INEFFICIENCY OR USELESSNESS? THE PRACTICAL AVATAR OF REGULATING THE PREVENTIVE CONCORDAT AND THE AD HOC MANDATE

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ABSTRACT: *The present paper deals with the notions of efficiency and efficacy in the field of commercial law, especially in insolvency law. The author proves that the effectiveness of a commercial law mustn't merely state that this norm is indeed made use of in practice, when there are no other alternative ways. The very small number of trials on the preventive concordat and the ad hoc mandate shows that its Act is inefficient, not useless.*

KEYWORDS: *insolvency, preventive concordat, ad hoc mandate, efficiency, inefficiency, uselessness*
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For any kind of talk, and especially for an academic one, we need to clarify the set of terms in use in order to have a real dialogue going on. Even if, in this present case, we have a mediated dialogue, the possible confusions regarding the various concepts here mentioned need to be avoided.

In Romanian, efficiency is by rule considered a perfect synonym of efficacy. The Romanian language dictionary describes as being effective something "that produces the desired effect, offering a positive result." It is well known that each science has, apart from the basic common word stock, a certain number of words bearing particular meanings, bound to each subject. Due to the fact that, in the juridical language, there are specific connotations different from those in the common language[1], it is our intention to determine whether the word "efficiency" has different meanings from the ones listed in the common vocabulary.

At a first glance, it appears that the two types of vocabularies share the same word, without creating different connotations for it. Yet, beyond this, the law theory defines "efficacy" as a norm which imposes a particular type of behavior and is obeyed in most

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[1] M. Mureşan, S. Fildan, *Drept civil. Partea generală*, Cordial Lex, Cluj-Napoca, 2010, p. 48.

instances.[2] But the things are far more complex, since there isn't necessarily a concord between the efficacy and the validity of a juridical norm (and this aspect should be, in our opinion, clarified from a theoretical perspective)[3]!

Even though the present paper isn't concerned with the law theory, we cannot dodge some questions that intersect the commercial law area. To be more accurate, one needs to take into account the vastness of the juridical encyclopedia.

How about the efficiency of the commercial norm – can it be abstractly compared to that of any norm of the juridical system? In other words, to what extent is the efficiency of the juridical norm from the commercial law closer or more distant then the one from different other branches? For example, starting from the Antiquity, "the punishment meant discouragement, being strictly related to public safety and the elimination of the offenders from the society." Aullus Gelius, borrowing some ideas from the Greek philosophers, considered that one purpose of the act of punishment is "to discourage and prevent further crimes committed by other persons."[4]

Either can we forget the fact that the efficiency of the criminal norm is facilitated by the existence of some factors which can stop or seriously discourage the crime committing actions; such factors are the close monitoring of the particular areas in which the number of crimes is high, or the street lighting system etc.[5] (issues that have been inferred or really well understood in the most modern way, starting from the 18th century[6]).

Another possible description of this notion would thus state that the efficiency of the criminal norm isn't measured by breaking the legal prescriptions but, on the contrary, by obeying them. In a direct antithesis with the above stated idea, we place the efficiency of the commercial norm, that, in our opinion, can be quantified by the frequency of its usage, and note by that of the non usage of its provisions.

Consequently, a first conclusion is the one according to which the efficiency of a juridical norm cannot be stated based on a normalized standard, belonging to the whole juridical system, but it needs to be analyzed differently, according to the particularities of each law branch.

Paradoxically enough, in the continental – European juridical systems, although being a part of the private law, the commercial law registers a strong unwarrantable interference of the state regarding its regulating matters. We should say that, in Romania, the changes necessary to carry on properly the commercial terms are so frequent that they can discourage an uninformed person.[7]

Although there is a Legislative Council and a strongly articulated doctrine, the commercial legislation changes have been so frequent after the 1990s, that only an

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[2] H. L. A. Hart, *Conceptul de drept*, translated by Șt. Lupu, Sigma, Chișinău, 1999, p. 108.

[3] *Ibidem*, p. 109.

[4] O. F. Robinson, *Penal Practice and Penal Policy in Ancient Rome*, Routledge, 2007, p. 181; (see also M. Tonry, *Thinking about crime: sense and sensibility in American penal culture*, Oxford University Press, 2004). For a general view of the Roman law, see Vl. Hanga, M. D. Bob, *Curs de drept privat roman*, 3rd ed., revised and completed, Universul Juridic, București, 2009.

[5] For further developings of the subjects, see B. C. Welsh, D. P. Farrington, *Making Public Places Safer: Surveillance and Crime Prevention*, Oxford University Press, 2009.

[6] C. Beccaria, *'On Crimes and Punishments' and Other Writings*, Cambridge University Press, 1995.

[7] For a debate over the intrinsic nature of the laws public character, hence the intrusion of this element in the private law, see G. Teubner, *State Policies in Private Law? A Comment on Hanoch Dagan*, in "American Journal of Comparative Law", no. 3 / 2008, pp. 835-843.

electronic statistics could keep their accurate account. The predictability of the changes in the normative framework, as much as it can be rationally anticipated from a doctrinarian point of view, is overshadowed by the tedious legislative instability. The almost yearly changes of the main incident laws (such as, the Companies Act[8], the Law on the trade register[9], the Insolvency law[10]), sometimes significant, other times of no importance or generated by mean interests (like, for instance, the subordination of the trade register to Chamber of Industry and Commerce or to the Ministry of Justice), have destroyed the idea of a predictable and solid juridical framework that is vital to both doctrine and jurisprudence, and to the general framework of the carrying on of the specific juridical relations. But the appetite for change hasn't stopped here. At the end of 2011, a New Romanian Civil Code come into force. This new law, which was initially supposed to simplify the private law relations in general, and those of commercial law in particular by setting up a juridical monism, does in fact something else, unsettling them both. Of course, the official statistics, read in a certain key could prove exactly the opposite. There are no longer commercial trials since the divisions or panels of courts bearing this name have been dissolved, and these having been replaced by civil divisions or panels with growing numbers, but being made up of the same judges!

Nevertheless, the commercial legislation was efficient at large, its usage being put to practice *volens, nolens*. But, beyond such a "success" some normative acts became efficient through coercive force of the state, and not by their own force. Yet, when the alternative offered by the legislator wasn't good enough, in practice it was strongly rejected; this is the case of the preventive concordat and the ad hoc mandate law.[11]

What is more, although applicable and generating effects, these laws are not ones of the most highly waited by the business world, theoreticians or practitioners. One can thus conclude that it is not possible to speak solely of a "raw" efficiency, in the absence of a deeper understanding of the concept in itself. The mere effects generated by a law can quantify a primary, rough level of its effectiveness. Sometimes, the "effectiveness" of a law is only a puppet of those who care to declare the success of a reform that unsettles the already much too busy courts.

We state that this effectiveness can be a false success of the legislator as long as he does not offer an alternative to the framework he wants to impose through his legislation. And, as long as the juridical relations have to take place, being necessary for a real trade life, the shape under which they are enforced cannot substitute a successful legislative policy.

As we have mention before, we can look at the case related to the ratifying at the law concerning the preventive concordat and the ad hoc mandate. Having to face the increasing number of bankruptcies at the national scale, the legislator wanted to create a mechanism by means of which to prevent the starting insolvency procedure. It needs to be

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[8] Law no 31 / 1990 on the commercial enterprises, published in "Monitorul oficial al României" [the Official Gazette], part I, no 1066 from November 17 2004, republished, modified.

[9] Law no 26 / 1990 on trade register, published in "Monitorul oficial al României" [the Official Gazette], part I, no 49 from February 4 1998, modified.

[10] Law no 85 / 2006 on insolvency, published in "Monitorul oficial al României" [the Official Gazette], part I, no 359 from April 21 2006, modified.

[11] Law no 381/2009 on preventive concordat and the ad hoc mandate, published in "Monitorul oficial al României" [the Official Gazette], part I, no 870 from December 14 2009.

said that the registered insolvency requests do not illustrate correctly the true economic situation. In our opinion, this picture is much darker than it appears from the simple reading of the trials having insolvency as their object. We base our statement on the fact that a very large number of Small and Medium Enterprises (SMEs) cannot reach the limits required by law at the insolvency, for getting under the shield of the insolvency provisions (like, for example, stopping the flow of interests). In addition, the judiciary statistics should be interpreted under the reserve of the fact that the minimum limit required for the insolvency has increased (for the debtor or creditor) from 10.000 RON in 2006 to 45.000 RON in 2010. Nevertheless, in that particular period, neither the National Institute of Statistics, nor the Romanian National Bank reported a 450% inflation, which could have justified that particular increasing of the debts ratio.

Like we have stated above, the noble aim of the Romanian legislator was to reduce the number of trials that had insolvency as their object. If, at various moments in time, the ways of "fighting" against insolvency were based on increasing the financial limit (initially set at 10.000 RON, later raised at 30.000 RON and reaching 45.000 RON in 2010), or on extending the period in which the debits weren't paid (from 30 days to no less than 90 days), some other levers at least as efficient as the previous ones, had to be found.

Still, despite the facts that the provisions of the Preventive Concordat and the Ad Hoc Mandate Law were presented as a desirable alternative to the insolvency,[12] in practice the normative act represent a failure or a monument of the law inefficiency. Although our data are basically related to Cluj Law Court and Cluj Court of Appeal, they are relevant for the huge discrepancy between the number of trials having as their object the Law no. 381/2009 and the ones related to Law no. 85/2006. The simple accessing of the trials portal containing data regarding the trials registered at the above mentioned courts can illustrate the numerical proportion that favors insolvency by far.[13]

In the end, we can safely concluded that the effectiveness of a commercial law mustn't merely state that this norm is indeed made use of in practice, when there are no other alternative ways. The efficiency relates especially to the registering of the positive effects experience in the business world. Among them, there are the stimulation of the business environment and the direct or indirect contribution to the safety of the trade circuit. And finally, the efficiency of the legal framework brings with itself the economic growth, the profit being in fact the reason why the commercial enterprises have been created in the first place.

[12] For a detailed analysis of the legal provisions under discussion, see Gh. Piperea, *Legea concordatului*, Wolters Kluwer, Bucureşti, 2010.

[13] In the „relevant jurisprudence", when searching the word "concordat" on the courts portal, one can only find 11 sencences. By comparison, the term "bankruptcy" shows no less than 2157 sentences... http://portal.just.ro/SitePages/Jurisprudenta_all.aspx?k=faliment&a=%20MJmpJurisprudenta%3A1&start1=2151.