will try to assess if, and to what extent, a performance-based budget can influence the judges’ behavior and the perception of their independence.

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<sup>2</sup> See Appendix A for more details.

## 2. From “Justice as a Power” to “Justice as a Public Service”

“A judge shall exercise the judicial function independently on the basis of the judge’s assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason”<sup>3</sup>. “A judge shall perform his or her judicial duties without favor, bias or prejudice.”<sup>4</sup> The Bangalore Principles of Judicial Conduct establish six guidelines for the ethical conduct of judges: Independence, impartiality, integrity, propriety, equality, competence and diligence. Independence is the first value: In most of the countries, judicial independence is enshrined in the Constitution.

The “separation of powers” principle, according to [Montesquieu \(1748\)](#), implies that the three powers (executive, legislative and judicial) must be separated and independent from each other. Each power must check and limit the other two powers, and all three powers should have the same weight (“check and balance” principle). In this model, judges should be independent of external and internal pressures.

Nevertheless, the budget can be a source of pressure and can influence the judicial independence. First, despite the separation of powers principle, the judicial funding is in the hands of the other two powers, which have some “extra weapons” and can potentially reduce the judicial budget if some disagreements between the branches arise ([Webb and Whittington 2004](#)). Secondly, if judges’ salaries are not adequate, judges can be vulnerable to undue influences. A proper amount of budget allocated to judicial training can also improve the integrity and the competence of the court staff.

If, on the one hand, the dependence from executive or parliamentary driven funding mechanisms can affect judicial independence, on the other hand, an “excessive financial independence of the judiciary could be used by some judiciary to shield themselves against legitimate reform efforts and reasonable expectation regarding performance”<sup>5</sup> ([The World Bank 2011](#)).

For these reasons, according to the European Network of Councils for the Judiciary (ENCJ) guidelines, a funding mechanism based upon transparent criteria is necessary to maintain the independence of the judiciary, as long as the judiciary is closely involved in setting these criteria ([European Network of Council for the Judiciary \(ENCJ\) 2016](#)). “Within the ENCJ the prevailing opinion is that a more business-like approach to management and finance is desirable, as it promotes, on the one hand, the functioning of the courts, and gives stronger incentives for the efficient use of public funds. On the other hand, it promotes the independence of the judiciary by making one of the vulnerable links between the judiciary and the other state powers much more transparent: More cases means more budget; otherwise court delays will increase”<sup>6</sup> ([Van Dijk and Dumbrava 2013](#)).

The “performance-based budgeting” models, as explained in the next paragraphs, link the funding to performance criteria, allocating money proportionally to the results. If, on the one hand, these models increase transparency and reduce the risk of arbitrary resources allocation and influence from the executive, on the other hand, they restrict the judicial autonomy by strengthening the control by court managers on judges’ activities and self-organization.

The “performance-based budgeting” is part of the New Public Management, a wave of reforms starting from the 80s and spreading through the 90s, that consists of applying private sector management techniques to the public sector, for the purpose of improving efficiency. In the last decades, the new wave of change has involved courts and prosecutor offices too. Later than the other public institutions, the courts have felt the need to measure their performance and improve efficiency and effectiveness in answer to the growing complaints about delays in justice and the reduction of

<sup>3</sup> The Bangalore Principles of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25–26 November 2002—Principle 1.1.

<sup>4</sup> The Bangalore Principles of Judicial Conduct—Principle 2.1.

<sup>5</sup> ([The World Bank 2011](#), p. 15).

<sup>6</sup> ([Van Dijk and Dumbrava 2013](#)).

public resources. In some countries, justice is the last public sector body to be subjected to public sector discipline (Loveday 2000). This process, known as “Court Management” or “New Court Management,” developed in the mid-90s starting from the United States, was also stimulated by the low level of public trust and confidence in the judiciaries (Schauffler 2007).

Before the introduction on NPM in the judiciary, justice was characterized by an “an emperor-like relationship with time” which was not accounted for (Garapon 2010): The judge’s decision arrived after a long reflection, a long time after the events. Neither the costs of decisions were taken into account.

The new managerial paradigm moves the focus from the institution to the individual (citizen), from “justice as a power” to “justice as a public service,” from the ritual to the result.

It introduces new elements, like cost control, performance indicators, case clearance, reduction of delays, and case dealing in real-time.

As public service, the judiciary must be accountable to the taxpayers and inform them about the use of resources and the results achieved with that resources. Transparency in the use of public funds is necessary to pursue public trust.

This new attention to time and costs had a direct impact on judges, who found themselves under increasing pressure from the court managers, the press, the citizens and all the other stakeholders (Fabri and Langbroek 2000).

The enhanced control by managers over professionals is a characteristic feature of new public management, except judges are a peculiar kind of professionals.

### 3. Judges as Professionals

Starting from Mintzberg (1979), several authors have identified the characteristics of professionals: They deliver high-knowledge services, they are skilled and experts of their domain, they work autonomously and in direct contact with the client. They are represented by professional associations and communities, where they share ethics and codes of conduct. These professional associations are often in charge of training, selection and peer supervision of professionals.

Judges are public service professionals: They are experts embedded in a professional community with ethics and values, they have specialist knowledge supported by experience, they deal with users and, at the same time, they serve public goals. As professionals working in public organizations, they are subject to different pressures caused by the managerial reforms (Noordegraaf and Steijn 2014).

The NPM wave, with its stress on the performance measurement, efficiency, cost-control and managerialization, led above all to a cultural change in the public administration.

Generally speaking, the NPM was the response to an increased demand for transparency and accountability coming from citizens, politics and the media, due to changes in demographic, socio-economic and cultural patterns. The pressure of the society on public organizations is reflected in the pressure of public organization on public service professionals (Noordegraaf and Steijn 2014).

Mintzberg defined as “professional bureaucracy” an organization where products or services are dealt with by professionals: Notably they are schools, universities, hospitals, accounting firms. Courts can also be considered as professional bureaucracies (Ng 2007).

The relationship between professionals and organizations is not easy.

Professional bureaucracies run into problems of coordination and control. Since professional activities are high-knowledge and abstract activities, they are difficult to evaluate, especially by those who are not professionals. Work processes are complex and hardly standardizable. In professional organizations, managers try to control professionals through supervision and standardization of work processes and outputs. This control, according to Mintzberg, can lead to dysfunctional behaviors because it “measures the wrong output, forcing the professionals to play the machine bureaucratic game, satisfying the standards instead of serving the clients<sup>7</sup>.”

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<sup>7</sup> (Mintzberg 1979, p. 377).

Since the beginning of the managerialization process of public services, public professionals have increasingly been confronted with public managers. Many scholars underlined the tension between managers and professionals. Managers are accused of interfering with the professional autonomy. “Managerial control mechanisms are superfluous in well-functioning professional organizations. Professionals are always embedded in a professional community, with its own codes, that contribute to the quality of the service delivery<sup>8</sup>” (De Bruijn 2011). However, the increasing demand for efficiency imposed new standards different from the existing professional standards, and the response to this demand required a new kind of expertise, different from the professional expertise (De Bruijn 2011).

Even if courts seem to be fully-fledged professional organizations, some important differences involve the relationship between professionals and managers:

1. Professionals are autonomous. Judges are more than autonomous: They must be independent. Therefore, the managers’ room to maneuver is limited because every decision that affects the judge’s behavior can be perceived as a threat to judicial independence;
2. While in classic public professional organizations managers are non-professionals, “too powerful, while they know little about the profession<sup>9</sup>” (De Bruijn 2011), in courts the court manager is a judge itself. The figure of the “court manager” with a different kind of professionalism has not developed in Europe (Consultative Council of European Judges of the Council of Europe (CCEJ) 2016), so in most countries, the court manager coincides with the court president, that is the chief judge. The power of the court president in most countries is partial, and the chief judge is considered “primus inter pares.” If, on the one hand, the tension between manager and professionals is mitigated because judges are headed by one of them, on the other hand, the managerial skills of the manager, necessary to manage an organization, are quite limited;
3. In courts there are no monetary incentives for the judges, nor sanctions: Judges cannot be moved from the court, and salaries are fixed by law<sup>10</sup>;
4. Another limitation to the court manager power comes from the procedural norms: While in the classic professional organization one of the tasks of the manager is to decide the procedures professionals must comply with, in courts the judicial procedure is laid down by law. Notwithstanding this, court managers still have the faculty to provide for organizational procedures or praxis that do not collide with the norms.

The level of power and control of court managers varies from country to country. For example, in The Netherlands, “tasks and responsibilities of individual professionals were partly taken over by standard procedures” settled by the court management: “In New Public Management, the autonomy of professionals has been restricted<sup>11</sup>” (Langbroek and Westenberg 2018).

Even in courts, a major source of tension between professionals and management is the performance measurement.

If, on the one hand, performance measurement is an incentive for performance, it increases transparency and accountability, and can improve the organization’s intelligence, on the other hand, performance management can lead to dysfunctional behavior and decreased professionalism (De Bruijn 2011). In courts, for example, to increase the number of solved cases, judges can decide to deal only with simple cases. In Italy, some judges are complaining about the fact that statistics are not taking into account the attempts at conciliation, that is an intensive and qualitative activity which will deserve better attention. A performance evaluation system that displaces professional

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<sup>8</sup> (De Bruijn 2011, p. 1).

<sup>9</sup> Ibidem.

<sup>10</sup> According to the (European Network of Council for the Judiciary (ENCJ) 2016). *Funding the judiciary*—Recommendation number 10: “The remuneration of judges must be constitutionally guaranteed in law and not altered to the disadvantage of judges after their appointment.” This is another typical measure to protect judicial independence and judge’s impartiality.

<sup>11</sup> (Langbroek and Westenberg 2018, p. 2).



considerations can bring to perverse effects. According to De Bruijn (2011), “the more impact performance management has, the more the information will be perverted<sup>12</sup>”: If the performance figures will result in financial incentive or financial sanction, and if the data will be published (and the professional ranked consequently), professionals will be tempted to bend the data.

Agreeing with this explanation, performance-based budgeting and its link between performance and funding, seems to be at risk of producing dysfunctional behavior.

According to Noordegraaf and Steijn (2014), professionals feel pressured, and these pressures are caused by managerial approaches. Some forms of performance-based budgeting are part of a broader “Management for Results” approach and are aimed at stimulating performance through incentives or a tight link between performance targets and resources. If high-powered incentives are linked to imperfect targets or measures, these incentives risk leading to perverse effects, demotivating professionals instead of motivating them (Robinson 2007).

In the two case studies presented in this report, there are no incentives related to the individual performance of judges and staff, but the court funding is linked to the judges’ performance, and this, especially in The Netherlands, translates into increased pressure on judicial efficiency.

In the next paragraphs, I will briefly sketch the performance-based budgeting models, describing which models are in use in the judiciaries of Finland and The Netherlands, and what are the impacts of these models on the judges’ behavior and professionalism.

#### 4. Performance-Based Budget in the Judiciaries: Finland and The Netherlands

Performance budgeting is a label that groups all budgeting models that use performance information measurement as a base for budgetary decisions.

Performance measurement and management are central issues in new public management wave of reforms. Performance management implies not only the collection and the evaluation of performance information, but also its use in the decision-making process (Van Dooren et al. 2015). Policies must be “evidence-based,” that means that politicians and managers might take decisions based on accurate data (Van Dooren et al. 2015).

The selection of data and indicators is crucial. Depending on its purpose, different sets of data can be used as performance indicators: “The form of the measurement system should follow the function” (Van Dooren et al. 2015, p. 118). Van Dooren et al. distinguished three possible uses of performance information: to learn (in order to identify what is working and what is not, and to improve policies), to steer and control (in order to control the present performance and evaluate if it is in line with targets), and to give account (in order to be accountable to the citizens for the results of the policies). For the first purpose, input, output and outcome indicators are needed, for the second purpose a combination of input and output indicators can be used, while, for accountability, optimal indicators should be outcome indicators.

The output is a measure of the production, and it is related to efficiency, while the outcome is related to effectiveness, and to the effects that output produces (Osborne and Gaebler 1992). Outcomes are generally more difficult to measure than outputs (Osborne and Gaebler 1992). Outcomes in the public sector are expressed as social impact and social benefits; they are not directly observable and, therefore, it is difficult to quantify them. In addition, outcomes can depend on unpredictable external factors, or the activities of other agencies.

This raises a major issue which has several implications also for the assessment of budget models, because the outcomes that in the public sector, and in particular in the judiciary, people most care about, appear to be hardly quantifiable and, therefore, very difficult to measure. This leads to the forced need to focus on measures of outputs as a proxy, sometimes very weak, to quantify outcomes.

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<sup>12</sup> (De Bruijn 2011, p. 150).

Therefore, it is important that performance-based budgeting is grounded on a proper performance management system that takes into account and balances different values and related measures.

The purposes of the performance-based budgeting are manifold: To increase accountability and transparency, to encourage an evidence-based approach to policy making, to rationalize the allocation of public expenditure, to prioritize services, and to increase efficiency and productivity.

Therefore, this process is supposed to boost the allocative and technical efficiency of public resources to improve the quality and quantity of services delivered to citizens.

The budgeting reform process in Europe is still an ongoing process, and budgeting models' practices are continuously evolving. A first classification of three different types of "performance-based budget," which can be defined as "a form of budgeting that relates funds allocated to measurable results" ([Organisation for Economic Co-operation and Development \(OECD\) 2007](#)), takes into consideration the link between performance information and funding. These three types are (1) presentational performance budgeting; (2) performance-informed budgeting; (3) direct/formula performance budget.

In the "presentational performance budgeting," there is no formal link between performance information and budget allocation (funding). However, Ministries, or agencies, in charge of drafting the budget can decide to produce performance information to orient budget negotiation and, then, allocation.

In the "performance-informed budgeting," the collection of performance information is formally part of the budget process, but there are also other factors that are considered in the decision-making process (e.g., policy priorities). The performance information can be used for planning or accountability purposes. In this case, performance information and budget allocation are loosely linked, and they are partially used to plan next year funding.

In "direct/formula performance budgeting," funding is directly and explicitly linked to performance through a formula.

In the last 20 years, many European Countries (e.g., Denmark, France, Finland, The Netherlands, Sweden, Switzerland, the UK) have progressively moved from a historical line-item budget, focused on the expenditures necessary to carry out public services (inputs), to budgets models more focused on the results (outputs and outcomes) obtained from those expenditures. The different aims of budgetary reforms, combined with different constitutional, political, and economic structure of European countries, have produced a variety of budgetary models that are "performance-based."

These models have subsequently been applied to the judiciaries. Different performance-based budgeting models, with different approaches, can be found in the judiciaries of France, Finland, The Netherlands, Albania, Denmark, Sweden, Estonia, Ireland, and the UK ([European Network of Council for the Judiciary \(ENCJ\) 2016](#)).

In his book "Performance Budgeting: linking funding and results" (2007), Marc Robinson provides a taxonomy of PB models based on: (a) The objectives emphasized; (b) the link between results and funding; (c) the type of performance information used. Using this classification, the budgeting mechanisms used in Finland and The Netherlands can be identified.

Notably, in Finland a performance-informed budgeting model is in use, that can be similar to a more specific "budget-linked performance target" model. The "Budget-linked performance targets" model is characterized by the setting of performance targets aimed at improving efficiency (output targets) or effectiveness (outcome targets). Targets describe the level of performance expected at any given amount of money, and any additional request for money from departments should be related to an improvement in output and outcome ([Robinson 2007](#)).

In The Netherlands a tighter "purchase-provider model," that is a peculiar form of "formula budget" model, is in use: In the "formula funding" model the link between performance and funding is very tight, depending on an algebraic formula that links the planned output to the amount of funding. The budget amount is calculated by multiplying the expected number of output units for their "price." The price is based on the estimates of the costs of delivering those outputs. If the actual output is

different from the expected one, there is no reduction or increasing of funding. The “purchase-provider model” is a peculiar formula funding model in which the budget is calculated by the actual output, multiplied for its given price. The more output is produced, the higher the budget allocated is. These models are applicable only to outputs, because outcomes are generally not measurable (Robinson 2007). According to Robinson (2007) this last model, compared to the others, creates more intensive pressure on efficiency.

J. Wittrup, in his paper “Budgeting in the era of judicial independence” (Wittrup 2010) distinguished two models: The traditional “Ministry of Justice model,” where the budget is managed and allocated by the Ministry of Justice, and the more recent “Council model,” where the budget is managed and allocated to a more or less independent body, that can be either the Judicial Council or an agency for Court Administration. In his paper, Wittrup states that the challenge of the MoJ model is to efficiently manage the judicial resources without being accused of violating judicial independence, and the solution “lies in the development of a transparent system of valid and objective indicators for workload and court performance<sup>13</sup>”, that can allow the Ministry to justify its choices. In the “Council model,” the Judicial Council must justify its choices too, to avoid an accusation of favouritism from some courts.

While Finland enjoys a ministerial model, in The Netherlands the budget is drafted by the Judicial Council. Let us see in detail.

#### 4.1. Finland

In Finland, the creation of a Court Administration Agency for the Judiciary, separated from the Ministry of Justice, is under approval these days. Until now, the budgeting process was managed directly by the Ministry of Justice interacting with the courts.

The budget allocation is related to the achievement of performance targets and the value of some key performance indicators. The targets are based on the forecasted caseload and regard the cost per case and the number of decisions per judge (person-year). Other indicators taken into account are:

- Number of incoming cases
- Length of proceedings
- Number of postponed cases
- Number of pending cases
- Number of decisions
- Caseload of judges and courts
- The budgetary means of a court and the spending of the budget
- Quality indicators<sup>14</sup>

All these indicators are calculated on the basis of a weighted caseload system: Differences in the case structure are taken into account by grouping case categories into different difficulty categories, each of which has a fixed weighting coefficient. The coefficient was calculated by a working time-monitoring conducted in 2009. Not only working time, but other criteria such as the difficulty level, the number and the length of hearings necessary, or the number of judges composing the panel who takes the decision, were taken into account in calculating weight coefficients.

However, “even though these indicators were developed to allocate resources to particular court offices, their use for this purpose does not follow automatically. The indicators instead form a source of knowledge on which to base discussion around the negotiation of the budget of each court. They

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<sup>13</sup> (Wittrup 2010, p. 6).

<sup>14</sup> Source: Presentation provided by the Ministry of Justice during the interviews in Helsinki on August 2018—see Appendix A.



are also used during annual meetings to help the Ministry of Justice and the heads of each court office to define the objectives to be met<sup>15</sup> (Contini and Mohr 2008).

The budget cycle begins in January, with the formulation of the “budget framework” by the Ministry of Finance, after discussing with the Ministry of Justice. Within this threshold, the Ministry of Justice decides the amount and the guidelines for budget allocation. The Department of Judicial Administration within the Ministry of Justice is in charge of individual negotiation with each Court President. Before the “face to face” meetings, a “kick-off meeting” with all the courts is arranged, with the aim of increasing transparency within courts, evaluating the overall situation of the judiciary and discussing the contingencies that entail new budgetary needs.

The individual meetings take place from September to November. During these meetings, the performance of the courts, the level of accomplishment of the targets, and the forecasts for the next year are analyzed. Within the budget limit imposed by the framework, each court sets the number of cases it can solve with the resources allocated. Since the 80% of the court budget is related to salaries, the main focus of the negotiation is the number of judges and staff assigned to the court<sup>16</sup>. During this discussion, additional judges or temporary staff, where appropriate, are negotiated.

At Court level, the resources are managed by the President of the Court, with the help of the executive board. The executive board is composed of the heads of departments (judges) and representatives of staff. Its function is purely consultative, supporting the president in its decisions. The budgetary autonomy of the Finnish courts is limited, since only 10% of resources are directly managed by the court—these resources are mostly used for office supplies and judicial training. If the court needs extra resources to finance some innovation projects or to cope with unexpected necessities (e.g., a sudden increase in the number of incoming cases) they can ask directly to the Ministry of Justice that, after discussion, can provide the resources needed<sup>17</sup>. If they save money at the end of the year, they can keep it for the next year. In practice, the budget allocated to each court does not depend on the number of decided cases, but the number of decided cases and the other targets depend on the amount of budget allocated to each court.

#### 4.2. The Netherlands

Unlike in Finland, in The Netherlands the budget allocated to each court depends directly on the number of decided cases. The more cases are decided, the more money the court receives. The formula linking budget to performance is  $P \times Q$ , where  $P$  is the price assigned to each category of cases, and  $Q$  is the number of cases decided for each category. The prices are negotiated every three years, and are based on the time necessary to judges and staff to solve the case, multiplied for the price per minute.

The negotiation process follows two separated and overlapping flows: One from the Ministry to the Council, and the other from the Council to the Courts. The basis for the calculation of the budget allocated to the Council differs from the basis for the calculation of the budget allocated to the courts: The first one is based on 11 case categories, while the second one is based on 70 case categories.

The Ministry of Justice decides the prices for case categories every three years, quantities are negotiated with the Council every year, by the forecasted number of solved cases. The Council sets both prices and quantities every year, mainly by forecasted caseload and courts’ outputs. These prices are then used to allocate funding to the courts.

Each court receives the same amount of money for a given case category. Courts that manage to keep their real costs low for case categories can thus retain a surplus. In this way, there is an incentive for courts to reduce costs (De Rechtspraak-Council for the Judiciary 2014). Courts that produce more than forecasted receive 70% of the agreed price on the surplus of cases. Courts that produce less

<sup>15</sup> (Contini and Mohr 2008, p. 34).

<sup>16</sup> Interview with the Head of Court Administration Department—Ministry of Justice in Finland—27 August 2018.

<sup>17</sup> Interview with President of the Helsinki District Court—28 August 2017.

than expected must return 70% of the agreed price of the unsolved cases in an “equalization account” managed by the Council for the Judiciary.

One of the main features of the budgetary reform in The Netherlands is the autonomy of the courts, which are self-administering organizations, under the supervision of the Council.

Each court has its management board, which is the decision-making body in charge of the general management. The board is composed of the president of the court, the director of operations (usually a person with a managerial background), and another judge of the court appointed by the Council ([Consultative Council of European Judges of the Council of Europe \(CCEJ\) 2016](#)). The management board is in charge of the allocation of resources within the court. No amount is earmarked, which means that the board has a large discretion about how to spend the money and can obtain additional resources if the court solves more cases than planned.

As salaries represent around 75% of the total court expenses, judges cannot be moved and the revenue is calculated on solved cases, the leverages that court management can use to increase the court’s budget and/or decrease the costs are: (a) Stimulating judges’ production to increase the number of cases solved; (b) moving judges within the court based on the caseload; (c) hiring staff from temporary recruitment agencies to increase productivity; (d) not replacing retired judges to decrease the cost per case, (e) moving judges, only with their consent, to other courts and adding the judges’ salary costs to these latter courts, (f) moving cases from an overwhelmed court to another and receive financial compensation for this.<sup>18</sup>

Table 1 summarizes the main differences between the two budgeting models.

**Table 1.** Budgeting models in Finland and The Netherlands.

	<b>Finland</b>	<b>The Netherlands</b>
<b>Framework</b>	Ministry of Justice model	Council model
<b>Budgeting model</b>	Budget-linked performance targets	Purchaser-provider model
<b>Budgeting process</b>	Ministry—courts negotiations	Two-flows negotiation (from the Ministry to the Council, from the Council to the courts)
<b>Main performance indicator</b>	Forecasted caseload	Price × Quantity (forecasted number of solved cases)
<b>Weighted caseload system</b>	Based on three difficulty levels per eight categories	Based on 70 case categories
<b>Link between performance and funding</b>	Loose link	Direct link
<b>Consequences if targets are not reached</b>	Discussion and reallocation of resources	Budget refunding from the courts to the Council
<b>Decision-making body</b>	President of the Court	Management board
<b>Court budgetary autonomy</b>	Low: Court budget is earmarked, only 10% can be autonomously managed	High: Court budget is not earmarked
<b>Judge’s work assessment</b>	Individual discussions	Working process assessment by the court management
<b>Setting of individual targets</b>	Possible but uncommon	In some courts. Subject under debate.

<sup>18</sup> Interview with the Financial Director—Council for the Judiciary in The Netherlands—11 April 2018.

## 5. Pressures on Productivity: The Impact of Performance Budgeting on Judicial Autonomy

In this chapter, I will try to outline the impact of the performance-based budgeting on the judicial autonomy, based on the two case studies: Finland and The Netherlands. Being a preliminary work, evidence in this phase is based upon literature analysis and first interviews with contact people in the two countries. A further deeper analysis with questionnaires and focus-group will follow in the next months.

### 5.1. Finland

After the introduction of the “management by results” system in Finland, including the performance budgeting model, some judges expressed their disagreement accusing this system of being a threat to their independence and to focus the attention only on the efficiency, to the detriment of the quality of the decision. The supreme overseer of legality in Finland, the Chancellor of Justice, in his response to such criticism stated the following: “The judiciary through its management by results system may not interfere with the objective and subjective independence of the courts in their decision-making and other application of the law, which is the real essence of the independent judicial power safeguarded in the constitution. The fact that general information about handling times, the number of cases to be resolved or similar data is written in the documents of individual courts dealing with management by results does not in itself lessen or endanger the independence of the court in reaching a decision in individual court cases. Even at the level of individual courts it is after all a question of documents expressing targets and measures to be undertaken at a still rather general level.”<sup>19</sup>

“Both the Ministry of Justice and the courts have found the experiences gained from the management by results system to be fairly positive. The system has influenced the planning of work in the courts, and for it to function properly the courts and especially the head judge and administrative staff must closely follow the volume of cases and identify potential problem areas. The system has also increased the knowledge the Ministry of Justice has about court operations and the degree to which legislative reforms have been implemented.”<sup>20</sup>

During my interviews in Helsinki, I did not find any criticism against this system. The budgeting system seems to be rather flexible, based on dialogue between the courts and the Ministry, with the possibility to ask for extra funds at any time of the year (when needed), and there are no negative consequences if performance targets are not achieved. If the targets are not reached, it follows a discussion between the Court and the Ministry that can lead to a renegotiation of targets or a reallocation of temporary resources. It frequently happens that the court that does not reach the targets obtains more resources<sup>21</sup>. “The idea behind this thinking is the fact that the citizens are equal and they should not suffer because of less performing courts. Therefore we need to support them.”<sup>22</sup>

For these reasons, court management does not seem to put pressure on judges for efficiency.

In the Helsinki District Court, the pressure comes from the workload and the backlog. Since the Finnish judicial budget has been cut over the years, and the number of incoming cases has remained the same or, in some cases, increased, the court is trying to be efficient solving the same number of cases with less money. To do that, court management is not pushing judges to decide more cases. “Judges have different skills and experience, someone is slower, and someone is quicker, but they all do their best.”<sup>23</sup> If a judge is defining a few cases, the court manager will discuss with her/him to know

<sup>19</sup> See <https://rm.coe.int/ministry-of-justice-department-of-judicial-administration-the-finnish-/168078f3d2>. (last access November 2018)

<sup>20</sup> Ibidem.

<sup>21</sup> Interviews with Ministry of Finance and Ministry of Justice in Finland—27 August 2018.

<sup>22</sup> Interview with Ministry of Justice of Finland—27 August 2018.

<sup>23</sup> Interview with President of the Helsinki district court—28 August 2018.

the reasons and find a joint solution. The assessment of judges is of an informal nature and based on so-called “development discussions or conversations” ([Consultative Council of European Judges of the Council of Europe \(CCEJ\) 2016](#)). Instead, court management is trying to make the procedures and praxis more efficient, by standardizing working methods of court clerks and other administrative staff. Obviously, a different organization of the work of clerks can impact on the working methods of judges too, but this does not seem to be an interference on judicial independence.

The non-judicial staff’s working procedures’ optimization is underway in the Market Court<sup>24</sup> as well. In the Market Court, there is no backlog, and the court management does not need to push on productivity, because judges are already producing their best, motivated by career.

At the Supreme Court<sup>25</sup> information about judges’ productivity is shared among judges, but this information is used to plan the activities, not to compare performance, so judges do not feel pressured.

A recent research paper presented at the 2018 EGPA conference by Tinaa Puolakka and Petra Pekkanen<sup>26</sup> deeply analyses the interaction between management and judges at the Insurance Court in Finland, and how the management can manage the judges’ work without interfering with their autonomy. Judges perceive their autonomy as a source of motivation; they are autonomous in managing their case inventory, in managing priorities (which cases they want to prioritize), and in managing their working time. At the same time, intermediate managers are coordinating workflows, assigning cases to departments and judges with balanced weights, influencing judges’ self-management and intervening only in rare cases. A first-in first-out method is suggested, but judges can decide to manage their files otherwise. The weekly targets setting and the sharing of single judges’ performance data among judges are the main methods used to influence judicial performance. Only in extreme situations of poor performance, managers are intervening discussing with the judge and redistributing cases among judges.

## 5.2. The Netherlands

In The Netherlands, where the budget model that offers the tightest link between performance measures and funding allocation was developed, it may be safely said that the judiciary as a whole and the courts are more independent from other branches of Government, in particular, from the executive. The Judicial Council, although in consultation with the Ministry of Justice, plays a fundamental role in budget appropriation and resources allocation to courts, which are based on clear and evidenced-based criteria, using a purchaser-provider budget model. In this way, the judiciary has a factually based argument and clear performance indicators about what it may deliver based on the availability of resources. Even if the external independence (independence of the judiciary from the executive) is safeguarded, the same cannot be safely said for the internal independence (independence of the judge from the court management)<sup>27</sup>.

Pressures on productivity and efficiency are strongly perceived by Dutch judges, who are complaining a higher caseload caused by the budgetary constraints, a strict schedule of hearings that reduce the time allocated to cases definition and, therefore, reduce attention to the quality of judgment ([Contini 2017](#)).

In 2012, a group of 800 Dutch judges published a “manifesto”<sup>28</sup> in which they complained about the financing system and its impact on their work. The main critique was about the work pressure and the stress over production and targets, with a lack of attention to the quality of the work and the judicial

<sup>24</sup> Interview with Court President and Permanent Secretary—Market Court of Finland—29 August 2018.

<sup>25</sup> Interview with Supreme Court Judge of Supreme Court of Finland—30 August 2018.

<sup>26</sup> “Interplay between Judges and Managers in Managing Court Operations and Workflow”—presented in Lausanne at the EGPA Conference, 5–8 September 2018.

<sup>27</sup> Regarding the difference between internal and external independence, see the Venice Commission [https://www.venice.coe.int/webforms/documents/?pdf=CDL\(2012\)035-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL(2012)035-e).

<sup>28</sup> ‘Manifest’ published in *Tijdschrift voor de Rechterlijke Macht* 2013, afl. 2, p. 40.

decision. These complaints were confirmed in 2016 (Langbroek and Westenberg 2018). According to the program manager at the Council for the Judiciary, interviewed by Langbroek and Westenberg<sup>29</sup>, “the financing system introduced strong work ethics in terms of production, which became ingrained in judicial mentality.” According to the interviewed, Dutch judges are not autonomous in managing their case inventory and their workload: The intermediate managers (team leaders) decide about the workload, and judges “just work on the files in the order they receive them.”<sup>30</sup> Judges do not have enough influence on the organization of their work. The working process is assessed and can be optimized by the court management (Consultative Council of European Judges of the Council of Europe (CCEJ) 2016).

Furthermore “according to the Council for the Judiciary, the source of dissatisfaction among judges is not the financing system, but the way it has been applied by the management boards of the courts,<sup>31</sup>” putting too much emphasis on budget (Langbroek and Westenberg 2018). In The Netherlands, judges are strongly influenced by the financing system and by the court management, and some changes in the budgeting policy (as proposed by the Ministry of Justice) to “restore the balance between money-driven policies and management on the one hand, and judges as professional on the other<sup>32</sup>” will be needed (Langbroek and Westenberg 2018). One solution has been the integration of quality measures in the “price per minute,” to counterbalance production measures. For example, the number of cases reviewed by another judge, or the number of cases that are decided by a panel of judges, can increase the price per case negotiated with the Ministry of Justice. However, the eventually increased prices for a better “quality” in deciding cases leave each court the discretion to have the case reviewed by a second judge or decided by a panel of judges. In this way, each court management board has the flexibility to play with the court’s costs and its budget<sup>33</sup>.

Other issues raised by Langbroek are the confusion of roles between judges and managers, the lack of managerial skills, the inability of the judicial members of the board of managers to counteract the financial pressures by the Council, and the failed communication between judges and managers, where managers impose their decision on the organization “from above” without discussing them with judges first.

## 6. Conclusions

This is one of the first papers of an ongoing research project that will explore in detail an important and quite unexplored issue: The budgeting processes in place in some European judiciaries and their implication for efficiency, court’s functioning, judicial independence, and accountability. Notably, this paper represents the first part of a large-scale investigation into the use of performance-based budgeting in Finland and The Netherlands and its impact on courts’ organization and judges’ behavior. The second part of the study will be dealt with using online questionnaires and semi-structured in-depth interviews with judges and court management in the selected countries, aimed at exploring how the change in the funding process can have an impact on judges’ decision making and work, with pressure on production, definition of cases prioritization, access to resources (staff, technology), training opportunities, investments on innovations, etc.

Therefore, there are still several questions that need to be answered, which will be addressed in the following steps of the research project.

This work has focused on the impact of performance-based budgeting on judges’ autonomy and independence, setting the stage for further research questions, showing the need for more empirical research on this topic, which will be carried out.

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<sup>29</sup> (Langbroek and Westenberg 2018, p. 156).

<sup>30</sup> Ibidem.

<sup>31</sup> Op.cit, p. 157.

<sup>32</sup> Ibidem.

<sup>33</sup> Interview with Financial Director of Council for the Judiciary in The Netherlands—11 April 2018.



The performance-based budget is primarily a tool to ensure a rational and fair distribution of resources among courts. The calculation of the resources needed to make the judiciary function properly is not based on just an incremental approach from the year before (historical line-item budget), but it takes into consideration the past and forecasted performance, to better estimate the resources needed, and then allocate them to the courts in the most effective possible way.

Some positive impacts on the functioning of justice have emerged. In Finland, resources and judges' accountability have increased. The budgeting system has enabled the Ministry to "coordinate the principles of allocation and ensure equality and objective rules"<sup>34</sup> (Contini 2017). Through the weighting caseload scores, apparently, there is a more balanced resources distribution among courts, with an increase in allocative efficiency. The following further results have emerged: a better internal knowledge and control, an increased transparency among courts and accountability to the citizens<sup>35</sup>.

In The Netherlands, the performance-based budget has made the resource allocation process more transparent and based on clear and shared criteria, which contribute to improving allocative efficiency<sup>36</sup>. According to the Court of Audit: "Since the introduction of performance-based funding, the cost of a court case stabilized after having increased for a long period of time (1983–2002), and the cost differences between courts and cases have declined. It is reasonable to assume that this is due in part to the introduction of performance-based funding."<sup>37</sup>

However, in the two countries, although to different degrees, judges are blaming the performance budget system to be the cause of too much pressure on efficiency, to the detriment of the quality of the decision.

What stands out at this early stage is a two-fold impact of performance-budgeting on judicial independence: If, on the one hand, a budgeting model based upon transparent criteria can reduce the discretion in distributing funds and guarantee the external judicial independence, a budgeting model too much focused on production can divert attention from quality and undermine the judges' internal independence.

The issue at stake is the relationship between judges and court management. Judges are public professionals embedded in a working environment: As public professionals, they need to be accountable. The role of court management is to ensure accountability and efficiency without interfering on judicial autonomy.

The relationship between management and professionals in courts is quite different from the others professional bureaucracies: Judges must safeguard their independence, and courts managers are often professionals, with few managerial skills and little leeway to intervene in professional activities, that are regulated by norms. Notwithstanding this, in some countries, such as The Netherlands, managers are accused of interfering on judicial autonomy by excessively standardizing working processes. One of the main sources of tension between managers and professionals comes from the performance measurement, especially if it is strictly related to the funding.

In The Netherlands, where a strict performance-based budget model is in place, a lack of autonomy of judges in organizing their work is perceived, together with pressure on efficiency and productivity and lack of attention on quality. The economic perspective is dominant (Langbroek and Westenberg 2018), and the attention is focused only on outputs. This may lead managers and professionals away from outcomes and basic values. Furthermore, a lack of communication between judges and court management can disturb the relationship between the two actors. To cope with these issues, the Judicial Council is introducing some quality measures and targets, and developing initiatives to

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<sup>34</sup> (Contini 2017, p. 44).

<sup>35</sup> Interview with President of the Helsinki district court—28 August 2017.

<sup>36</sup> Interview with Financial Director of Council for the Judiciary in The Netherlands—11 April 2018.

<sup>37</sup> <https://english.rekenkamer.nl/publications/reports/2016/04/21/funding-the-judiciary-system-consequences-for-efficiency>.

ensure the improvement of quality<sup>38</sup>. Further research is needed to establish if these measures are working effectively.

In Finland, where a less strict performance budgeting is in place, judges seem to feel less pressured, and they can conserve a large scope of autonomy in managing their working time and their priorities. The open dialogue between judges and management, and between management and Ministry of Justice, seems to be a key element to ensure a convergence of vision and objectives. Not only outputs, but also inputs, together with effectiveness and quality indicators, are considered, and this makes the budgetary system more flexible and responsive to the citizens' needs. A reform process, creating a Court Administration Agency that will deal with budgetary issues, is ongoing, so that the effects can be appreciated only in the next months.

To solve the tension between management and professionals, a balance needs to be found.

More empirical research is needed to better understand in practice the impact of budgeting on judicial independence and behavior, and to try to test which budget model can fit better for the judiciary, balancing independence and accountability without interfering with judges' autonomy.

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## Appendix A

### a. List of interviews

**Table A1.** list of interviews.

Institution	Role	Day	Length
<b>The Netherlands</b>			
Council for the Judiciary	Financial Director	11 and 12 April 2018	180 min
	Former Strategy and Development Director		60 min
	Financial Trainee		
<b>Finland</b>			
Ministry of Finance	Counsellor of Legislation	27 August 2018	60 min
Ministry of Justice—Department of Judicial Administration	Head of Department Head of Planning Senior Planning Officer	27 August 2018	90 min
Helsinki District Court	Chief Judge Counsel to the Finance Committee Counsel to the Legal Affairs Committee	28 August 2018	120 min
Parliament	Counsel to the Finance Committee Counsel to the Legal Affairs Committee	28 August 2018	60 min
Market Court	Chief Judge Permanent Secretary	29 August 2018	60 min
Supreme Court	Judge of Supreme Court	30 August 2018	45 min

### b. Interview outline

- Budgeting process: Formulation, approval, execution, audit
- Budget composition
- Budget allocation criteria

<sup>38</sup> The ReCHTESpraaQ, introduced in 2002, is a total quality management system that integrates performance measurement with quality measures. <https://www.rechtspraak.nl/SiteCollectionDocuments/Quality-of-the-judicial-system-in-the-Netherlands.pdf>.

- Performance indicators
  - Case weighting system
  - Court's autonomy
  - Court management board: role and leeway
  - Judicial map reform
  - Impact of PF budgeting on efficiency
  - Impact of PF budgeting on judges' perceived autonomy and pressure on efficiency
  - Impact of PF budgeting on judges' workload and performance
  - Impact of PF budgeting on quality of organization and judicial decisions
  - Strengths and weaknesses of the budgetary model
- c. List of documents collected during the interviews

The Netherlands:

- Performance Based Budget presentation
- Consolidated budget reports 2006–2016
- Time spending research

Finland:

- Performance Based Budget presentation
- Budget annual timetable
- Weighted caseload system
- District Court performance targets

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